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CLEAN AIR ACT AMENDMENTS: AN OVERVIEW

BACKGROUND

In 1970, Congress passed the Clean Air Act. The Act placed the primary responsibility for air quality on the shoulders of state governments. The Administrator of the EPA was charged with the responsibility of promulgating standards for "ambient air quality." Ambient air quoting from the language of the statute, "means that portion of the atmosphere external to buildings to which the general public has access." In other words, it refers to practically all of the atmosphere.

Two levels of standards were mandated, those for primary and secondary air quality. Primary standards were, again in the language of the statute: "(standards) the attainment and maintenance of which in the judgement of the Administrator...are requisite to protect the public health." The secondary air standards referred to "...a level of air quality the attainment and maintenance of which in the judgment of the Administrator is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollution in the ambient air." This broader definition was actually intended to cover pollutants which might be found harmful to crops, wildlife, livestock, and the like.

There were eight detailed requirements established as a criterion for the Administrator's approval of a state implementation plan under the Act. These included deadlines, emission limitations, provisions for monitoring, reporting requirements, and guarantees of adequate funding and personnel. Standards governing the performance of emissions of air pollutants from stationary sources were included in the Act in two forms. One standard was set for new sources, and another for existing sources. The Act also set emission standards for automobiles and target deadlines for attainment of those standards.

As required under the Act, states began to submit implementation plans to the Administrator. Before any of them could be acted upon, however, the Sierra Club filed suit against the EPA. In their suit they sought to enjoin the Administrator from approving any state plan which allowed the degradation of existing air, regardless of whether or not the air met the national standards.

William D. Ruckelshaus, who was then Administrator of the Environmental Protection Agency did not feel that the Act empowered him to take such action. He found no authority in the Act which required that the state implementation plans prevent the degradation of air to the national standard. The District Court granted a preliminary injunction and directed Ruckelshaus to promulgate regulations prescribing steps to prevent significant deterioration of ambient air quality within six months. The District of Columbia Court of Appeals later upheld the lower court's decision and the Supreme Court affirmed the Appeals Court ruling in *Fri v. Sierra Club* with a 4-4 split decision. With this decision the Court created one of the most controversial aspects of the Air Quality debate.

Another area of controversy which remains from the initial legislation is the actual determination of the levels of pollutants allowable under the Act. The original bill mandated that standards for various types of pollutants be established within a relatively brief time frame. The speed with which these standards were determined has given rise to some concern as to their reliability. It has been argued that with the advent of new and better monitoring technology, the standards have become unrealistically stringent. The current debate over the amendments to the Clean Air Act is focusing on six issues, four of which are more general in nature and two of which are specifically auto-related. These are: 1) the ongoing battle over non-degradation, 2) the question of "non-attainment," 3) the requirement that "Best Available Control Technology" be used, 4) the proposed penalties for non-compliance with the Act's requirements, 5) the implementation of emission standards for automakers, and 6) the warranty requirements for emission devices.

NON-DEGRADATION

The current EPA non-degradation regulations are being challenged before the Supreme Court on the grounds that they are a violation of the State's Constitutional right to control development within their boundaries. The EPA regulations are also under heavy criticism from environmentalists who would like to see them even more stringent.

Currently, the EPA sets three categories of ambient air quality zones: Class I areas where any deterioration of air quality would be considered "significant," Class II areas where deterioration normally connected with "moderate wellcontrolled growth" would be allowed, and Class III areas where deterioration up to the national standard would be allowed. New construction must not effect the air quality in a fashion which would lead to concentrations of pollutants in excess of the increments allowable in the particular area, and the source (new plant or facility) would comply with the emission limit representing the level of emission reduction which

would be achieved by application of the best available control technology for particulate matter or sulphur dioxide.

These rules have given rise to considerable controversy. Both sides agree that they are unclear as to what is or is not actually allowable, and are not entirely workable. Further, as they are primarily intended to meet the requirements of the Sierra Club case, there is some question as to whether or not they actually fully meet the letter of the requirements of the law.

This question arises from the criticism leveled at the Court's decision in Sierra Club. It has been noted that the Court focused on the question of deterioration of air quality. While the Act did say that it was intended to "protect and enhance" the nation's air quality, it also stated that there was a second objective, the promotion of "Public welfare and productive capacity." This second goal was totally ignored by the Court, and was most certainly an integral part of the original legislation. Further, considerable discretion was allowed the states under the original Act, as evidenced by Section 108(c)(1): "A State may adopt an ambient air quality standard applicable to such State or any portion thereof for any pollutant if the Secretary agrees that such State standard is more stringent than the national ambient air quality standard for such pollutant." It is obvious that wide discretion was intended in the state's implementation of the Act. This discretion has all but disappeared since the Court's decision in Sierra. It should also be noted that the Senate report on the final version of the bill said "...the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable for the continued maintenance of such ambient air quality...deterioration of air quality should not be permitted except under circumstances where there is no available alternative." These qualifiers indicate that the legislative intent was to allow, in some circumstances, some deterioration of air quality. This runs counter to the very narrow interpretation of the Act in the Sierra Club decision.

Industry spokesmen have argued that the non-degradation requirements of the Act could effectively strangle economic development. This is especially true in areas which have relatively clean air, such as the new industrial regions of the South and Southwest. These areas already have more efficient, less polluting plants and little can be gained in terms of pollution abatement through the use of technology. If the environmentalists win the debate over non-degradation, and the most stringent standards are applied, there is little doubt that the sunbelt states will suffer a disproportionate share of the burden. A second factor which is likely to have significant impact on the non-degradation controversy is the Carter Administration's plans to force a large part of American industry to convert to coal. The environmental impact of coal on air quality is known to be considerable. Coal utilization of the magnitude envisioned under

the Carter plan is apt to raise new and serious questions as to the ability of the EPA to develop workable standards under the mandate of the Sierra Club decision.

NON-ATTAINMENT

As currently constituted, the Clean Air Act effectively forbids industrial growth in areas which have not met the national air quality standards. These areas are generally those where the most industrial plants are already located, and where facilities such as railroad heads, warehouses, and the like are most readily available. The EPA's prohibition is exercised through its veto power over construction permits. Recent examples of construction which has been prevented through EPA refusal include the widely publicized Hampton Roads Refinery in Virginia. This particular instance of EPA refusal to grant a permit is of considerable interest due to the circumstances surrounding the action. The plant was to be located some 12 miles from the Great Dismal Swamp. Oxidant levels generated through the natural decay of vegetation in the swamp exceeded the national standards. As a result, the EPA felt that the additional oxidants which would have been released into the atmosphere by the plant in the course of its production of some 175,000 barrels of low-sulphur fuel per day would contribute to the local smog problem to an unacceptable degree. At a public hearing on the matter, Dr. Peter Finkelstein of the Region III office of the EPA stated "While we are working to eliminate pollution from existing sources to achieve the (smog) standard it is not reasonable to allow new sources." In response, Virginia Governor Mills Godwin has stated that the statement by Dr. Finkelstein "would appear to mean a 'no growth' posture on the part of the EPA as far as industrial development" in Virginia is concerned.

The EPA has attempted to compromise through what are called "offsets." The "offset" policy refers to allowing a company which wishes to construct a plant to shut down an existing plant which is currently polluting and replace it with its new facility. This solution has not proved to be entirely workable. First, in many areas there simply is no way to trade off one plant for another. This is especially true in areas where the principal fuels are oil and natural gas. Further, it frequently is economically infeasible to purchase an existing plant and shut it down, or to pay for the clean up of an existing facility. To give an example of how ludicrous the situation can become, in the above mentioned example of the Hampton Roads Refinery, the company actually considered purchasing every auto in the area and scrapping them in order to create an offset so that the plant could be built.

A second problem with non-attainment is that with the increased use of coal projected as the result of the Administration's push for conversion from gas and oil, large new sources of pollution will be

created. In areas where the non-attainment provisions of the EPA regulations apply, industries may be prohibited from converting. This may put them in the untenable position of having one federal regulatory body ordering them to convert to coal and another refusing to grant a permit for them to do so.

Some commentators have questioned the reasonableness of the standards for air quality. They note that testimony at the time of the passage of the initial Clean Air Act indicated that a much longer time frame would have been realistic. Further, the information on which the current standards were based has not come into question. It has been suggested that a review of standards in the light of improved technology for measurement of pollutants should be conducted to determine if they are even attainable.

BEST AVAILABLE CONTROL TECHNOLOGY

The requirement that facilities use what is termed "Best Available Control Technology" has caused considerable controversy. The heart of this controversy lies in the assertion by industry spokesmen that such methods are not always necessary in order to achieve the national standards, and in such instances are an unnecessary diversion of capital from far more productive uses. Further, in some instances, the requirement that BACT be used may put smaller firms out of business, or cause the closing of small plants operated by larger firms due to the economic infeasibility of the utilization of such techniques.

Environmentalists argue that BACT is necessary to comply with the intent of the Clean Air Act. They contend that there is a mandate in the measure to take all steps possible to insure the minimum of emissions. Careful reading of the Act does not seem to support this extreme view. Nor does it support the contention that there are no circumstances in which BACT may be required. Rather, the Act clearly indicates that the total scope of life, including its economic and social aspects, was to be considered, not merely the effects of pollution. The impact of pollution of the air, however, was considered to have a significant effect on the quality of life and was therefore to be given considerable weight.

Central to the problem of where and when to use BACT is the question of alternative controls such as tall stacks and interruptions of production schedules. In the original Act, such alternatives were considered viable. Subsequent policy decisions, and most recently, statements by the Carter Administration indicate that the EPA no longer considers such alternatives as within the scope of allowable techniques. The President has indicated that he will require the use of BACT on all plants converting to coal under the requirements of his energy proposal. Further, there is some indication that the Administration is considering requiring the retrofitting of such equipment on existing facilities which burn

coal. Opponents of such a requirement point out that this would place a tremendous burden which would inevitably be passed on to consumers, and particularly to consumers of electric power.

While there is adequate rationale for the inclusion of BACT on new facilities constructed in areas which are suffering from poor air quality, there is some question as to the blanket requirement of the utilization of such technology. Where the national ambient air quality standards are being exceeded, the use of such pollution control devices could conceivably result in an eventual improvement of the air. Areas which currently enjoy relatively good air quality, however, present a different situation. This is especially true in some areas of the South and Southwest where national standards are being exceeded by a considerable degree. In such areas, it may well be that methods such as production interruption during periods of stationary inversion, and tall stacks provide more than adequate protection at a far cheaper cost. The obvious result of utilization of such alternatives is to free capital for use in other areas, to develop jobs which are going to be desperately needed in the near future.

NON-COMPLIANCE PENALTIES

Amendments to the Clean Air Act present a particularly nonproductive approach to the question of compliance in the opinion of many industry observers. The Act would enforce an "excess emission fee" for industrial plants which have failed to comply with the national emission standards, regardless of the circumstances for their inability to meet the deadline. An attempt to extend the deadlines for compliance with the emission standards was defeated in committee during the markup on this year's amendments to the Clean Air Act; however, the extension will be offered as an amendment on the floor.

The major arguments against the penalties for emission standards are that they divert capital which is necessary for the purchase of pollution control equipment, and that by not making allowance for special circumstances such as strikes, materials shortages, or other occurrences beyond the control of the operators of the facility, the imposition of them is patently unfair.

Industry spokesmen are especially concerned about the impact of penalties on marginal industries. These are the industries which will have the most difficult time in raising capital to finance pollution control devices in the first place, and it is argued that it simply does not make sense to divert large amounts of capital in fines while the air continues to be polluted. Further, the burden imposed by the fines might actually delay the installation of the equipment.

EMISSION STANDARDS FOR AUTOMOBILES

With the enactment of the original Clean Air Bill, standards for automobile emission were established. The original measure provided for compliance by 1975. At the time hearings were being held on the original Clean Air Act, experts testified that it would take at least ten years to develop the technology necessary to bring the auto industry into compliance. Congress ignored this testimony and set a five-year deadline with the provision for a two-year extension. During the Arab Oil Embargo, the Congress passed an additional provision which allowed the EPA to extend the deadline for one more year. The result is that if no extension is passed, the standards will go into effect with the 1978 model year.

Auto manufacturers have stated that they cannot comply with the standards, but that they will not violate the law. Soon, they must begin to tool up for the 1978 model year, and if no extension is enacted, the automobiles they are preparing to produce will be in violation. The impact of a curtailment of production could have serious effects on the economy. One out of every six persons in the United States is employed either directly or indirectly in an industry which is dependent on the automobile. An attempt to extend the deadline was defeated in committee, and officials of the EPA have indicated that they would oppose on principle any extension.

The situation currently remains at an impasse until such time as the final version of the bill containing this year's amendments to the Clean Air Act is passed by the Congress. In the interim, auto manufacturers are going ahead with plans for production in hopes of an extension.

WARRANTIES

Under the 1970 Clean Air Act, auto manufacturers are required to warranty the emission control systems on their vehicles for five years or fifty thousand miles. This requirement means that every one of the parts related to emission control, a number in excess of one hundred sixty, must be covered. If, as planned, the warranty requirement is implemented this year, its effect will be to dramatically increase the price of an automobile to the consumer. It also would have a highly deleterious impact on the small businessman engaged in garage or mechanical work. During the markup on the bill, an amendment was offered which would have reduced the warranty requirement to eighteen months or eighteen thousand miles. This measure was defeated in committee; however, it may come up on the floor.

CONCLUSION

While there can be no denial that the nation needs to take strong

steps to reduce air pollution, the conflict between attaining current standards and meeting the projected need for 25 million jobs by 1985 presents a seemingly insoluble conflict. Perhaps the most serious aspect of the problem is that even if the debate over standards is resolved in favor of additional industrial development, the lead time necessary for the creation of new jobs may be so long that delays already experienced will insure continuing high unemployment.

A second problem is the obvious conflict between the advocates of a pristine environment and the necessity of massive conversion to coal on the part of industry. Coal is a particularly dirty fuel, and its widespread use must, of necessity add to the pollution of the environment. How the EPA intends to cope with the problem is at present a questionmark.

The most important factor in the ongoing debate over environmental controls may wind up being a philosophical one rather than a technological one. If reason and rationality are used, along with a certain amount of common sense, it may be possible to work out solutions to the problems. If, however, environmentalists insist on the most stringent standards without consideration to their economic and social consequences, the eventual result may be significant deterioration of the country's standard of living.

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