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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

204 Health Building
DEPARTMENT OF HEALTH
Davis Street
Providence, R.I. 02908

6 December 1974

Mr. Vincent Vespia
City Clerk
City Hall
25 Dorrance Street
Providence, Rhode Island 02903

Dear Mr. Vespia:

As you are no doubt aware, the State of Rhode Island, as a result of litigation brought by the Rhode Island Lung Association, has been ordered by the Federal District Court to develop a transportation plan to reduce carbon monoxide levels in downtown Providence (copy of order enclosed).

At present we are researching a variety of alternate plans to accomplish this task one of which has gotten a significant amount of publicity recently. Sometime in early January we hope to make a final decision on the specific plan to be proposed by the State. This decision will be made in conjunction with the Department of Transportation, the Division of Statewide Planning and the City of Providence administration. Please be assured that before any proposal is made public, the city council will be appraised of its contents.

We are well aware of the ramifications of creating a new vehicle free zone in the downtown area and that it will be the responsibility of the city council to vote on such a proposal. It is our intent to closely coordinate our activities with the new administration to come up with a plan that will satisfy the court order and have the most beneficial economic impact in the downtown area.

Very truly yours,

Austin C. Daley

Austin C. Daley, Chief
Division of Air Pollution Control

ACD/kz

IN CITY COUNCIL
APR 13 1976
READ:
WHEREUPON IT IS ORDERED THAT
THE SAME BE RECEIVED.
CLERK

THE COMMITTEE ON
PUBLIC WORKS

Recommends

To be Continued

Clerk

MAR 2 7 1975

THE COMMITTEE ON
PUBLIC WORKS

Recommends

To Be Recommended

Clerk

April 6, 1976

IN CITY COUNCIL

JAN 6 1975

FIRST READING

REFERRED TO COMMITTEE ON PUBLIC WORKS

CITY CLERK

THE COMMITTEE ON
PUBLIC WORKS

Recommends

To Be Continued

Clerk

FEB 2 7 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1219

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO COURT ORDER OF JULY 27, 1973 FOR FURTHER INFORMATION ON THE RHODE ISLAND IMPLEMENTATION PLAN.

On May 2, 1973, the United States Court of Appeals for the First Circuit entered its opinion in the above captioned case which requested, inter alia, that the Environmental Protection Agency provide further explanation of the basis for its classification of the Metropolitan Providence Interstate Air Quality Control Region as a Priority III region. On June 1, 1973, a statement was filed with the Court which indicated that EPA, in conjunction with the State of Rhode Island, was going to undertake extensive air quality monitoring during the summer months to obtain air quality data to be used in determining whether the priority classification should be revised or not. On July 27, 1973, the Court entered a supplemental memorandum and order in which the Court indicated its concurrence with the monitoring program but asked that a report be

filed by October 1, 1973, regarding the results of that monitoring.

Monitors designed to measure ambient concentrations of carbon monoxide and photochemical oxidants were placed at various locations in the Metropolitan Providence region where the concentrations of those pollutants were expected to be highest. These monitors have been in operation continuously since June and were analyzed periodically to obtain the measured concentrations. The instruments were also calibrated periodically to insure valid sampling results. The monitors indicate that concentrations of carbon monoxide and photochemical oxidants during this period on many occasions exceeded the national standards. While this data is continuing to be analyzed by EPA and by the State, it is the determination of EPA that the significant number of readings in excess of the standards indicates that the region should be classified Priority I with respect to both carbon monoxide and photochemical oxidants (hydrocarbons).

EPA is presently preparing a revision to the Rhode Island implementation plan which will change the priority designation of the Metropolitan Providence Interstate Region from Priority III to Priority I. Because of the desire to obtain maximum data, EPA received monitoring results until September 15. The necessary analysis of this data did not permit the preparation of the Federal Register documents in time for them to be published by October 1. However, the State has been notified of this decision and it is expected that the publication will appear in the Federal Register within two weeks. Because the region will now be classified Priority I, the State is under an obligation to adopt control strategies

for achievement of the standards in that region by 1975. The Federal Register notice will contain a request that the State develop and submit to EPA within four months a plan revision containing an adequate control strategies for attainment and maintenance of these two standards.

Since the petitioners in this case were challenging the May 31, 1972, Priority III classification, and requested that it be revised to Priority I, the action being taken by EPA as outlined herein should satisfy their request and this Court's orders of May 2 and July 27. Copies of the Federal Register notice will be forwarded to the Court upon publication.

Respectfully submitted,

Dated: OCT 1 1973

Robert L. Sansom
Assistant Administrator for
Air and Water Programs

United States Court of Appeals
For the First Circuit

No. 72-1219

NATURAL RESOURCES DEFENSE COUNCIL, INC., PROJECT ON CLEAN AIR, RHODE ISLAND TUBERCULOSIS AND RESPIRATORY DISEASES, INC., and ELLERBE W. ACKERMAN, JR.,

PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

No. 72-1224

NATURAL RESOURCES DEFENSE COUNCIL., INC., PROJECT ON CLEAN AIR, ET AL.,

PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

ON PETITIONS FOR REVIEW OF REGULATIONS OF THE ENVIRONMENTAL PROTECTION AGENCY

Before COFFIN, *Chief Judge,*
ALDRICH and CAMPBELL, *Circuit Judges.*

Richard E. Ayres and *Thomas B. Arnold* for petitioners.

Thomas C. Lee, Attorney, Department of Justice, with whom *Kent Frizzell*, Assistant Attorney General, *Edmund B. Clark*, and *Martin Green*, Attorneys, Department of Justice, were on brief, for respondent in case 72-1219.

John P. Hills, Attorney, Department of Justice, with whom *Kent Frizzell*, Assistant Attorney General, *Edmund B. Clark*, and *Martin Green*, Attorneys, Department of Justice, were on brief, for respondent in case 72-1224.

May 2, 1973

CAMPBELL, *Circuit Judge.* Petitioners seek review[1] of decisions by the Administrator of the Environmental Protection Agency (E.P.A.) approving portions of the Rhode Island and Massachusetts air pollution implementation plans.[2]

The Clean Air Amendments of 1970 [to the Air Quality Act of 1967], 42 U.S.C. § 1857-c-3 *et seq.*, require the Administrator—as he has already done—to establish national primary and secondary ambient air quality standards stating how much of each pollutant shall be allowed in the ambient air. Primary standards are maximums allowable to protect the public health; secondary standards are maximums to protect the public welfare from any known or anticipated adverse effects. Each state must then submit to the Administrator a plan for implementation, maintenance and enforcement of the standards. § 1857c-5(a)(1). The plan must be such as to achieve primary standards within three years (subject to a possible two-year extension), and secondary standards within a reasonable time. § 1857c-5(a)(2); *see* § 1857c-5(c) and (f). The Administrator is to approve or disapprove a plan, or any portion, in light of its ability to meet those timetables and its fulfilling of the other requirements of § 1857c-5(a)(2)(B) through (H). If a state plan or any portion does not meet the statutory requirements, the Administrator is directed to publish his own regulations setting forth an implementation plan, or portion thereof for the state. § 1857c-5(c).

[1] "A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 1857h-5(b)(1).

[2] The Administrator's approval of the Rhode Island and Massachusetts plans, at 37 Fed. Reg. 10891 and 10872-73 (May 31, 1972), consists of a brief statement that the plans are satisfactory, unaccompanied by any findings, conclusions or supporting rationale.

Petitioners raise eight objections to the Administrator's approval of the Rhode Island plan, and four to the Massachusetts plan.[3]

THE RHODE ISLAND PLAN

I

Petitioners argue that the Administrator erred in approving the classification of the Metropolitan Providence Interstate Air Quality Control Region (MPIAQCR) as Priority III for photochemical oxidants and carbon monoxide.[4] The classification was made pursuant to 40 C.F.R. § 51.3(b)(2):

> In the absence of measured data to the contrary, classification with respect to carbon monoxide, photochemical oxidants and nitrogen dioxide will be based on the following estimate of the relationship between these pollutants and population: Any region containing an area whose 1970 "urban place" population, as defined in the U.S. Bureau of Census, exceeds 200,000 will be classified Priority I. All other regions will be classified Priority III.

[3] Certain other questions relating to the timing of the Massachusetts plan and E.P.A. regulation of vehicular emissions, originally raised before us, were recently resolved by the Court of Appeals for the District of Columbia Circuit. *National Resources Defense Council, Inc., et al.* v. *E.P.A.*, Order filed Jan. 31, 1973, 41 U.S.L.W. 2400; *see* 465 F.2d 492 (1st Cir. 1972).

[4] The classification system (which is not provided for in the Act but was devised by the Administrator) is described in 40 C.F.R. § 51.3. In general, it is used to differentiate areas of relatively impure air where improvement of air quality is required (Priority I) from areas of relative purity where the present air quality need only be maintained. 40 C.F.R. § 51.14(a)(1) provides that "Each plan for a region classified Priority I with respect to carbon monoxide, photochemical oxidants . . . shall set forth a control strategy which shall provide for the degree of emission reduction necessary for attainment and maintenance of the national standard for each such pollutant. . . ", while pursuant to § 51.14(d)(3), "For Priority III regions no air quality data for carbon monoxide . . . and photochemical oxidants need be submitted."

Both parties seem agreed that there was an "absence of measured data to the contrary," and that the " 'urban place' population" criterion was used. Although the precise meaning of " 'urban place' population" was questioned by petitioners, respondent has informed us that the term was taken from the 1960 census, and that it was intended to mean what "place" population means in the 1970 census. The 1970 "place" population of Providence was 170,000; hence, the Priority III classification. We accept the Administrator's interpretation of his own regulation. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

The harder question is whether the regulation goes beyond statutory authority. Petitioners argue that it is irrational, since

> Air pollutants, by their nature, do not respect political boundaries, so that two cities, closely juxtaposed, would have nearly the same degradation of air quality as a single city of the same total population. It is population density and traffic density that are relevant, not the individual city size. Although Providence alone has a population of 170,000, the metropolitan Providence area contains the immediately contiguous cities of Central Falls, Cranston, Cumberland, East Providence, Johnston, North Providence, Pawtucket, Providence, Warwick and West Warwick with a total population of over 570,000.

Whatever the facts in Rhode Island, the regulation seems to presume what must, in some places, be fiction: that, if a region lacks a city of over 200,000, its air is relatively pure in the absence of measured data to the contrary. 40 C.F.R. § 51.3(b)(2). The air over a region containing a dense population, much industry, but no one city with over 200,000 inhabitants, could, though polluted, be classified Priority III. Recognizing this, the Administrator points to

his need to tackle the national problem in a manag way. Since photochemical oxidants and carbon mon are associated with automobiles, and since control require regulation of the use of automobiles, he say must concentrate initial control strategies in single, l cities having a centralized government and hence gr capability to regulate traffic.

This may be the only feasible approach. Yet the C Air Amendments, on their face, contemplate achie national standards within the allowable time everywl an object which the Administrator's urban place prior would seem not to achieve. We would be loath to cons the Act as requiring the Administrator to do the im sible; however, without further information we ca make an informed judgment. We do not accept fac arguments advanced by attorneys in briefs or orall substitutes for official finding or explanations of the age *International Harvester Company* v. *Ruckelshaus*, 72-1517 (D.C.Cir. Feb. 10, 1973) at p. 25. Without d either we must conclusively presume that the Administr is right—a presumption which would reduce judicial view of the question to a formality—or we must l further data from the agency upon which to mak reasoned judgment.

At present, we not only do not know officially and detail why the agency has adopted an approach wl seems *not* to ensure national compliance within the allot time, we do not know why there remains an "absence measured data" regarding the extent of photochem oxidants and carbon monoxide pollution in the MPIAQ

In a letter dated June 15, 1971, Mario Storlazzi, Regio Air Pollution Control Director, E.P.A., notified Dr. Jos E. Cannon, Director of the Rhode Island Department Health, that the MPIAQCR was classified *Priority I* carbon monoxide and photochemical oxidants "based on

Island Department of Health] has agreed to monitor the air quality for [these pollutants] in an area of high traffic density during the time period from July 1 to September 30 of this year. The air quality data collected will be used to establish the final classification."

There is no evidence that the data was ever collected. We should know whether it is available today, one and one-half years later, particularly in light of 42 U.S.C. § 1857 c-5(a)(2)(C).[5] If the data is still not available, is Rhode Island under a continuing duty to collect it, or will the MPLAQCR retain its Priority III classification forever?

The Clean Air Amendments do not expressly require the E.P.A. to provide an explanation of its decisions approving state implementation plans. Compare 42 U.S.C. § 1857h-5 (b)(1) with § 1857c-5(f)(2). Nonetheless, the judicial review provision necessarily confers authority to compel such information from the E.P.A. to the extent needed to determine whether the Administrator's action is in accordance with law.[6] *See Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419-421 (1971); *Camp* v. *Pitts*, 41 U.S.L.W. 3515 (U.S. March 26, 1973); *Kennecott Copper Corp.* v. *Environmental Protection Agency*, 462 F. 2d 846, 848-850 (D.C. Cir. 1972); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-1522 etc. (D.C. Cir. Jan. 31, 1973). *See also Environmental*

[5] This section requires that state plans include "provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator."

[6] Under the Administrative Procedure Act, the relevant review standard is whether the Administrator's approval was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Clauses 2(E) and 2(F) of § 706 are inapplicable.

pany v. *Ruckelshaus*, No. 72-1517 (D.C. Cir. Feb. [illegible]; *Appalachian Power Company* v. *Environmental Protection Agency*, No. 72-1733 (4th Cir. April 11, 1973) at pp. [illegible].

We ask the E.P.A. to provide us with a detailed statement of its reasons for adopting 40 C.F.R. § 51.3(b) what efforts have been and are being made to collect concerning photochemical oxidants and carbon monoxide levels in the MPLAQCR, and elsewhere in Rhode Isl whether or not adequate data is now available, and other information which the E.P.A. considers migh helpful to this court in reviewing the question.[7]

II

Petitioners claim that Rhode Island's control strategy for nitrogen dioxide will reduce the ambient nitrogen dioxide concentration by only 9.2%, whereas in 1969 the primary standard was exceeded by 26.5%. We need not discuss this argument in detail since we are now informed that the Administrator has announced the impending reclassification of all regions for nitrogen dioxide, based upon findings that the air quality data originally used in assigning classifications to regions significantly overestimate the actual ambient concentrations of nitrogen dioxide.[8]

[7] We have said in a different procedural context, "In environmental matters particularly, we would hope that the government would recognize that courts need the expertise and views of responsible agencies whose programs will be affected, one way or another, by litigation." *Sierra Club* v. *Romney*, 473 F.2d 287, 289 (1st Cir. 1973).

[8] The Administrator announced, in 37 Fed. Reg. 23085 (Oct. 28, 1972) that:

"As discussed below, regulations are not promulgated at this time to correct deficiencies in control strategies for nitrogen oxides in the following States: Massachusetts, Maryland, Michigan, Missouri, New Jersey, and Texas.

Regulations for the control of nitrogen oxides emissions were proposed for the above six States on June 14, 1972 (37 F.R. 1182). The preamble to those proposed regulations indicated that the air quality data for nitrogen dioxide which was used to classify air quality control regions may be in error, and the Administrator would reassess the classifications and, where appropriate, revise them. After c[illegible]

According to respondent, many regions with air quality better than the nitrogen dioxide air quality standard may have been erroneously classified priority I, and the data which indicated a need in Rhode Island for a 26.5% reduction may have been wrong by as much as a factor of ten. We decline to review this aspect of the plan pending reclassification. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956). The Administrator shall advise us within thirty days whether, in light of the reclassification, the Rhode Island plan is in compliance with the requirements of the Clean Air Amendments. Should the necessary data still be unavailable, he shall file a status report within said thirty day period.

III

Petitioners assert that the Administrator erred in approving the Rhode Island plan since it does not provide for revisions, as required by 42 U.S.C. § 1857c-5(a)(2)(H). The statutory language is clear:

> [The Administrator shall approve the plan if he determines that] it provides for revision, after public hearings, of such plan (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.

We think the plan must expressly provide for revision after public hearings on the occasions and under the circumstances described in the federal statute. Congress did not indicate merely that the state, or some state authority, should have a power of amendment. Compare G.L.R.I. § § 23-25-5(1) and 23-25-5(n).[9] The plan was to be approved only if "*it provides* for revision, after public hearings" in two sets of circumstances where revision is mandatory, not merely optional. The Administrator erred in approving a plan which sets forth something less. We see no reason, when Congress has spoken precisely, for the Administrator or us to try to decide whether the state's informal substitute is, in the long run, just or almost as good. Presumably the necessary revision undertaking could be in regulations promulgated by the state director of health, or, if more convenient, the Administrator could promulgate his own regulations as a part of the state plan. § 1857c-5(c).

IV

Petitioners claim that the Rhode Island plan failed to provide the "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan" required by 42 U.S.C. § 1857

sidering the numerous comments on the proposed nitrogen oxides regulations, the Administrator has decided to postpone the promulgation of any such regulations until after the regional classification reassessment. It is the Administrator's determination that this postponement will not substantially delay the control of nitrogen oxides emissions where such control is required.

It is the Administrator's intention to complete the regional classification reassessment and to promulgate nitrogen oxides emissions regulations for stationary sources in the appropriate regions by April 2, 1973. Compliance schedules from sources covered by such regulations will be required by July 1, 1973, which is consistent with the commitments made by the Administrator in proposing the regulations. No change will be made at this time in the Administrator's May 31, 1972, disapprovals of nitrogen oxides control strategies unless supplemental information was submitted by the involved States to correct the deficiencies."

[9] "[The Director shall have the power] to make, issue and amend rules and regulations consistent with this chapter for the prevention, control and abatement of air pollution, and the enforcement of orders issued hereunder . . ." § 23-25-5(1)

"[The Director shall have the power] to exercise all incidental powers necessary to carry out the purposes of this chapter." § 23-25-5(n).

c-5(a)(2)(F). Respondent counters that the Rhode Island Plan complied with E.P.A. regulation 40 C.F.R. § 51.20:

> Each plan shall include a description of the resources available to the State and local agencies at the date of submission of the plan and of any additional resources needed to carry out the plan during the 5-year period following its submission. Such description, which shall be provided in a form similar to that in Appendix K to this part, shall include projections of the extent to which resources will be acquired at 1-, 3-, and 5-year intervals.

The Rhode Island Plan *described* the available resources and projected further resource acquisition. The question becomes whether 40 C.F.R. § 51.20 is consistent with the statute. An assurance is "the act of assuring . . . something that inspires or tends to inspire confidence . . . the quality or state of being sure or certain: freedom from doubt: CERTAINTY . . ." (Webster's Third New International Dictionary). At first glance, a description does not seem to inspire confidence or provide certainty that the state will have adequate personnel, funding and authority to carry out its plan. Yet given the mechanics of state-federal relations, it is difficult to imagine what sort of guarantee the current Rhode Island executive or legislature could give the E.P.A. to insure that adequate resources would be devoted to the Plan. Petitioner speaks of a "commitment . . . to use all reasonable efforts to obtain these resources from the legislature or from other programs . . . The Governor [should] give his assurance that he will do everything possible to obtain adequate resources, including filing special acts before the state legislature, or if necessary making available the necessary resources from other programs under his control." Such assurances might have a symbolic effect; however, they would have little more, since a governor or even a present session of the legislature cannot make binding commitments on behalf of their successors, nor would such representations seem to be enforceable.

We believe that Congress has left to the Administrator's sound discretion determination of what assurances are "necessary". The Administrator has required the states to describe their resources, doubtless reasoning that review of such an inventory is the best practical "assurances" he can obtain. The Administrator can determine whether the itemized resources together with such federal funds as the Administrator may himself channel to Rhode Island (*see* 42 U.S.C. § 1857c) will enable the state to carry out the plan. The Administrator might also have asked for a promise by the Governor to use his "best efforts." But we are not prepared to fault the Administrator for deciding that such a gesture would be so lacking in enforceability as to be meaningless. The "necessary assurances" clause seems to us to call less for rhetoric than for the Administrator's reasoned judgment as to the adequacy of resources.

V

Petitioners say the Administrator erred in approving that portion of the Rhode Island plan which permits the state to grant variances.[10] They maintain that

[10] G.L.R.I. § 23-25-15. Variances. —

"(a) Upon application and after a hearing the director may suspend the enforcement of the whole or any part of this chapter or of any rule or regulation promulgated hereunder in the case of any person who shall show that the enforcement thereof would constitute undue hardship on such person without a corresponding benefit or advantage obtained thereby.

(b) In determining under what conditions and to what extent the variance may be granted the director shall give due recognition to the progress which the person requesting such variance shall have made in eliminating or preventing air pollution. In such a case the director shall consider the reasonableness of granting a variance conditioned on the person's affecting a partial abatement of the pollution or a progressive abatement thereof or such other circumstances as the

§ 1857c-5(f) establishes the exclusive variance procedure.[11]

The Rhode Island variance provision as it now stands should have been disapproved as a part of that state's plan. The statute tells us that a state plan implementing a national primary air quality standard is to provide "for the attainment of such primary standard as expeditiously as practicable but [subject to subsection (e), providing for a possible later two-year extention] in no case later than three years from the date of approval of such plan." § 1857c-5 (a)(2)(A). Secondary standards are to be implemented

director may deem reasonable. No variance shall be granted to any person applying therefor who is causing air pollution which creates a danger to public health or safety.

(c) Any variance granted hereunder shall be granted for such period of time, not exceeding one (1) year as the director shall specify, but any variance may be continued from year to year. No variance shall be construed as to relieve the person receiving it from any liability imposed by law for the commission or maintenance of a nuisance nor shall there be any appeal from a denial of a variance."

[11] "(f)(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.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

within "a reasonable time" as specified in the plan. A plan must include "emission limitations, schedules and timetables for compliance with such limitations, and such other measures as may be necessary to *insure attainment and maintenance* of such primary or secondary standard . . ." § 1857c-5(a)(2)(B). [Emphasis supplied.]

A state's implementation plan must therefore provide for two periods of time: an earlier period during which attainment of primary standards is to be achieved as expeditiously as practicable, but in no case later than three years; and a later period after which standards, having been attained, are to be maintained. We shall consider the Rhode Island variance provision as it applies to each of the two periods (bearing in mind that neither the variance provision itself nor the Rhode Island plan, as presently written, make any distinction between them).

a. *The period after mandatory attainment of standards*

Under the variance provision, the Rhode Island director of health is authorized, from year to year, to exempt pol-

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 1857h-5(a) of this title (relating to subpoenas) shall be applicable to any proceeding under this subsection."

luters from state emission limitations, schedules and timetables. Were this power to be exercised liberally after the mandatory attainment dates, he could, at his pleasure, grant exemptions which would render maintenance of standards impossible. His retention of such extensive discretion is inconsistent with the federal statute and its stated objectives. It is plain from the legislative history that the expeditious imposition of "specific emission standards" and their "effective enforcement" were primary goals of the Clean Air Amendments. Report No. 91-1146, U.S. House of Representatives, 91st Cong., 2d Sess., pp. 1, 5 (1970). The Congressional intent could too easily be frustrated by the existence of open-ended exceptions. Sources of pollutants should either meet the standard of the law, or be closed down. Report No. 91-1196, U.S. Senate, 91st Cong., 2d Sess., p. 3 (1970).

Congress's intention to restrict individual exemptions is further reflected in its enactment of § 1857c-5(f). That section with its precise standards, its limitation of postponements to not more than one year, and its provision for judicial review, would be meaningless if much less restricted state variance machinery, nowhere authorized by the federal statute, were simultaneously to exist. We think Congress meant § 1857c-5(f) to be the exclusive mechanism for hardship relief after the mandatory attainment dates.

We have, of course, not yet arrived at those dates, and from the Administrator's argument and brief, we do not understand that he necessarily endorses utilization of state variance machinery after that time. But a state plan must provide not only for the present preparatory period; it must ensure both the attainment and the maintenance of standards. The Administrator may not approve a plan, or a portion thereof, which fails to deal appropriately with both objects.

The Administrator contends that the danger of indiscrim-

inate variances is avoided by his own regulations requiring each state and local variance to be treated as a "revision" of the state plan. 40 C.F.R. § 51.32(f). "Revisions" are not to be considered part of a plan until approved by the Administrator. 40 C.F.R. § 51.6. The Administrator's regulations prohibit a state or local agency from granting "any variance of, or exception to, any compliance schedule" if it will prevent or interfere with timely attainment or maintenance of a national standard. 40 C.F.R. § 51.15. They further provide that § 1857c-5(f) postponement procedures are not necessary unless a state's "determination to defer the applicability of any portions(s) of the control strategy with respect to such source(s)" will prevent timely attainment or maintenance of a national standard. 40 C.F.R. § 51.32(f).

These regulations, however, insofar as applicable in the post-attainment period, substitute a less rigorous procedure for the one enacted by Congress. Had Congress meant § 1857c-5(f) to be followed only if a polluter, besides violating objective state requirements, was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? *See e.g. Getty Oil Company* v. *Ruckelshaus*, 342 F. Supp. 1006 (D. Del. 1972), remanded with directions, 467 F. 2d 349 (3rd Cir. 1972), *cert. denied* 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums. We hold that the only recourse provided those seeking postponements of a state's emission limitations after the mandatory deadlines is the restricted provisions of § 1857c-5(f).

We do not say that a state plan may not provide, during the post-attainment period, for minor state and local de-

ferral procedures, such as by brief postponement of the effective date of abatement orders. Some flexibility may be allowed for mechanical breakdowns and acts of God. Any such procedures would, however, have to be limited to specific time periods measured in weeks or a few months, and would have to contain standards and controls precluding abuse.

b. The period before the date or dates set for mandatory attainment of standards.

Whether states may defer control strategy *prior* to the mandatory compliance dates—by variance, postponement or otherwise—is more difficult. While one may contend that § 1857c-5(f) must remain the exclusive deferral mechanism, we doubt that Congress intended altogether to preclude the Administrator from approving plans containing reasonable state deferral mechanisms during the preliminary period. The provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of standards. A state plan must provide for attainment of primary standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval . . . ", and of secondary standards "within a reasonable time" as stated in the plan. § 1857c-5(a)(2)(A).

A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the "as expeditiously as practicable" language § 1857c-5(a)(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in

order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

The Administrator sees his power to allow such exemption procedures as deriving from the "revision" authority in § 1857c-5(a)(3). We tend to view it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period. We do not doubt the Administrator's power to approve reasonable mechanisms for state and local deferrals of control strategy provided they cease before the mandatory compliance date and the individual variances are not granted without his specific approval.

Nothing we say here is to suggest that the Administrator may permit such deferral mechanisms to threaten attainment of full compliance within the mandatory time period or sooner if practicable. We merely hold that the Administrator has discretion—as he does not after the mandatory dates—to permit state and local deferral mechanisms not inconsistent with national objectives.

(c) *Disapproval of the Variance Provision*

The Administrator, in arguing the related issue of Rhode Island's overly broad abatement-order laws (*infra*), asserts that he is powerless to remedy deficiencies in state law:

> Even if the Administrator disapproved the enforcement authority of Rhode Island, there would be no substantive corrective action which he could take to remedy the deficiency. All that he could do would be to publish a disapproval notice in the Federal Register. Elimination of the economic and technical feasibility considerations from the formulation of state enforcement orders would require a revision of the statutory authority of the Department of Health, to-wit, Sections 23-25-5(h) and 23-25-8(a). However, there is no authority provided in the Clean Air Act which would permit the Administrator to accomplish this. Admi-

tedly, if a State fails to submit a satisfactory implementation plan, the Administrator is directed to promulgate regulations setting forth a plan for that State. Section 110(c), 42 U.S.C. sec. 1857c-5(c). It is doubtful that Congress ever intended this provision to be used by the Administrator to revise the basic statutory authority of state agencies.

We do not accept these protestations of helplessness. Of course, the Administrator cannot repeal the state laws. He is specifically empowered, however, to disapprove not only a state implementation plan, but "any portion thereof" (§ 1857c-5(a)(2) and § 1857c-5(c)); and he "shall . . . promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if . . . (2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, . . ." § 1857c-5(c).

We hold that these statutory provisions not only empower, but also require, the Administrator to disapprove state statutes and regulations, or portions thereof, which are not in accordance with the requirements of the Clean Air Amendments. Congress plainly intended the federal statute and regulations promulgated thereunder to take precedence over state laws and regulations. By enabling the Administrator to insert his own regulations in a state plan, it provided him with the needed authority to substitute appropriate provisions for inappropriate ones. Thereafter, as legal components of the state plan, the Administrator's regulations may be both federally and locally enforced; violations thereof are violations of a state plan. § 1857c-8(a)(1); *see* §§ 1857c-7(d)(1), 1857c-9(b).

We disapprove the Administrator's practice of approving defective state laws or regulations as "surplusage".

The result will be confusion in the minds of state an ities and citizens, and, most likely, unnecessary litiga The Administrator's primary enforcement powers are gered by violation of "any requirement" of a state § 1857c-8. It is therefore critical that the plan as fi approved (and as supplemented by the Administra regulations forming part thereof) sets forth precisely is required. If it does not, enforcement efforts in later y may be seriously hampered.

With respect to the Rhode Island variance provision Administrator is directed to take the following action:

The Administrator shall publish his disapproval of portion of the Rhode Island implementation plan consis of the variance statute (G.L.R.I. § 23-25-15) insofar as statute permits the granting of any variance after federal compliance dates for attainment of national mary and secondary standards (except minor deferra hereinabove described); insofar as it permits the grai of any variance prior to these dates not first approve the Administrator; and insofar as it permits the grai of any variance other than one conforming to requirem set forth in regulations to be promulgated as part of Rhode Island plan by the Administrator. After issuing disapproval, the Administrator shall promptly promul regulations, as part of the Rhode Island plan, specif the limited terms, conditions and circumstances under w state variances may still be issued. Such terms, condit and circumstances shall be consistent with this opinion may include additional more restrictive provisions deemed appropriate by the Administrator.

VI

Petitioners' sixth argument, also relating to alleged fects in the Rhode Island variance procedure, is contro by what we have already said on the subject.

VII

Petitioners contend that two provisions of the Rhode Island Clean Air Act, which are part of Rhode Island's air pollution implementation plan, violate the federal statute by permitting the state air pollution director to consider economic and social factors, and technical feasibility in issuing abatement orders.[12] Both sides seem agreed that the Clean Air Amendments of 1970 rejected consideration of these factors in determining whether violators should be made to comply with the law. Report No. 91-1196, U.S. Senate, 91st Cong., 2d Sess., p. 3 (1970); Hearings, "Implementation of the Clean Air Act Amendments of 1970, Pt. I," U.S. Senate, Subcommittee on Air and Water Pollution, Committee on Public Works, 92nd Cong., 2d Sess., p. 21 (1972); *Hearings, supra at* 277, 312.

Respondent's defense is that "Insofar as these sections

[12] G.L.R.I. § 23-25-5(h) grants the director power "to issue, modify, amend or revoke such orders prohibiting or abating air pollution as are in accord with the purposes of this chapter and the rules and regulations promulgated hereunder. In making the orders hereunder authorized, the director shall consider all relevant factors including, but not limited to, population density, air pollution levels, the character and degree of injury to health or physical property and the economic and social necessity of the source of air pollution."

G.L.R.I. § 23-25-8(a): "If any person is causing air pollution and if after investigation and hearing the director shall so find, he may enter an order directing such person to adopt or to use, or to operate properly, as the case may be, some practicable and reasonably available control system or device or means to prevent such pollution, having due regard for the rights and interests of all persons concerned. Such order may specify the particular control systems, device or means to be adopted, used or operated; provided, however, where there is more than one such practical and reasonably available systems or means such order shall give to the person complained of the right to adopt or use such one of said systems or means as he may choose. The order shall specify the time within which such system or means shall be adopted or used or such operation thereof shall be commenced. Such time may be extended by the director in his discretion from time to time upon application being made by such person, and any such order may upon like application from time to time be modified in any other particular not inconsistent with the provisions hereof."

are not required as part of the State's implementation they are surplusage as they relate to the Clean Air Insofar as they might be inconsistent with the Clean Act, they are a nullity . . ."

This response is not sufficient. To the extent that G. §§ 23-25-5(h) and 23-25-8(a), as now worded, are sistent with the federal statute, they must be disapp

The same considerations and limitations which we discussed at length with respect to variances apply erally to abatement orders.

During the post-attainment period, the Rhode director must be guided in the issuance of orders l objective requirements of the state's implementation He may not exercise discretion, based on economi social factors and on notions of technical feasibility. ponements may only be allowed as permitted in la regulations hereinafter approved or promulgated l Administrator providing for very brief grace-perio to exceed several months. Any greater deferral of e men must be achieved, if at all, through § 1857c-5(f) Prior to the attainment dates, greater discretion n allowed by the Administrator in the issuance and of orders. We leave to the Administrator the promul of suitable regulations, to become part of the Rhode plan, indicating the standards to be followed by the Island director when acting under the Rhode Island Any substantial deferrals of control strategy will, a variances, require approval of the Administrator.

The Administrator's disapproval of the two Rho land statutes, as written, which shall be published follow a format generally similar to that set forth for disapproval of the variance statute. Suitable d regulations consistent herewith and with the Clea Amendments shall thereafter be promulgated and part of the Rhode Island plan.

VIII

We disagree with petitioners' final argument that G.L.R.I. § 23-25-9[13] fails to comply with 40 C.F.R. § 51.18(d).[14] § 23-25-9 appears to refer to situations where a person is ordered by the Director to adopt, use or properly operate an air pollution control device pursuant to § 23-25-8. It would appear not to refer to the case envisioned by 40 C.F.R. § 51.18 where the Department of Health approves the construction or modification of stationary sources under § 23-25-5(k). Furthermore, Section 4.1.2 of the Rhode Island plan states that "Approval of any construction, installation or modification shall not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy." Regulations 9.5.1 and 9.8.1 of the Rhode Island plan are further evidence that construction and modification approval does not exempt a source from compliance with other regulations.[15]

[13] "Any person who shall adopt or use and who shall properly operate a system or means to prevent air pollution in compliance with an order of the director shall thenceforth as long as such approval or order remains unrevoked or unmodified be deemed to have complied with all orders and determinations of the director issued during such period under the authority conferred upon him by this chapter."

[14] "(a) Each plan shall set forth legally enforceable procedures that will be used to implement the authority described in § 420.11 (a)(4), which procedures shall be adequate to enable the State to determine whether construction or modification of stationary sources will result in violations of applicable portions of the control strategy or will interfere with attainment or maintenance of a national standard . . . .

(d) Such procedures shall provide that approval of any construction or modification shall not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy."

[15] "9.5 Standards for Granting Approval To Construct, Install or Modify

9.5.1 No approval to construct, install or modify shall be granted unless the applicant shows to the satisfaction of the director that:

(a) The machine, equipment, device, article, facility or air pollution control system is designed and will be constructed, installed or modified to operate without causing a violation of the applicable air pollution control rules and regulations.

(b) The machine [etc.] as constructed, installed or modified does not prevent the maintenance or attainment of any applicable ambient air quality standard.

9.8.1 Any approval given by the director shall continue in effect only as long as the operation of the machine, equipment, device, article, facility or air pollution control system is satisfactory to the director."

THE MASSACHUSETTS PLAN

Petitioners' first three objections to the Massachusetts plan raise substantially the same issues as those discussed above with regard to the Rhode Island plan.

IX

Petitioners argue that Massachusetts has failed to provide the "necessary assurances that the state will have adequate personnel, funding and authority to carry out such implementation plan" as required by 42 U.S.C. § 1857c-5(a)(2)(F). Massachusetts candidly states that it must have additional funds and staff to implement the plan. We have earlier stated, with regard to Rhode Island, that Congress left to the Administrator's sound discretion determination of what assurances are "necessary." The difficulty of a state's forecasting future resources, funds and needs requires that much be left to the Administrator's reasoned judgment; honest data, moreover, and even honest doubts are preferable to empty rhetoric. But we cannot, without knowing more, affirm the Administrator's approval of that portion of the Massachusetts plan which, on its face, indicates an inability to provide "necessary assurances." It may be that Massachusetts' statement of inadequate resources is offset by the Administrator's reasonable belief that he will be able to channel sufficient federal funds to the state to do the job. *See* 42 U.S.C. § 1857c. It may be that his detailed knowledge of the Massachusetts situation satisfies him that, notwithstanding asserted shortages, the state's personnel and funding, insofar as can now be est

mated, will be adequate. We recognize, of course, the difficulties faced by the Administrator were a state adamantly to refuse to provide for sufficient personnel and funding. But matters must be taken a step at a time; and the first step, required by the statute, is for the Administrator to make a reasoned judgment whether, in light of the resources shown to exist, and his best estimate of future federal and state resources, the necessary assurances requirement has been met. And for us to review the Administrator's approval in the present case, we must, in view of the doubts expressed by Massachusetts, have more information.

We direct the Administrator to provide us with a detailed statement of his rationale for concluding from the information in the Massachusetts plan and otherwise in his possession that Massachusetts, notwithstanding the doubts expressed in its plan, has provided "necessary assurances" that it will have adequate personnel, funding and authority to carry out its implementation plan.

X-XI

Our conclusions with respect to petitioners' objections to Massachusetts' variance procedures[16] are identical to those

[16] "Regulation 50.1 *Variances*

The Department, upon its own initiative or upon application to it by any person, after due notice and a public hearing, may vary the application of any regulation as it may deem necessary for the public good or to allay undue hardship. Variances, when granted, shall be in writing and shall be for not more than one year. The applicant shall assume all costs such as, but not limited to, the publishing of legal notices incidental to the application for and granting of a variance."

Regulation 2.4 *Criteria of Application*

When, in the opinion of the Department, any facility has a likelihood of causing or contributing to a condition of air pollution, the person owning, leasing, or controlling the operation of the facility shall, upon request by the Department, submit to the Department, plans, specifications, Standard Operating Procedure, maintenance procedure and such other information as may be necessary to determine the adequacy of application in said facility of air pollution control technology. If, after review of said information, the Department determines that the facility is

expressed in our discussion of the Rhode Island p
shall not repeat them here (see V, above). The
Massachusetts regulations shall be disapproved in t
ner and to the extent there described, and suitable
tions thereafter promulgated, as part of the Massa
plan, consistent with the requirements and standard
we have described in the case of Rhode Island.

XII

We agree with petitioners that the Massachuse
failed to comply with 42 U.S.C. § 1857c-5(a)(2)(F
requires each plan to provide,

> . . . (ii) requirements for installation of equipr
> owners or operators of stationary sources to
> emissions from such sources, (iii) for periodic
> on the nature and amounts of such emissior
> that such reports shall be correlated by th
> agency with any emission limitations or st
> established pursuant to this chapter, *which*
> *shall be available at reasonable times for pu*
> *spection* . . . [Emphasis supplied.]

This section, particularly important to insure pub

in need of reconstruction, alteration, or repair to preven
causing or contributing to a condition of air pollut
facility may be temporarily continued in operation pend
reconstruction or repair if the person owning, leasing,
trolling the operation of the facility,

(a) demonstrates to the satisfaction of the Departme
ship or public need and

(b) agrees to submit plans and specifications for re
tion, alteration, or repair of the facility and
Standard Operating Procedure for the reconstr
altered facility to the Department within an agr
reasonable period of time for the Department's
and approval prior to the intended reconstructior
tion, or repair and subsequent operation and

(c) indicates his intention to reconstruct, alter, or re
thereafter to operate the facility in accordance
plans, specifications, Standard Operating Proced
maintenance procedure as approved by the Dep
after submittal."

ticipation in the enforcement process, is implemented by E.P.A. regulations 40 C.F.R. §§ 51.10(c) and 51.11(a)(6).[17]

Regulation 14 of the Massachusetts Department of Public Health Air Pollution rules states:

> Upon request by the Department through direct communication or public notice, any person who owns or operates a stationary emission source . . . (b) shall make periodic reports to the Department on the nature and amounts of emissions from said such source which the Department shall review and correlate for its use in emissions control and exhibit for public information.

As petitioners point out, Regulation 14 does not *require* periodic reports. If the Department does not request such reports, they need not be made. We agree that this discretionary aspect of the Regulation is in conflict with the Act, and should have been disapproved.

There is a further problem with this aspect of the Massachusetts plan. G.L.c. 111 § 142D is enabling legislation for the Department to implement federal air pollution requirements. § 142D provides, in part, that "The powers, duties and rights of the department in the exercise of air pollution control in districts established under this section . . . shall be as provided in section one hundred and forty-two B." § 142B states:

> Personnel of the department may in the performance

[17] "Each plan shall provide for public availability of emission data reported by source owners or operators or otherwise obtained by a State or local agency. Such emission data shall be correlated with applicable emission limitations or other measures. . . ."

40 C.F.R. § 51.10(c)

"Each plan shall show that the State has legal authority to carry out the plan, including authority to . . . (6) Require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also authority for the State to make such data available to the public as reported and as correlated with any applicable emission standards or limitations." 40 C.F.R. § 51.11(a)(6)

> of their duties under this section, enter and
> any property, premise, or place, . . . *Any infor*
> *relating to secret processes, methods of manu,*
> *or production obtained in the course of such ins*
> *shall be kept confidential upon request.* [Er
> supplied.]

G.L. c.111 § 2B contains similar language regarding mation obtained during inspections to uncover vio of air pollution emergency orders:

> Information relating to trade secrets, secret pr
> or methods of manufacture or production s
> confidential and shall not be disclosed or receiv
> ing the course of any such investigation; no
> such information be used or disclosed in any
> hearing under this section.

These statutes suggest that Massachusetts does no authority to compel public disclosure of emission

That the federal statute specifically intended er data to become public knowledge is clear from 42 § 1857c-9(c):

> Any records, reports or information obtained

[18] The Massachusetts plan designates "Administrative #71-3" (of the Executive Office for Administration and Fina the source of the state's authority to compel public disclosure Bulletin requires disclosure of "public" and "quasi-public" Emission data is not a "public" record as defined by statute, definition of "quasi-public" records excludes "(6) A record co trade secrets or other information obtained on a privileged dential basis." However, we note the possibility that (5) might the disclosure of such data, since it states: "A record co investigatory information obtained for the purpose of enforce implementation of law [is not a quasi-public record] except extent that such record is required by law to be made avail a party other than the state agency having custody thereof phrase "required by law" might be construed as encompass requirements of the Clean Air Act. However, we need not this question since G.L. c. 111 §§ 2B and 142B, wholly apa Administrative Bulletin 71-3, conflict with 42 U.S.C. § 5(a)(2)(F).

> subsection (a) of this section [permitting the Administrator access to emission records] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, *(other than emission data)* to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter. [Emphasis supplied.]

The Administrator should have disapproved so much of the Massachusetts statutes and regulations forming a part of the state's implementation plan as allow emission reports to be held confidential.[19]

ORDER

No. 72-1219 *The Rhode Island Plan*

The Administrator is hereby ordered:

1. To file with the court no later than thirty days from the date hereof information respecting classification of the MPIAQCR requested in Section I above.

2. To notify the court within thirty days from the date hereof, in accordance with Section II, whether, in light of the nitrogen dioxide regional reclassification, the Rhode Island plan is found to ensure compliance with the federal nitrogen dioxide standard. Should the necessary data still

[19] We understand that the Administrator disapproved the New Jersey and Vermont plans because of state "confidentiality" statutes similar to those of Massachusetts. *See* 37 Fed. Reg. 10880 and 10899.

be unavailable, he shall file a status report with
thirty day period.

3. Forthwith to disapprove the Rhode Island impl
tion plan, or portions thereof, in accordance with
III, V and VII of this opinion, and to take furthe
consistent with such Sections and as required u
U.S.C. § 1857 c-5(c) and other applicable provision
Clean Air Amendments.

Copies of filings under (1) and (2) above shall b
upon the petitioners when made. Petitioners may f
ten responses thereto with the court within ten day
after.

No. 72-1224 *The Massachusetts Plan*

The Administrator is hereby ordered forthwith t
prove the Massachusetts plan, or portions thereof
cordance with Sections X, XI, and XII of this opini
to take further action consistent with such Sections
required under 42 U.S.C. § 1857 c-5(c), and other ap
provisions of the Clean Air Amendments.

The Administrator is hereby ordered, in accordan
Section IX above, to file with the Court no later tha
days from the date hereof a detailed statement of hi
nale for concluding that Massachusetts has provi
"necessary assurances" required by 42 U.S.C. §
(a)(2)(F). A copy of this statement shall be serve
the petitioners when made. Petitioners may file
responses thereto with the court within ten days the

So ordered.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1219

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO COURT ORDER OF JULY 27, 1973 FOR FURTHER INFORMATION ON THE RHODE ISLAND IMPLEMENTATION PLAN.

On May 2, 1973, the United States Court of Appeals for the First Circuit entered its opinion in the above captioned case which requested, inter alia, that the Environmental Protection Agency provide further explanation of the basis for its classification of the Metropolitan Providence Interstate Air Quality Control Region as a Priority III region. On June 1, 1973, a statement was filed with the Court which indicated that EPA, in conjunction with the State of Rhode Island, was going to undertake extensive air quality monitoring during the summer months to obtain air quality data to be used in determining whether the priority classification should be revised or not. On July 27, 1973, the Court entered a supplemental memorandum and order in which the Court indicated its concurrence with the monitoring program but asked that a report be

filed by October 1, 1973, regarding the results of that monitoring.

Monitors designed to measure ambient concentrations of carbon monoxide and photochemical oxidants were placed at various locations in the Metropolitan Providence region where the concentrations of those pollutants were expected to be highest. These monitors have been in operation continuously since June and were analyzed periodically to obtain the measured concentrations. The instruments were also calibrated periodically to insure valid sampling results. The monitors indicate that concentrations of carbon monoxide and photochemical oxidants during this period on many occasions exceeded the national standards. While this data is continuing to be analyzed by EPA and by the State, it is the determination of EPA that the significant number of readings in excess of the standards indicates that the region should be classified Priority I with respect to both carbon monoxide and photochemical oxidants (hydrocarbons).

EPA is presently preparing a revision to the Rhode Island implementation plan which will change the priority designation of the Metropolitan Providence Interstate Region from Priority III to Priority I. Because of the desire to obtain maximum data, EPA received monitoring results until September 15. The necessary analysis of this data did not permit the preparation of the Federal Register documents in time for them to be published by October 1. However, the State has been notified of this decision and it is expected that the publication will appear in the Federal Register within two weeks. Because the region will now be classified Priority I, the State is under an obligation to adopt control strategies

for achievement of the standards in that region by 1975. The Federal Register notice will contain a request that the State develop and submit to EPA within four months a plan revision containing an adequate control strategies for attainment and maintenance of these two standards.

Since the petitioners in this case were challenging the May 31, 1972, Priority III classification, and requested that it be revised to Priority I, the action being taken by EPA as outlined herein should satisfy their request and this Court's orders of May 2 and July 27. Copies of the Federal Register notice will be forwarded to the Court upon publication.

Respectfully submitted,

Dated: OCT 1 1973

Robert L. Sansom
Assistant Administrator for
Air and Water Programs

United States Court of Appeals
For the First Circuit

No. 72-1219

NATURAL RESOURCES DEFENSE COUNCIL, INC., PROJECT ON CLEAN AIR, RHODE ISLAND TUBERCULOSIS AND RESPIRATORY DISEASES, INC., and ELLERBE W. ACKERMAN, JR.,

PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

No. 72-1224

NATURAL RESOURCES DEFENSE COUNCIL, INC., PROJECT ON CLEAN AIR, ET AL.,

PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

ON PETITIONS FOR REVIEW OF REGULATIONS OF THE ENVIRONMENTAL PROTECTION AGENCY

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Richard E. Ayres and *Thomas B. Arnold* for petitioners.

Thomas C. Lee, Attorney, Department of Justice, with whom *Kent Frizzell*, Assistant Attorney General, *Edmund B. Clark*, and *Martin Green*, Attorneys, Department of Justice, were on brief, for respondent in case 72-1219.

John P. Hills, Attorney, Department of Justice, with whom *Kent Frizzell*, Assistant Attorney General, *Edmund B. Clark*, and *Martin Green*, Attorneys, Department of Justice, were on brief, for respondent in case 72-1224.

May 2, 1973

CAMPBELL, *Circuit Judge*. Petitioners seek review[1] of decisions by the Administrator of the Environmental Protection Agency (E.P.A.) approving portions of the Rhode Island and Massachusetts air pollution implementation plans.[2]

The Clean Air Amendments of 1970 [to the Air Quality Act of 1967], 42 U.S.C. § 1857-c-3 *et seq.*, require the Administrator—as he has already done—to establish national primary and secondary ambient air quality standards stating how much of each pollutant shall be allowed in the ambient air. Primary standards are maximums allowable to protect the public health; secondary standards are maximums to protect the public welfare from any known or anticipated adverse effects. Each state must then submit to the Administrator a plan for implementation, maintenance and enforcement of the standards. § 1857c-5(a)(1). The plan must be such as to achieve primary standards within three years (subject to a possible two-year extension), and secondary standards within a reasonable time. § 1857c-5(a)(2); *see* § 1857c-5(c) and (f). The Administrator is to approve or disapprove a plan, or any portion, in light of its ability to meet those timetables and its fulfilling of the other requirements of § 1857c-5(a)(2)(B) through (H). If a state plan or any portion does not meet the statutory requirements, the Administrator is directed to publish his own regulations setting forth an implementation plan, or portion thereof for the state. § 1857c-5(c).

[1] "A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 1857h-5(b)(1).

[2] The Administrator's approval of the Rhode Island and Massachusetts plans, at 37 Fed. Reg. 10891 and 10872-73 (May 31, 1972), consists of a brief statement that the plans are satisfactory, unaccompanied by any findings, conclusions or supporting rationale.

Petitioners raise eight objections to the Administrator's approval of the Rhode Island plan, and four to the Massachusetts plan.[3]

THE RHODE ISLAND PLAN

I

Petitioners argue that the Administrator erred in approving the classification of the Metropolitan Providence Interstate Air Quality Control Region (MPIAQCR) as Priority III for photochemical oxidants and carbon monoxide.[4] The classification was made pursuant to 40 C.F.R § 51.3(b)(2):

> In the absence of measured data to the contrary, classification with respect to carbon monoxide, photochemical oxidants and nitrogen dioxide will be based on the following estimate of the relationship between these pollutants and population: Any region containing an area whose 1970 "urban place" population, as defined in the U.S. Bureau of Census, exceeds 200,000 will be classified Priority I. All other regions will be classified Priority III.

[3] Certain other questions relating to the timing of the Massachusetts plan and E.P.A. regulation of vehicular emissions, originally raised before us, were recently resolved by the Court of Appeals for the District of Columbia Circuit. *National Resources Defense Council, Inc., et al. v. E.P.A.*, Order filed Jan. 31, 1973, 41 U.S.L.W. 2406; *see* 465 F.2d 492 (1st Cir. 1972).

[4] The classification system (which is not provided for in the Act but was devised by the Administrator) is described in 40 C.F.R § 51.3. In general, it is used to differentiate areas of relatively impure air where improvement of air quality is required (Priority I) from areas of relative purity where the present air quality need only be maintained. 40 C.F.R. § 51.14(a)(1) provides that "Each plan for a region classified Priority I with respect to carbon monoxide, photochemical oxidants . . . shall set forth a control strategy which shall provide for the degree of emission reduction necessary for attainment and maintenance of the national standard for each such pollutant. . . ", while pursuant to § 51.14(d)(3), "For Priority III regions, no air quality data for carbon monoxide , . . . and photochemical oxidants need be submitted."

Both parties seem agreed that there was an "absence of measured data to the contrary," and that the " 'urban place' population" criterion was used. Although the precise meaning of "'urban place' population" was questioned by petitioners, respondent has informed us that the term was taken from the 1960 census, and that it was intended to mean what "place" population means in the 1970 census. The 1970 "place" population of Providence was 170,000; hence, the Priority III classification. We accept the Administrator's interpretation of his own regulation. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

The harder question is whether the regulation goes beyond statutory authority. Petitioners argue that it is irrational, since

> Air pollutants, by their nature, do not respect political boundaries, so that two cities, closely juxtaposed, would have nearly the same degradation of air quality as a single city of the same total population. It is population density and traffic density that are relevant, not the individual city size. Although Providence alone has a population of 170,000, the metropolitan Providence area contains the immediately contiguous cities of Central Falls, Cranston, Cumberland, East Providence, Johnston, North Providence, Pawtucket, Providence, Warwick and West Warwick with a total population of over 570,000.

Whatever the facts in Rhode Island, the regulation seems to presume what must, in some places, be fiction: that, if a region lacks a city of over 200,000, its air is relatively pure in the absence of measured data to the contrary. 40 C.F.R. § 51.3(b)(2). The air over a region containing a dense population, much industry, but no one city with over 200,000 inhabitants, could, though polluted, be classified Priority III. Recognizing this, the Administrator points to

his need to tackle the national problem in a manage way. Since photochemical oxidants and carbon mono are associated with automobiles, and since control require regulation of the use of automobiles, he say must concentrate initial control strategies in single, l cities having a centralized government and hence gre capability to regulate traffic.

This may be the only feasible approach. Yet the C Air Amendments, on their face, contemplate achie national standards within the allowable time everywh an object which the Administrator's urban place priori would seem not to achieve. We would be loath to cons the Act as requiring the Administrator to do the im sible; however, without further information we ca make an informed judgment. We do not accept fac arguments advanced by attorneys in briefs or orally substitutes for official finding or explanations of the age *International Harvester Company* v. *Ruckelshaus*, 72-1517 (D.C.Cir. Feb. 10, 1973) at p. 25. Without d either we must conclusively presume that the Administra is right—a presumption which would reduce judicial view of the question to a formality—or we must h further data from the agency upon which to mak reasoned judgment.

At present, we not only do not know officially and detail why the agency has adopted an approach wh seems *not* to ensure national compliance within the allot time, we do not know why there remains an "absence measured data" regarding the extent of photochem oxidants and carbon monoxide pollution in the MPIAQC

In a letter dated June 15, 1971, Mario Storlazzi, Regio Air Pollution Control Director, E.P.A., notified Dr. Jos E. Cannon, Director of the Rhode Island Department Health, that the MPIAQCR was classified *Priority I* carbon monoxide and photochemical oxidants "based on

[State Department of Health] has agreed to monitor the air quality for [these pollutants] in an area of high traffic density during the time period from July 1 to September 30 of this year. The air quality data collected will be used to establish the final classification."

There is no evidence that the data was ever collected. We should know whether it is available today, one and one-half years later, particularly in light of 42 U.S.C. § 1857 c-5(a)(2)(C).[5] If the data is still not available, is Rhode Island under a continuing duty to collect it, or will the MPLAQCR retain its Priority III classification forever?

The Clean Air Amendments do not expressly require the E.P.A. to provide an explanation of its decisions approving state implementation plans. Compare 42 U.S.C. § 1857h-5 (b)(1) with § 1857c-5(f)(2). Nonetheless, the judicial review provision necessarily confers authority to compel such information from the E.P.A. to the extent needed to determine whether the Administrator's action is in accordance with law.[6] *See Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419-421 (1971); *Camp* v. *Pitts*, 41 U.S.L.W. 3515 (U.S. March 26, 1973); *Kennecott Copper Corp.* v. *Environmental Protection Agency*, 462 F. 2d 846, 848-850 (D.C. Cir. 1972); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-1522 etc. (D.C. Cir. Jan. 31, 1973). *See also Environmental*

[5] This section requires that state plans include "provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator."

[6] Under the Administrative Procedure Act, the relevant review standard is whether the Administrator's approval was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Clauses 2(E) and 2(F) of § 706 are inapplicable.

Agency v. *Ruckelshaus*, No. 72-1017 (D.C. Cir. Feb. [illegible]; *Appalachian Power Company* v. *Environmental Protection Agency*, No. 72-1733 (4th Cir. April 11, 1973) at pp. 2

We ask the E.P.A. to provide us with a detailed s ment of its reasons for adopting 40 C.F.R. § 51.3(b what efforts have been and are being made to collect concerning photochemical oxidants and carbon mono levels in the MPLAQCR, and elsewhere in Rhode Isl whether or not adequate data is now available, and other information which the E.P.A. considers migh helpful to this court in reviewing the question.[7]

II

Petitioners claim that Rhode Island's control stra for nitrogen dioxide will reduce the ambient nitrogen d ide concentration by only 9.2%, whereas in 1969 the mary standard was exceeded by 26.5%. We need not dis this argument in detail since we are now informed the Administrator has announced the impending rec sification of all regions for nitrogen dioxide, based u findings that the air quality data originally used in ass ing classifications to regions significantly overestim the actual ambient concentrations of nitrogen dioxide.[8]

[7] We have said in a different procedural context, "In environm matters particularly, we would hope that the government would re that courts need the expertise and views of responsible agencies w programs will be affected, one way or another, by litigation." S v. *Romney*, 473 F.2d 287, 289 (1st Cir. 1973).

[8] The Administrator announced, in 37 Fed. Reg. 23085 (Oct 28, 1972) that:

"As discussed below, regulations are not promulgated at time to correct deficiencies in control strategies for nitrogen oxide the following States: Massachusetts, Maryland, Michigan, Miss New Jersey, and Texas.

Regulations for the control of nitrogen oxides emissions v proposed for the above six States on June 14, 1972 (37 F.R. 1182 The preamble to those proposed regulations indicated that the quality data for nitrogen dioxide which was used to classify air qua control regions may be in error, and the Administrator would revis the classifications and, where appropriate, revise them. After c

According to respondent, many regions with air quality better than the nitrogen dioxide air quality standard may have been erroneously classified priority I, and the data which indicated a need in Rhode Island for a 26.5% reduction may have been wrong by as much as a factor of ten. We decline to review this aspect of the plan pending reclassification. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956). The Administrator shall advise us within thirty days whether, in light of the reclassification, the Rhode Island plan is in compliance with the requirements of the Clean Air Amendments. Should the necessary data still be unavailable, he shall file a status report within said thirty day period.

III

Petitioners assert that the Administrator erred in approving the Rhode Island plan since it does not provide for revisions, as required by 42 U.S.C. § 1857c-5(a)(2)(H). The statutory language is clear:

> [The Administrator shall approve the plan if he determines that] it provides for revision, after public hearings, of such plan (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.

We think the plan must expressly provide for revision after public hearings on the occasions and under the circumstances described in the federal statute. Congress did not indicate merely that the state, or some state authority, should have a power of amendment. Compare G.L.R.I. § § 23-25-5(1) and 23-25-5(n).[9] The plan was to be approved only if "*it provides* for revision, after public hearings" in two sets of circumstances where revision is mandatory, not merely optional. The Administrator erred in approving a plan which sets forth something less. We see no reason, when Congress has spoken precisely, for the Administrator or us to try to decide whether the state's informal substitute is, in the long run, just or almost as good. Presumably the necessary revision undertaking could be in regulations promulgated by the state director of health, or, if more convenient, the Administrator could promulgate his own regulations as a part of the state plan. § 1857c-5(c).

IV

Petitioners claim that the Rhode Island plan failed to provide the "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan" required by 42 U.S.C. § 1857

sidering the numerous comments on the proposed nitrogen oxides regulations, the Administrator has decided to postpone the promulgation of any such regulations until after the regional classification reassessment. It is the Administrator's determination that this postponement will not substantially delay the control of nitrogen oxides emissions where such control is required.

It is the Administrator's intention to complete the regional classification reassessment and to promulgate nitrogen oxides emissions regulations for stationary sources in the appropriate regions by April 2, 1973. Compliance schedules from sources covered by such regulations will be required by July 1, 1973, which is consistent with the commitments made by the Administrator in proposing the regulations. No change will be made at this time in the Administrator's May 31, 1972, disapprovals of nitrogen oxides control strategies unless supplemental information was submitted by the involved States to correct the deficiencies."

[9] "[The Director shall have the power] to make, issue and amend rules and regulations consistent with this chapter for the prevention, control and abatement of air pollution, and the enforcement of orders issued hereunder . . ." § 23-25-5(1)

"[The Director shall have the power] to exercise all incidental powers necessary to carry out the purposes of this chapter." § 23-25-5(n).

c-5(a)(2)(F). Respondent counters that the Rhode Island Plan complied with E.P.A. regulation 40 C.F.R. § 51.20:

> Each plan shall include a description of the resources available to the State and local agencies at the date of submission of the plan and of any additional resources needed to carry out the plan during the 5-year period following its submission. Such description, which shall be provided in a form similar to that in Appendix K to this part, shall include projections of the extent to which resources will be acquired at 1-, 3-, and 5-year intervals.

The Rhode Island Plan *described* the available resources and projected further resource acquisition. The question becomes whether 40 C.F.R. § 51.20 is consistent with the statute. An assurance is "the act of assuring . . . something that inspires or tends to inspire confidence . . . the quality or state of being sure or certain: freedom from doubt: CERTAINTY . . ." (Webster's Third New International Dictionary). At first glance, a description does not seem to inspire confidence or provide certainty that the state will have adequate personnel, funding and authority to carry out its plan. Yet given the mechanics of state-federal relations, it is difficult to imagine what sort of guarantee the current Rhode Island executive or legislature could give the E.P.A. to insure that adequate resources would be devoted to the Plan. Petitioner speaks of a "commitment . . . to use all reasonable efforts to obtain these resources from the legislature or from other programs . . . The Governor [should] give his assurance that he will do everything possible to obtain adequate resources, including filing special acts before the state legislature, or if necessary making available the necessary resources from other programs under his control." Such assurances might have a symbolic effect; however, they would have little more, since a governor or even a present session of the legislature

cannot make binding commitments on behalf of their successors, nor would such representations seem to be enforceable.

We believe that Congress has left to the Administrator's sound discretion determination of what assurances are "necessary". The Administrator has required the states to describe their resources, doubtless reasoning that review of such an inventory is the best practical "assurances" he can obtain. The Administrator can determine whether the itemized resources together with such federal funds as the Administrator may himself channel to Rhode Island (*see* 42 U.S.C. § 1857c) will enable the state to carry out the plan. The Administrator might also have asked for a promise by the Governor to use his "best efforts." But we are not prepared to fault the Administrator for deciding that such a gesture would be so lacking in enforceability as to be meaningless. The "necessary assurances" clause seems to us to call less for rhetoric than for the Administrator's reasoned judgment as to the adequacy of resources.

V

Petitioners say the Administrator erred in approving that portion of the Rhode Island plan which permits the state to grant variances.[10] They maintain that

[10] G.L.R.I. § 23-25-15. Variances. —

"(a) Upon application and after a hearing the director may suspend the enforcement of the whole or any part of this chapter or of any rule or regulation promulgated hereunder in the case of any person who shall show that the enforcement thereof would constitute undue hardship on such person without a corresponding benefit or advantage obtained thereby.

(b) In determining under what conditions and to what extent the variance may be granted the director shall give due recognition to the progress which the person requesting such variance shall have made in eliminating or preventing air pollution. In such a case the director shall consider the reasonableness of granting a variance conditioned on the person's affecting a partial abatement of the pollution or a progressive abatement thereof or such other circumstances as the

§ 1857c-5(f) establishes the exclusive variance procedure."

The Rhode Island variance provision as it now stands should have been disapproved as a part of that state's plan. The statute tells us that a state plan implementing a national primary air quality standard is to provide "for the attainment of such primary standard as expeditiously as practicable but [subject to subsection (e), providing for a possible later two-year extention] in no case later than three years from the date of approval of such plan." § 1857c-5 (a)(2)(A). Secondary standards are to be implemented

director may deem reasonable. No variance shall be granted to any person applying therefor who is causing air pollution which creates a danger to public health or safety.

(c) Any variance granted hereunder shall be granted for such period of time, not exceeding one (1) year as the director shall specify, but any variance may be continued from year to year. No variance shall be construed as to relieve the person receiving it from any liability imposed by law for the commission or maintenance of a nuisance nor shall there be any appeal from a denial of a variance."

"(f)(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 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.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

within "a reasonable time" as specified in the plan. A plan must include "emission limitations, schedules and timetables for compliance with such limitations, and such other measures as may be necessary to *insure attainment and maintenance* of such primary or secondary standard . . ." § 1857c-5(a)(2)(B). [Emphasis supplied.]

A state's implementation plan must therefore provide for two periods of time: an earlier period during which attainment of primary standards is to be achieved as expeditiously as practicable, but in no case later than three years; and a later period after which standards, having been attained, are to be maintained. We shall consider the Rhode Island variance provision as it applies to each of the two periods (bearing in mind that neither the variance provision itself nor the Rhode Island plan, as presently written, make any distinction between them).

a. *The period after mandatory attainment of standards.*

Under the variance provision, the Rhode Island director of health is authorized, from year to year, to exempt pol-

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 1857h-5(a) of this title (relating to subpoenas) shall be applicable to any proceeding under this subsection."

liters from state emission limitations, schedules and timetables. Were this power to be exercised liberally after the mandatory attainment dates, he could, at his pleasure, grant exemptions which would render maintenance of standards impossible. His retention of such extensive discretion is inconsistent with the federal statute and its stated objectives. It is plain from the legislative history that the expeditious imposition of "specific emission standards" and their "effective enforcement" were primary goals of the Clean Air Amendments. Report No. 91-1146, U.S. House of Representatives, 91st Cong., 2d Sess., pp. 1, 5 (1970). The Congressional intent could too easily be frustrated by the existence of open-ended exceptions. Sources of pollutants should either meet the standard of the law, or be closed down. Report No. 91-1196, U.S. Senate, 91st Cong., 2d Sess., p. 3 (1970).

Congress's intention to restrict individual exemptions is further reflected in its enactment of § 1857c-5(f). That section with its precise standards, its limitation of postponements to not more than one year, and its provision for judicial review, would be meaningless if much less restricted state variance machinery, nowhere authorized by the federal statute, were simultaneously to exist. We think Congress meant § 1857c-5(f) to be the exclusive mechanism for hardship relief after the mandatory attainment dates.

We have, of course, not yet arrived at those dates, and from the Administrator's argument and brief, we do not understand that he necessarily endorses utilization of state variance machinery after that time. But a state plan must provide not only for the present preparatory period; it must ensure both the attainment and the maintenance of standards. The Administrator may not approve a plan, or a portion thereof, which fails to deal appropriately with both objects.

The Administrator contends that the danger of indiscriminate variances is avoided by his own regulations requiring each state and local variance to be treated as a "revision" of the state plan. 40 C.F.R. § 51.32(f). "Revisions" are not to be considered part of a plan until approved by the Administrator. 40 C.F.R. § 51.6. The Administrator's regulations prohibit a state or local agency from granting "any variance of, or exception to, any compliance schedule" if it will prevent or interfere with timely attainment or maintenance of a national standard. 40 C.F.R. § 51.15. They further provide that § 1857c-5(f) postponement procedures are not necessary unless a state's "determination to defer the applicability of any portions(s) of the control strategy with respect to such source(s)" will prevent timely attainment or maintenance of a national standard. 40 C.F.R. § 51.32(f).

These regulations, however, insofar as applicable in the post-attainment period, substitute a less rigorous procedure for the one enacted by Congress. Had Congress meant § 1857c-5(f) to be followed only if a polluter, besides violating objective state requirements, was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? *See e.g. Getty Oil Company v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del. 1972), remanded with directions, 467 F. 2d 349 (3rd Cir. 1972), *cert. denied* 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums. We hold that the only recourse provided those seeking postponements of a state's emission limitations after the mandatory deadlines is the restricted provisions of § 1857c-5(f).

We do not say that a state plan may not provide, during the post-attainment period, for minor state and local de-

ferral procedures, such as by brief postponement of the effective date of abatement orders. Some flexibility may be allowed for mechanical breakdowns and acts of God. Any such procedures would, however, have to be limited to specific time periods measured in weeks or a few months, and would have to contain standards and controls precluding abuse.

b. The period before the date or dates set for mandatory attainment of standards.

Whether states may defer control strategy *prior* to the mandatory compliance dates—by variance, postponement or otherwise—is more difficult. While one may contend that § 1857c-5(f) must remain the exclusive deferral mechanism, we doubt that Congress intended altogether to preclude the Administrator from approving plans containing reasonable state deferral mechanisms during the preliminary period. The provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of standards. A state plan must provide for attainment of primary standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval . . .", and of secondary standards "within a reasonable time" as stated in the plan. § 1857c-5(a)(2)(A).

A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the "as expeditiously as practicable" language § 1857c-5(a)(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in

order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

The Administrator sees his power to allow such exemption procedures as deriving from the "revision" authority in § 1857c-5(a)(3). We tend to view it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period. We do not doubt the Administrator's power to approve reasonable mechanisms for state and local deferrals of control strategy provided they cease before the mandatory compliance date and the individual variances are not granted without his specific approval.

Nothing we say here is to suggest that the Administrator may permit such deferral mechanisms to threaten attainment of full compliance within the mandatory time period or sooner if practicable. We merely hold that the Administrator has discretion—as he does not after the mandatory dates—to permit state and local deferral mechanisms not inconsistent with national objectives.

(c) *Disapproval of the Variance Provision*

The Administrator, in arguing the related issue of Rhode Island's overly broad abatement-order laws (*infra*), asserts that he is powerless to remedy deficiencies in state law:

> Even if the Administrator disapproved the enforcement authority of Rhode Island, there would be no substantive corrective action which he could take to remedy the deficiency. All that he could do would be to publish a disapproval notice in the Federal Register. Elimination of the economic and technical feasibility considerations from the formulation of state enforcement orders would require a revision of the statutory authority of the Department of Health, to-wit, Sections 23-25-5(h) and 23-25-8(a). However, there is no authority provided in the Clean Air Act which would permit the Administrator to accomplish this. Admi-

tedly, if a State fails to submit a satisfactory implementation plan, the Administrator is directed to promulgate regulations setting forth a plan for that State. Section 110(c), 42 U.S.C. sec. 1857c-5(c). It is doubtful that Congress ever intended this provision to be used by the Administrator to revise the basic statutory authority of state agencies.

We do not accept these protestations of helplessness. Of course, the Administrator cannot repeal the state laws. He is specifically empowered, however, to disapprove not only a state implementation plan, but "any portion thereof" (§ 1857c-5(a)(2) and § 1857c-5(c)); and he "shall . . . promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if . . . (2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, . . ." § 1857c-5(c).

We hold that these statutory provisions not only empower, but also require, the Administrator to disapprove state statutes and regulations, or portions thereof, which are not in accordance with the requirements of the Clean Air Amendments. Congress plainly intended the federal statute and regulations promulgated thereunder to take precedence over state laws and regulations. By enabling the Administrator to insert his own regulations in a state plan, it provided him with the needed authority to substitute appropriate provisions for inappropriate ones. Thereafter, as legal components of the state plan, the Administrator's regulations may be both federally and locally enforced; violations thereof are violations of a state plan. § 1857c-8(a)(1); *see* §§ 1857c-7(d)(1), 1857c-9(b).

We disapprove the Administrator's practice of approving defective state laws or regulations as "surplusage".

The result will be confusion in the minds of state and ities and citizens, and, most likely, unnecessary litigat The Administrator's primary enforcement powers are t gered by violation of "any requirement" of a state § 1857c-8. It is therefore critical that the plan as fi approved (and as supplemented by the Administrat regulations forming part thereof) sets forth precisely is required. If it does not, enforcement efforts in later y may be seriously hampered.

With respect to the Rhode Island variance provision, Administrator is directed to take the following action:

The Administrator shall publish his disapproval of portion of the Rhode Island implementation plan consis of the variance statute (G.L.R.I. § 23-25-15) insofar as statute permits the granting of any variance after federal compliance dates for attainment of national mary and secondary standards (except minor deferral hereinabove described); insofar as it permits the gran of any variance prior to these dates not first approved the Administrator; and insofar as it permits the gran of any variance other than one conforming to requirem set forth in regulations to be promulgated as part of Rhode Island plan by the Administrator. After issuing disapproval, the Administrator shall promptly promul regulations, as part of the Rhode Island plan, specif the limited terms, conditions and circumstances under w state variances may still be issued. Such terms, condit and circumstances shall be consistent with this opinion may include additional more restrictive provisions deemed appropriate by the Administrator.

VI

Petitioners' sixth argument, also relating to alleged fects in the Rhode Island variance procedure, is contr by what we have already said on the subject.

VII

Petitioners contend that two provisions of the Rhode Island Clean Air Act, which are part of Rhode Island's air pollution implementation plan, violate the federal statute by permitting the state air pollution director to consider economic and social factors, and technical feasibility in issuing abatement orders.[12] Both sides seem agreed that the Clean Air Amendments of 1970 rejected consideration of these factors in determining whether violators should be made to comply with the law. Report No. 91-1196, U.S. Senate, 91st Cong., 2d Sess., p. 3 (1970); Hearings, "Implementation of the Clean Air Act Amendments of 1970, Pt. I," U.S. Senate, Subcommittee on Air and Water Pollution, Committee on Public Works, 92nd Cong., 2d Sess., p. 21 (1972); *Hearings, supra at* 277, 312.

Respondent's defense is that "Insofar as these sections

[12] G.L.R.I. § 23-25-5(h) grants the director power "to issue, modify, amend or revoke such orders prohibiting or abating air pollution as are in accord with the purposes of this chapter and the rules and regulations promulgated hereunder. In making the orders hereunder authorized, the director shall consider all relevant factors including, but not limited to, population density, air pollution levels, the character and degree of injury to health or physical property and the economic and social necessity of the source of air pollution."

G.L.R.I. § 23-25-8(a): "If any person is causing air pollution and if after investigation and hearing the director shall so find, he may enter an order directing such person to adopt or to use, or to operate properly, as the case may be, some practicable and reasonably available control system or device or means to prevent such pollution, having due regard for the rights and interests of all persons concerned. Such order may specify the particular control systems, device or means to be adopted, used or operated; provided, however, where there is more than one such practical and reasonably available systems or means such order shall give to the person complained of the right to adopt or use such one of said systems or means as he may choose. The order shall specify the time within which such system or means shall be adopted or used or such operation thereof shall be commenced. Such time may be extended by the director in his discretion from time to time upon application being made by such person, and any such order may upon like application from time to time be modified in any other particular not inconsistent with the provisions hereof."

are not required as part of the State's implementation
they are surplusage as they relate to the Clean Air
Insofar as they might be inconsistent with the Clean
Act, they are a nullity . . ."

This response is not sufficient. To the extent that G.L
§§ 23-25-5(h) and 23-25-8(a), as now worded, are i
sistent with the federal statute, they must be disappr

The same considerations and limitations which we
discussed at length with respect to variances apply
erally to abatement orders.

During the post-attainment period, the Rhode I
director must be guided in the issuance of orders b
objective requirements of the state's implementation
He may not exercise discretion, based on economic
social factors and on notions of technical feasibility.
ponements may only be allowed as permitted in la
regulations hereinafter approved or promulgated b
Administrator providing for very brief grace-period
to exceed several months. Any greater deferral of em
men must be achieved, if at all, through § 1857c-5(f)

Prior to the attainment dates greater discretion m
allowed by the Administrator in the issuance and t
of orders. We leave to the Administrator the promul
of suitable regulations, to become part of the Rhode
plan, indicating the standards to be followed by the
Island director when acting under the Rhode Island
Any substantial deferrals of control strategy will, a
variances, require approval of the Administrator.

The Administrator's disapproval of the two Rho
land statutes, as written, which shall be published
follow a format generally similar to that set forth
for disapproval of the variance statute. Suitable d
regulations consistent herewith and with the Clea
Amendments shall thereafter be promulgated and
part of the Rhode Island plan.

VIII

We disagree with petitioners' final argument that G.L.R.I. § 23-25-9[13] fails to comply with 40 C.F.R. § 51.18(d).[14] § 23-25-9 appears to refer to situations where a person is ordered by the Director to adopt, use or properly operate an air pollution control device pursuant to § 23-25-8. It would appear not to refer to the case envisioned by 40 C.F.R. § 51.18 where the Department of Health approves the construction or modification of stationary sources under § 23-25-5(k). Furthermore, Section 4.1.2 of the Rhode Island plan states that "Approval of any construction, installation or modification shall not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy." Regulations 9.5.1 and 9.8.1 of the Rhode Island plan are further evidence that construction and modification approval does not exempt a source from compliance with other regulations.[15]

[13] "Any person who shall adopt or use and who shall properly operate a system or means to prevent air pollution in compliance with an order of the director shall thenceforth as long as such approval or order remains unrevoked or unmodified be deemed to have complied with all orders and determinations of the director issued during such period under the authority conferred upon him by this chapter."

[14] "(a) Each plan shall set forth legally enforceable procedures that will be used to implement the authority described in § 420.11 (a)(4), which procedures shall be adequate to enable the State to determine whether construction or modification of stationary sources will result in violations of applicable portions of the control strategy or will interfere with attainment or maintenance of a national standard . . . .

(d) Such procedures shall provide that approval of any construction or modification shall not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy."

[15] "9.5 Standards for Granting Approval To Construct, Install or Modify

9.5.1 No approval to construct, install or modify shall be granted unless the applicant shows to the satisfaction of the director that:

(a) The machine, equipment, device, article, facility or air pollution control system is designed and will be constructed, installed or modified to operate without causing a violation of the applicable air pollution control rules and regulations.

(b) The machine [etc.] as constructed, installed or modified does not prevent the maintenance or attainment of any applicable ambient air quality standard.

9.8.1 Any approval given by the director shall continue in effect only as long as the operation of the machine, equipment, device, article, facility or air pollution control system is satisfactory to the director."

THE MASSACHUSETTS PLAN

Petitioners' first three objections to the Massachuset plan raise substantially the same issues as those discuss above with regard to the Rhode Island plan.

IX

Petitioners argue that Massachusetts has failed to pr vide the "necessary assurances that the state will ha adequate personnel, funding and authority to carry o such implementation plan" as required by 42 U.S.C. § 18 c-5(a)(2)(F). Massachusetts candidly states that it mu have additional funds and staff to implement the plan. W have earlier stated, with regard to Rhode Island, that Co gress left to the Administrator's sound discretion determ nation of what assurances are "necessary." The difficul of a state's forecasting future resources, funds and nee requires that much be left to the Administrator's reasone judgment; honest data, moreover, and even honest doub are preferable to empty rhetoric. But we cannot, witho knowing more, affirm the Administrator's approval of th portion of the Massachusetts plan which, on its face, i dicates an inability to provide "necessary assurances." may be that Massachusetts' statement of inadequate r sources is offset by the Administrator's reasonable belie that he will be able to channel sufficient federal funds t the state to do the job. *See* 42 U.S.C. § 1857c. It may be tha his detailed knowledge of the Massachusetts situatio satisfies him that, notwithstanding asserted shortages, th state's personnel and funding, insofar as can now be est

mated, will be adequate. We recognize, of course, the difficulties faced by the Administrator were a state adamantly to refuse to provide for sufficient personnel and funding. But matters must be taken a step at a time; and the first step, required by the statute, is for the Administrator to make a reasoned judgment whether, in light of the resources shown to exist, and his best estimate of future federal and state resources, the necessary assurances requirement has been met. And for us to review the Administrator's approval in the present case, we must, in view of the doubts expressed by Massachusetts, have more information.

We direct the Administrator to provide us with a detailed statement of his rationale for concluding from the information in the Massachusetts plan and otherwise in his possession that Massachusetts, notwithstanding the doubts expressed in its plan, has provided "necessary assurances" that it will have adequate personnel, funding and authority to carry out its implementation plan.

X-XI

Our conclusions with respect to petitioners' objections to Massachusetts' variance procedures[16] are identical to those

[16] "Regulation 50.1 *Variances*

The Department, upon its own initiative or upon application to it by any person, after due notice and a public hearing, may vary the application of any regulation as it may deem necessary for the public good or to allay undue hardship. Variances, when granted, shall be in writing and shall be for not more than one year. The applicant shall assume all costs such as, but not limited to, the publishing of legal notices incidental to the application for and granting of a variance.

Regulation 2.3 *Criteria of Application*

When, in the opinion of the Department, any facility has a likelihood of causing or contributing to a condition of air pollution, the person owning, leasing, or controlling the operation of the facility shall, upon request by the Department, submit to the Department, plans, specifications, Standard Operating Procedure, maintenance procedure and such other information as may be necessary to determine the adequacy of application in said facility of air pollution control technology. If, after review of said information, the Department determines that the facility is

expressed in our discussion of the Rhode Island pl
shall not repeat them here (see V, above). The r
Massachusetts regulations shall be disapproved in t
ner and to the extent there described, and suitable
tions thereafter promulgated, as part of the Massac
plan, consistent with the requirements and standard
we have described in the case of Rhode Island.

XII

We agree with petitioners that the Massachuse
failed to comply with 42 U.S.C. § 1857c-5(a)(2)(F)
requires each plan to provide,

> . . . (ii) requirements for installation of equipm
> owners or operators of stationary sources to r
> emissions from such sources, (iii) for periodic
> on the nature and amounts of such emission
> that such reports shall be correlated by the
> agency with any emission limitations or sta
> established pursuant to this chapter, *which*
> *shall be available at reasonable times for pu*
> *spection* . . . [Emphasis supplied.]

This section, particularly important to insure publ

in need of reconstruction, alteration, or repair to prevent
causing or contributing to a condition of air pollut
facility may be temporarily continued in operation pend
reconstruction or repair if the person owning, leasing,
trolling the operation of the facility,

(a) demonstrates to the satisfaction of the Departme
ship or public need and

(b) agrees to submit plans and specifications for re
tion, alteration, or repair of the facility and
Standard Operating Procedure for the reconstr
altered facility to the Department within an agre
reasonable period of time for the Department's
and approval prior to the intended reconstructio
tion, or repair and subsequent operation and

(c) indicates his intention to reconstruct, alter, or re
thereafter to operate the facility in accordance
plans, specifications, Standard Operating Proced
maintenance procedure as approved by the De
after submittal."

ticipation in the enforcement process, is implemented by E.P.A. regulations 40 C.F.R. §§ 51.10(e) and 51.11(a)(6).[17]

Regulation 14 of the Massachusetts Department of Public Health Air Pollution rules states:

> Upon request by the Department through direct communication or public notice, any person who owns or operates a stationary emission source . . . (b) shall make periodic reports to the Department on the nature and amounts of emissions from said such source which the Department shall review and correlate for its use in emissions control and exhibit for public information.

As petitioners point out, Regulation 14 does not *require* periodic reports. If the Department does not request such reports, they need not be made. We agree that this discretionary aspect of the Regulation is in conflict with the Act, and should have been disapproved.

There is a further problem with this aspect of the Massachusetts plan. G.L.c. 111 § 142D is enabling legislation for the Department to implement federal air pollution requirements. § 142D provides, in part, that "The powers, duties and rights of the department in the exercise of air pollution control in districts established under this section . . . shall be as provided in section one hundred and forty-two B." § 142B states:

> Personnel of the department may in the performance

[17] "Each plan shall provide for public availability of emission data reported by source owners or operators or otherwise obtained by a State or local agency. Such emission data shall be correlated with applicable emission limitations or other measures. . . ."

40 C.F.R. § 51.10(e)

"Each plan shall show that the State has legal authority to carry out the plan, including authority to . . . (6) Require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also authority for the State to make such data available to the public as reported and as correlated with any applicable emission standards or limitations."

40 C.F.R. § 51.11(a)(6)

> of their duties under this section, enter and
> any property, premise, or place, . . . *Any infor*
> *relating to secret processes, methods of manuf*
> *or production obtained in the course of such ins*
> *shall be kept confidential upon request.* [Em
> supplied.]

G.L. c.111 § 2B contains similar language regarding
mation obtained during inspections to uncover vio
of air pollution emergency orders:

> Information relating to trade secrets, secret pr
> or methods of manufacture or production sh
> confidential and shall not be disclosed or receiv
> ing the course of any such investigation; no
> such information be used or disclosed in any
> hearing under this section.

These statutes suggest that Massachusetts does no
authority to compel public disclosure of emission

That the federal statute specifically intended em
data to become public knowledge is clear from 42
§ 1857c-9(c):

> Any records, reports or information obtained

[18] The Massachusetts plan designates "Administrative
#71-3" (of the Executive Office for Administration and Fina
the source of the state's authority to compel public disclosure
Bulletin requires disclosure of "public" and "quasi-public"
Emission data is not a "public" record as defined by statute,
definition of "quasi-public" records excludes "(6) A record co
trade secrets or other information obtained on a privileged
dential basis." However, we note the possibility that (5) might
the disclosure of such data, since it states: "A record co
investigatory information obtained for the purpose of enforcer
implementation of law [is not a quasi-public record] except
extent that such record is required by law to be made avail
a party other than the state agency having custody thereof
phrase "required by law" might be construed as encompass
requirements of the Clean Air Act. However, we need not
this question since G.L. c. 111 §§ 2B and 142B, wholly apa
Administrative Bulletin 71-3, conflict with 42 U.S.C. §
5(a)(2)(F).

subsection (a) of this section [permitting the Administrator access to emission records] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, *(other than emission data)* to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter. [Emphasis supplied.]

The Administrator should have disapproved so much of the Massachusetts statutes and regulations forming a part of the state's implementation plan as allow emission reports to be held confidential.[19]

ORDER

No. 72-1219 *The Rhode Island Plan*

The Administrator is hereby ordered:

1. To file with the court no later than thirty days from the date hereof information respecting classification of the MPIAQCR requested in Section I above.

2. To notify the court within thirty days from the date hereof, in accordance with Section II, whether, in light of the nitrogen dioxide regional reclassification, the Rhode Island plan is found to ensure compliance with the federal nitrogen dioxide standard. Should the necessary data still

[19] We understand that the Administrator disapproved the New Jersey and Vermont plans because of state "confidentiality" statutes similar to those of Massachusetts. *See* 37 Fed. Reg. 10880 and 10899.

be unavailable, he shall file a status report wit
thirty day period.

3. Forthwith to disapprove the Rhode Island imp
tion plan, or portions thereof, in accordance with
III, V and VII of this opinion, and to take furth
consistent with such Sections and as required u
U.S.C. § 1857 c-5(c) and other applicable provisio
Clean Air Amendments.

Copies of filings under (1) and (2) above shall b
upon the petitioners when made. Petitioners may f
ten responses thereto with the court within ten day
after.

No. 72-1224 *The Massachusetts Plan*

The Administrator is hereby ordered forthwith t
prove the Massachusetts plan, or portions thereof
cordance with Sections X, XI, and XII of this opini
to take further action consistent with such Sections
required under 42 U.S.C. § 1857 c-5(c), and other ap
provisions of the Clean Air Amendments.

The Administrator is hereby ordered, in accordan
Section IX above, to file with the Court no later tha
days from the date hereof a detailed statement of hi
nale for concluding that Massachusetts has provi
"necessary assurances" required by 42 U.S.C. §
(a)(2)(F). A copy of this statement shall be serve
the petitioners when made. Petitioners may file
responses thereto with the court within ten days ther

So ordered.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.