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# WHOSE SIP IS IT ANYWAY? STATE-FEDERAL CONFLICT IN CLEAN AIR ACT ENFORCEMENT

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The Clean Air Act<sup>1</sup> ("CAA") is a peculiar animal. Like other federal environmental statutes, the Act owes its existence to the fact that Congress concluded that the separate states were neither able nor entirely willing to take the regulatory measures necessary to reduce air pollution in the United States.<sup>2</sup> Yet, Congress determined "that prevention and control of air pollution at its source is the primary responsibility of States and local governments."<sup>3</sup>

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The opinions expressed are those of the authors in their individual capacities and do not represent the position of the Department of Justice.

1. 42 U.S.C. §§ 7401-7671q (1988 & Supp. VI 1992).
2. In this regard, note the remarks of Senator Muskie, Chairman of the Environmental Pollution subcommittee of the Senate Committee on Public Works, in floor debate over the 1970 Amendments:

In 1963, Congress recognized that the Federal Government could not handle the enforcement task alone, and that the primary burden would rest on State and local governments. *However, State and local governments have not responded adequately to this challenge.* It is clear that enforcement must be toughened if we are to meet the national deadlines. More tools are needed, and the Federal presence and backup authority must be increased.

116 CONG. REC. 32,901 (1970) (emphasis added).

3. Air Pollution Prevention and Control Act of 1967, Pub. L. No. 90-148, § 2, 84 Stat. 485, 485 (enacting § 101(a)(3)) (codified as amended at 42 U.S.C. § 7401(a)(3)).

In 1976, Senate Minority Leader Howard Baker characterized the language of section 101(a)(3)<sup>4</sup> of the Clean Air Act as "carryover language," a "vestigial remainder" belied by "the nearly total federal supervisory and approval authority contained in" the 1970 Amendments to the Act.<sup>5</sup> But eleven years later, in hearings on the 1990 Amendments to the Act, organizations of state air regulators complained to Congress that the states had received too little direction from the federal government.<sup>6</sup> Nowhere is the paradoxical nature of the Act more evident or problematic than regarding the State Implementation Plan ("SIP") system. Section 110 of the Act directs each state to submit a plan, or set of regulations, for the "implementation, maintenance, and enforcement" of the National Ambient Air Quality Standards ("NAAQS") promulgated by the Environmental Protection Agency ("EPA") for certain pollutants.<sup>7</sup> The Act directs and empowers the Administrator of EPA to review and either approve or disapprove such SIPs.<sup>8</sup> Once EPA approves a SIP, either the state or the federal government may enforce the provisions of the SIP.<sup>9</sup>

One question that Congress did not address directly in the Clean Air Act is: "To whom do the courts defer when an approved SIP exists, and the state determines that a particular source is in compliance, but EPA disagrees?" Congress apparently envisioned a cooperative state-federal partnership in which the states would develop and present, and EPA would approve, clear and straightforward regulations that both the states and EPA would vigorously enforce. In fact, however, the state and federal governments have come to blows on several occasions when the federal government has filed suit against a source that the state considered to be in compliance. In other cases in which the state has not yet taken a position on the interpretation of a SIP provision as applied to a particular source, the source has argued that the federal enforcement action should be stayed until the state, or its courts, have ruled on the issue in question because the state's position would be controlling.<sup>10</sup>

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4. *See id.*

5. 122 CONG. REC. 7330 (1976).

6. *See infra* Section II.C. For a discussion of the various amendments to the Clean Air Act, *see infra* Section II.B.

7. CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1).

8. *Id.* § 110(a)(3)(B), 42 U.S.C. § 7410(a)(3)(B).

9. *Id.* §§ 113, 116, 42 U.S.C. §§ 7413, 7416.

10. *See generally infra* Section I.

The federal courts, faced with a statute that states that air pollution control is the "primary responsibility of States and local governments,"<sup>11</sup> but grants extensive "supervisory and approval authority" to the federal government, have taken differing approaches to these cases. Some courts have stated that SIPs are state law, and hence, the state's position, rather than EPA's, should control in any dispute about the terms of a SIP. Other courts have stated that because SIPs must be approved and enforced by the federal government, SIPs are federal law, and the interpretation of the federal government should control.<sup>12</sup>

Both pro-state and pro-federal courts have addressed the issue in a summary fashion. Generally, the courts appear to have adopted a mysterious habit of disregarding other relevant precedent. Although the authors of this Article find the reasoning of the pro-federal courts more compelling, the language of the Act provides support for both sides.

Ideally, state-federal conflicts simply would not arise. If the states did not submit, and EPA did not approve, state SIP provisions unless such provisions were clear, unambiguous, and acceptable to EPA. In the SIP process, however, the sovereigns' dedication to the goal of flexibility often undermines the goal of clarity. For example, several of the state-federal conflicts analyzed by this Article have arisen in the context of SIP provisions that have authorized the states to exempt from the literal terms of the SIP those individual sources meeting "equivalent" limits. In theory, such provisions serve the laudable purpose of enabling the state to account for source-specific conditions, while still reaching its emissions targets. In practice, EPA has found that it and the states do not always agree on the definition of "equivalent."<sup>13</sup>

This Article will attempt to analyze the cases that address the issue of state-federal conflict and to identify some factors that have caused such conflicts and might be likely to cause more in the future. The Article will first examine the reasoning of the courts which have taken sides on the issue of "Whose SIP is it?" Next, the Article will offer additional reasons for viewing SIPs as federal law and deferring to federal interpretations. The Article will also discuss the circumstances of some of the cases in which such disputes have arisen. Finally, the Article will examine the provisions of the 1990 Amendments to the Clean Air Act and the Act's

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11. CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3).

12. *See generally infra* Section I.

13. *See infra* Section II.D.

implementing regulations to determine the effect of these provisions on the state-federal conflict.

### I. CONFUSION IN THE COURTS

The case that best reflects the confusion in the federal courts over state-federal conflicts in the administration of SIPs is *United States v. General Dynamics Corp.*<sup>14</sup> In this action against General Dynamics, the federal district court was confronted with a dispute between the state and EPA on the interpretation of section 115.191 of the Texas SIP.<sup>15</sup> By reviewing precedent from the United States Court of Appeals for the Fifth Circuit, the court uncovered an intra-circuit dispute on how to resolve state-federal disagreements.

The court discovered that in *Florida Power & Light Co. v. Costle*,<sup>16</sup> the Fifth Circuit Court of Appeals held that "a federal agency should defer to a state's interpretation of the terms of its air pollution control plan when such interpretation is consistent with the Clean Air Act."<sup>17</sup> The court also noted, however, that in *American Cyanamid Co. v. United States Env'tl. Protection Agency*,<sup>18</sup> "[t]he Fifth Circuit upheld the EPA's interpretation because it was not clearly wrong or unreasonable and did not contradict the Louisiana SIP's plain meaning."<sup>19</sup>

The district court in *General Dynamics* managed to avoid acknowledging that the *Florida Power* and *American Cyanamid* decisions were inconsistent. Instead, the court held that the state's interpretation of the SIP failed even under the *Florida Power* test because the state interpretation was "not consistent with the Clean Air Act," "unreasonable," and "clearly nonsensical."<sup>20</sup> The court favored the federal government's interpretation by finding that EPA's interpretation was "not clearly wrong or unreasonable and [was] therefore binding."<sup>21</sup>

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14. 755 F. Supp. 720 (N.D. Tex. 1991).

15. Section 115.191 of the Texas SIP governs volatile organic compound emissions from "miscellaneous metal parts" manufacturing facilities. *Id.* at 722.

16. 650 F.2d 579, 588 (5th Cir. 1981).

17. *General Dynamics*, 755 F. Supp. at 722.

18. 810 F.2d 493, 498 (5th Cir. 1987).

19. *General Dynamics*, 755 F. Supp. at 723.

20. *Id.* at 722, 723.

21. *Id.* at 723.

Judge McBryde was in an odd predicament. Federal district court judges usually do not resolve disagreements between court of appeals panels. The traffic is supposed to go the other way. Although Judge McBryde's situation was somewhat novel, the legal issue he addressed was not. The doctrinal conflict addressed in *General Dynamics* had been at least fourteen years in the making.

The most significant case on the respective roles of the state and federal governments in administering the Clean Air Act is *Train v. Natural Resources Defense Council*.<sup>22</sup> *Train* was a victory for the federal government because the Supreme Court upheld EPA's approval of a Georgia SIP provision.<sup>23</sup> The language of the opinion, however, has repeatedly been invoked to support the state's position in state-federal disputes.<sup>24</sup>

The SIP adopted by Georgia in 1971 "provided for immediately effective categorical emission limitations, but also incorporated a variance procedure whereby particular sources could obtain individually tailored relief from general requirements."<sup>25</sup> EPA approved this provision, subject to the requirement that such variances would not "cause the plan to fail to comply with ... [section] 110(a)(2),"<sup>26</sup> and subject to a regulatory provision stating that such variances would be deemed "revisions" to the SIP under section 110(a)(3).<sup>27</sup> The National Resources Defense Council ("NRDC") argued that such variances should be viewed as "postponements" of the SIP, which must meet the requirements of section 110(f).<sup>28</sup>

The Court deferred to EPA's conclusion that such variances should be treated as revisions. Recognizing "that the Agency is charged with administration of the Act ... we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency."<sup>29</sup> But in its holding, the Court provided ammunition to those parties who would later

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22. 421 U.S. 60 (1975).

23. *Id.* at 99.

24. *See, e.g.,* United States v. Interlake, Inc., 432 F. Supp. 985 (N.D. Ill. 1977).

25. *Train*, 421 U.S. at 69.

26. *Id.* at 70.

27. *Id.* at 70, 71.

28. *Id.* at 71.

29. *Id.* at 87.

argue that the federal courts should not defer to EPA's interpretation of SIP provisions:

The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met .... The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [section] 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.<sup>30</sup>

The Court continued by stating that the same logic applied to both initial SIPs and SIP revisions.<sup>31</sup>

The *Train* decision does not mandate a conclusion that the state interpretation of an approved SIP should control over the federal interpretation. The decision states that EPA should approve a SIP that meets the NAAQS, not that once EPA has approved a SIP, the state can interpret the SIP in any way so chooses.<sup>32</sup> Indeed, the *Train* decision itself is an example of deference to an EPA interpretation of the Clean Air Act. Just two years after *Train*, however, parties were quoting its dicta in support of the proposition that the United States should not be permitted to enforce a SIP until the state has construed it.

In *United States v. Interlake, Inc.*,<sup>33</sup> the district court granted the defendant's request for a stay of a United States' action to enforce a SIP provision pending a review of that provision by the Illinois Pollution

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30. *Id.* at 79 (footnotes omitted).

31. *Id.* at 80.

32. *Id.* at 79.

33. 432 F. Supp. 985 (N.D. Ill. 1977).

Control Board ("IPCB").<sup>34</sup> The court observed that "[t]he provisions of the Illinois Implementation ... Plan here were developed by the IPCB and adopted by the Administrator" of EPA;<sup>35</sup> stated that the "IPCB should ... be given the opportunity to construct said rules in the first instance,"<sup>36</sup> and observed that "plaintiff should defer to the state's interpretation of the terms of its air pollution control plan when said interpretation is consistent with the Clean Air Act."<sup>37</sup> In support of this proposition, the district court quoted *Train*: "As the Supreme Court has noted, a state may determine the 'mix of emission limitations' so long as the end result is compliance with national ambient air standards."<sup>38</sup> The court also observed cryptically that "[p]laintiff's ... argument that it is seeking to enforce its own laws is not significant on this record."<sup>39</sup>

In *Florida Power & Light Co. v. Costle*,<sup>40</sup> the Court of Appeals for the Fifth Circuit quoted approvingly the *Interlake* statement that the plaintiff "'should defer to the state's interpretation of the terms of its air pollution control plan.'"<sup>41</sup> This observation followed an extensive discussion of *Train*.<sup>42</sup> The court of appeals also contrasted the "great flexibility accorded the states under the Clean Air Act" with the "narrow role to be played by EPA."<sup>43</sup>

The issue before the court in *Florida Power*, however, was not the interpretation of a state-submitted, federally-approved SIP provision. Rather, the court faced the issue of the propriety of EPA's decision to unilaterally "insist upon incorporating into Florida's SIP" a provision that Florida did not intend to become a part of the SIP at all.<sup>44</sup> EPA argued that its "incorporation" of the provision was mandated by another provision of Florida law, but the court of appeals found that interpretation

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34. *Id.*

35. *Id.* at 987.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 986.

40. 650 F.2d 579 (5th Cir. 1981).

41. *Id.* at 588 (quoting *Interlake*, 432 F. Supp. at 987).

42. *Id.* at 586-87.

43. *Id.* at 587.

44. *See id.*



"strained."<sup>45</sup> The court's *Interlake* quote was clearly dicta because the interpretation of an approved SIP provision was simply not at issue.

The court in *United States v. Riverside Laboratories, Inc.*,<sup>46</sup> also quoted the *Train*.<sup>47</sup> As in *Interlake*, the district court faced a situation in which the United States was pressing an enforcement action against a source for violation of a SIP provision while the source was simultaneously seeking a declaratory judgment in state court that (1) its facility was not subject to the SIP provision in question and (2) the application of the SIP provision to the source was unconstitutional.<sup>48</sup> Riverside sought to invoke the *Pullman*<sup>49</sup> abstention doctrine, which provides that a federal court should defer decision on a federal constitutional issue if the issue might be mooted by a state court determination of state law. The court ruled that *Pullman* abstention was appropriate in this case:

First, there exists a state law -- the Illinois SIP -- that is unclear in its application to Riverside's manufacturing operations. The USEPA argues that the SIP is not state law, but rather is federal law that the USEPA can interpret and enforce independent of any state court construction. This argument, however, is contrary to Seventh Circuit precedent. In *Bethlehem Steel Corp. v. Gorsuch*, ... the court held that the USEPA cannot make an [sic] SIP more stringent than intended by the state without following the procedures set out in the Clean Air Act.<sup>50</sup>

The court also cited its own decision in *Interlake* to support its holding.<sup>51</sup>

Significantly, the courts in *Florida Power* and *Riverside* did not acknowledge the possibility that the passage of the 1977 Amendments to the Clean Air Act had undermined the *Interlake* analysis.<sup>52</sup> Yet, those

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45. *Id.*

46. 678 F. Supp. 1352 (N.D. Ill. 1988).

47. *Id.* at 1354.

48. *Id.* In this case, the source argued that application of the SIP provision would violate its due process rights. *Id.*

49. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

50. *Riverside*, 678 F. Supp. at 1356-57 (citations omitted).

51. *Id.* at 1358, 1360 n.13.

52. *Florida Power*, 650 F.2d 579; *Riverside*, 678 F. Supp. 1352.

amendments expanded the federal role to such an extent that courts would find it difficult to characterize that role as "narrow."<sup>53</sup>

Moreover, in *Riverside* the court's reliance on *Bethlehem Steel Corp. v. Gorsuch*<sup>54</sup> was something of a stretch. In *Bethlehem*, EPA had attempted to "partially approve" a proposed SIP provision by deleting a part of the provision and thus making the regulation "substantially tougher."<sup>55</sup> The court concluded that EPA had no authority to partially approve a SIP provision. As in *Florida Power*, the issue was EPA's authority to approve and disapprove SIPs, not its authority to enforce and interpret approved SIPs.<sup>56</sup> In *Bethlehem* the court admonished readers of its opinion not to overemphasize its decision. The last paragraph of the decision began, "But do not exaggerate the scope of this holding."<sup>57</sup> The court also stated that EPA can approve part of a regulation and disapprove the rest, "provided the effect is just to prevent the state from weakening its previous regulation" and, further, that EPA could use the device of partial approval "even if the effect is to strengthen [a regulation] ... if it can show that the increase in the stringency ... is apparent rather than real, or if real is minor."<sup>58</sup>

In addition to overstating the *Bethlehem* ruling, and failing to acknowledge the significance of the 1977 Amendments, the court in *Riverside* ignored a contrary ruling by another district court from the previous year. In *United States v. Congoleum Corp.*,<sup>59</sup> as in *Interlake* and *Riverside*, the defendant moved to stay a federal enforcement action pending a decision on the interpretation of SIP provisions by a Pennsylvania hearing board.<sup>60</sup> The defendant, relying on *Interlake*, argued that the "SIP is state law because the state promulgated [the] SIP and a state agency administers it."<sup>61</sup> But the court in *Congoleum* disagreed:

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53. See *infra* Section II.B.3 (discussing the 1977 Amendments).

54. 742 F.2d 1028 (7th Cir. 1984)

55. *Id.* at 1035.

56. *Id.* at 1030.

57. *Id.*

58. *Id.* at 1037.

59. 635 F. Supp. 174 (E.D. Pa. 1986).

60. See *id.* at 175.

61. *Id.* at 177.

Before the EPA adopts the state's plan, the state is free, subject only to the provisions of the Act, to determine a mix of emission limitations. When the EPA approves the state plan, however, the plan is absorbed into federal law.... Additionally, if a provision of the plan were subject to two possible interpretations, the interpretation given to the provision by EPA is the proper interpretation. This is because the other interpretation was not approved by the EPA and did not properly become a provision of SIP. Consequently, SIP, after it is adopted by the EPA, is federal law.

Further support for the holding that SIP, once approved by EPA, is federal law is found in the fact that the Act gives the federal district court subject matter jurisdiction over this case to enforce SIP. As jurisdiction of the federal court is not based on diversity of citizenship, it must be grounded on federal question jurisdiction.<sup>62</sup>

The district court in *Congoleum* recognized that a flaw existed in the *Interlake* logic: the fact that a state has a right to propose any SIP which will achieve the NAAQS does not mean that, once that SIP is approved by EPA, the state may then interpret the SIP in any way it so desires, and EPA must defer to the state interpretation.<sup>63</sup> As the court in *Bethlehem* observed, the state "proposes," but EPA "disposes."<sup>64</sup> That is, the SIP requires EPA's approval to become law. The argument that the interpretation of the "proposer" is entitled to more deference than that of the "disposer" makes no sense.

As the court in *Congoleum* noted earlier in the opinion, once EPA has approved a SIP, the SIP "may be enforced by the EPA or the state air pollution control agency, or both."<sup>65</sup> Section 113 of the Clean Air Act grants EPA extensive authority to enforce SIP provisions. Indeed, the Administrator may make a finding that the state has "fail[ed] ... to enforce the plan effectively," and initiate a period of "federally assumed enforcement."<sup>66</sup> The *Interlake* arguments are difficult to justify in light

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62. *Id.* (footnotes omitted).

63. *Id.*

64. See *Bethlehem Steel*, 742 F.2d at 1034.

65. 635 F. Supp. at 175.

66. CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2).

of these provisions. Congress surely did not intend that EPA, to which it gave not only the power to enforce the SIPs, but the power to sit in judgment on the states' enforcement, should be forced to wait for, and meekly defer to, the states' interpretations of their SIPs.

In 1987, the fifth circuit issued an opinion that, strangely enough, virtually ignored all prior judicial opinions on the issue. In *American Cyanamid v. United States Env'tl. Protection Agency*,<sup>67</sup> EPA had assessed an administrative "noncompliance penalty" against the plaintiff for a violation of the Louisiana SIP.<sup>68</sup> Unlike the court in *Congoleum*, the court of appeals was confronted with an honest-to-goodness state-federal disagreement in that the state "[took] the position throughout the litigation" that EPA's analysis of the relevant provision was wrong.<sup>69</sup> Although the court "acknowledge[d] Louisiana's important role under the CAA, especially in formulating SIPs," it concluded that it was bound to uphold the federal interpretation.<sup>70</sup> Unlike the court in *Congoleum*, which relied solely on the provisions of the Clean Air Act itself, the court of appeals relied on general principles of administrative law:

In our judicial review we give great deference to the EPA's interpretation of the statutory scheme that Congress entrusted it to administer .... Such deference is justified because the EPA has developed special expertise in implementing and enforcing the Act .... Thus, we may not substitute our own judgment for the EPA's, ... although we will disapprove EPA decisions that contradict the Act's plain meaning or intent.<sup>71</sup>

The court concluded that EPA's interpretation of the SIP provision at issue "is not 'clearly wrong or unreasonable' and does not contradict the regulation's plain meaning. It is, therefore, binding."<sup>72</sup>

The court of appeals in *American Cyanamid* did not directly address the *Interlake-Congoleum* debate over whether SIPs are state or federal law, but did state that "[o]nce approved, an [sic] SIP becomes part

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67. 810 F.2d 493 (5th Cir. 1987).

68. *Id.* at 494.

69. *Id.* at 498.

70. *Id.*

71. *Id.* at 496 (citations omitted).

72. *Id.* at 498.

of the nationwide plan that either the EPA or the States can enforce."<sup>73</sup> Like the court in *Congoleum*, the fifth circuit acknowledged that "EPA is required by the statute to approve a proposed SIP or revision if it meets the requirements of [section] 42 U.S.C. 7410(a)(2),"<sup>74</sup> but the court did not acknowledge the inconsistency between that statement and its conclusion that EPA's interpretation controlled.

Unfortunately, the court of appeals did not address the apparent conflict between its 1987 ruling and the *Interlake* quote in the 1981 *Florida Power* ruling. One year later, in *United States v. General Motors Corp.*,<sup>75</sup> a district court in the fifth circuit, confronted with the same issue, elected to follow the *Florida Power* dicta and ignore the *American Cyanamid* holding.

The critical issue in *General Motors* was whether the facility had to comply with an emissions limit contained in the Texas SIP, or whether the facility could claim compliance by adhering to an alternate method of control ("AMOC") approved by the Texas Air Control Board ("TACB").<sup>76</sup> EPA argued that "each AMOC must be federally approved as a SIP revision."<sup>77</sup> The district court found that EPA's argument contradicted the "unambiguous provisions of the Texas SIP" providing for AMOCs.<sup>78</sup> The court further stated that

[e]ven if section 115.401(a) was ambiguous, the TACB's interpretation would control. As the ... Court of Appeals wrote in *Florida Power & Light Co. v. Costle* ... "EPA is to be accorded no discretion in interpreting state law." Quoting *United States v. Interlake, Inc.*, the court continued, stating that "[q]uite the contrary is true: the United States should defer to the state's interpretation of its air pollution control plan when said interpretation is consistent with the Clean Air Act." More recently, in *American Cyanamid* ... the Fifth Circuit reiterated that "congress, in explaining the [Clean Air Act], found that the prevention and control of air

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73. *Id.* at 496.

74. *Id.*

75. 702 F. Supp. 133 (N.D. Tex. 1988).

76. *Id.* at 134, 136-37.

77. *Id.* at 135.

78. *Id.*

pollution ... is the primary responsibility of States and local governments ....<sup>79</sup>

The case immediately preceding *General Dynamics* in the line of state-federal conflict cases was *United States v. Ford Motor Co.*<sup>80</sup> The United States actually lost this case, which like *General Motors*, involved the application of an AMOC.<sup>81</sup> In its opinion, however, the court articulated one of the best arguments in favor of the pro-federal position on resolving state-federal conflicts. The court found that the pro-state position on the issue could not be squared with the extensive enforcement authority Congress had granted to EPA:

Ford cites the undisputed evidence that the [Missouri Department of Natural Resources] considers Ford to be in compliance .... Ford argues that ... because Missouri finds Ford in compliance, this Court must find Ford in compliance as a matter of law.

Because such a holding would undermine the enforcement power expressly granted in the Act to the federal government, the Court cannot find Ford in compliance as a matter of law. \* \* \*

The legislative scheme of the Act expressly provides that the federal government may enforce a state's plan in federal court, a valid, approved SIP having the force of federal law .... Ford's position would effectively bar EPA from instituting a suit pursuant to [section] 113 if the state concludes the source is in compliance with the SIP, even if EPA's independent evaluation reveals the source is not complying with the SIP.

As plaintiff correctly notes, such a holding by this Court would completely eviscerate the independent federal enforcement authority which is critical to ensure compliance with emission limits in the SIP. As Congress recognized, the tension between a state's concern for its environment and its desire to maintain and build an industrial base is ever present. Independent federal enforcement authority is

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79. *Id.* (citations omitted).

80. 736 F. Supp. 1539 (W.D. Mo. 1990).

81. *Id.* at 1553.

critical to ensure that states do not relax their enforcement efforts in an attempt to attract industry.<sup>82</sup>

Thus, by the time the court in *General Dynamics* had ruled on its facts, the federal courts already were divided on the issue of whether state or federal interpretations of SIP provisions should control. The pro-state cases relied on the *Train* dicta and the "primary responsibility" language of section 101(a)(3). The pro-federal cases relied on the general administrative law principles of deference to the agency which administers the federal statute in question; the fact that SIP provisions require EPA approval; the fact that under the CAA the federal government has independent authority to enforce the SIPs; and in *Ford*, the practical point that by deferring to the states, the courts would be abandoning construction of the SIPs to sovereigns which may have a strong economic interest in lenient interpretations.

The pro-federal cases are more persuasive overall, but the issue is not an easy one. Several additional considerations support the pro-federal side in the state-federal conflict.

## II. ADDITIONAL ARGUMENTS FOR DEFERRING TO STRICTER FEDERAL INTERPRETATIONS

### A. *"Consistency With the Clean Air Act": An Alternate View*

Before considering arguments that the courts have not addressed, another look at one of the court standards may be helpful. The courts that tend to defer to the states have stated that deference is due if the state's interpretation of SIP provisions is "consistent with the Clean Air Act."<sup>83</sup> The meaning of this "standard," however, is not readily apparent. The Clean Air Act contains many provisions, among them the provisions that the states write SIPs; that EPA reviews and approves them; and that the states and EPA should insure that the SIPs are designed to attain compliance with the NAAQS.<sup>84</sup> In any dispute arising in a nonattainment area, a strong argument exists that "consistency with the

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82. *Id.* at 1550 (citations omitted).

83. *See, e.g.,* Florida Power & Light Co. v. Costle, 650 F.2d 579, 588 (5th Cir. 1981) (quoting United States v. Interlake, Inc., 432 F. Supp. 985 (N.D. Ill. 1977)).

84. *See* CAA § 110(a)(1)-(2), 42 U.S.C. § 7410(a)(1)-(2).

Clean Air Act" requires deference to a more restrictive EPA interpretation of any SIP provision.<sup>85</sup> The purpose of SIPs, after all, is to achieve attainment of the NAAQS. Indeed, attaining the NAAQS is a primary goal of the Act itself.<sup>86</sup> In effect, a SIP is a promise by the state that the regulations embodied in the SIP will achieve attainment.<sup>87</sup> Nonattainment is evidence that the state's promise has not been kept. It would be thoroughly inconsistent with the purpose of the Act to permit a state that has already failed to keep its "promise" to worsen the problem by adopting an unnecessarily lenient interpretation of its SIP.<sup>88</sup>

In attainment areas, the states have the stronger argument that if the SIP provides for attainment of the NAAQS under the state interpretation, adoption of the state interpretation is consistent with the Act.<sup>89</sup> An environmentalist, however, might counter with the plausible argument that the fundamental purpose of the Act is not mere compliance with the NAAQS, but clean air. Thus, the interpretation most consistent with the Act will always be the more stringent interpretation.

B. *The Successive Clean Air Act Amendments: The Expanding Federal Role*

An additional argument in favor of the pro-federal cases is what one might call the "Baker argument." This argument states that the evolution of the statute itself, which has tended to place an increasing amount of supervisory power in the hands of the federal government, supports the proposition that when any doubt exists concerning whose word should be law, the doubt should be resolved in favor of EPA. When Senator Baker characterized the language of section 101(a)(3) as a "vestigial remainder," the year was 1976. The Clean Air Act to which he referred was that created by the 1970 Amendments.<sup>90</sup> The Supreme Court, at least, seems to have disagreed with Baker, as evidenced by its *Train* ruling just a year before.<sup>91</sup>

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85. See *United States v. Ford Motor Co.*, 736 F. Supp. 1539 (W.D. Mo. 1990).

86. CAA § 110, 42 U.S.C. § 7410.

87. *Id.*

88. See generally *id.* § 110(i), 42 U.S.C. § 7410(i).

89. See *Train v. Natural Resources Defense Council*, 421 U.S. 60, 61 (1975).

90. See *supra* note 3-5 and accompanying text.

91. See 421 U.S. 60 (1975).



The subsequent history of the Act demonstrates that even if Baker's characterization was inappropriate in 1976, it is thoroughly appropriate in 1994. If the "federal supervisory and approval authority" granted by the 1970 Amendments was "nearly total," the authority granted by the 1977 and 1990 Amendments was even greater and thoroughly inconsistent with the *Train-Florida Power* notion that the federal government plays a "narrow," "secondary" role.<sup>92</sup>

1. *The Air Quality Act of 1967: The First Clean Air Act*

Although the series of federal laws dealing with air pollution date back to the mid-1950s,<sup>93</sup> the first federal legislation to establish a system of state-federal cooperation to battle air pollution was the Air Quality Act of 1967 ("AQA").<sup>94</sup> The AQA gave the federal government an exclusively advisory role, and left almost total responsibility for regulating air pollution in the hands of the states, where such power had traditionally rested. Among other things, the AQA required the Department of Health, Education and Welfare ("HEW") to establish "criteria of air quality standards" for "air quality control regions," and to report on pollution control techniques based on the latest technology.<sup>95</sup> The AQA gave states the responsibility for promulgating ambient air quality standards based on those criteria, and for setting compliance schedules for air pollution sources within its air quality control regions. The AQA required states to report their actions in implementation plans submitted to HEW.<sup>96</sup>

The AQA, however, contained no mechanism for requiring the states to fulfill their obligations. This was reflected in the statistic that only twenty-one states submitted plans between 1967 and December 1970, and no implementation plans were approved by the federal government.<sup>97</sup> Thus, although the AQA can be characterized as the first Clean Air Act

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92. See generally *id.*; *Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981).

93. Congress passed the first federal act dealing specifically with air pollution on July 14, 1955. An Act to Provide Research & Technical Assistance Relating to Air Pollution Control, Pub. L. No. 84-159, 69 Stat. 322 (1955).

94. Air Pollution Prevention and Control Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (codified as amended in scattered sections of 42 U.S.C. §§ 7401-7671q).

95. *Id.* § 107(a)-(c), 81 Stat. 485, 490-91, *repealed by* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1678.

96. *Id.* § 108(c)(1)-(2), 81 Stat. 485, 492 (codified as amended at 42 U.S.C. § 7415).

97. J. DAVIES, *THE POLITICS OF POLLUTION* 52-53 (1970).

because it introduced organizing principles that endured in later versions of the Act, it was still a scheme that left almost complete autonomy for regulating air pollution in the hands of the states.

## 2. *The Clean Air Act Amendments of 1970: The Act Gets Teeth*

Responding to the burgeoning public interest in pollution control in the late 1960s, Congress dramatically expanded the role of the federal government in regulating air quality by enacting the Clean Air Amendments of 1970 ("1970 Amendments").<sup>98</sup> The 1970 Amendments established the current scheme of federal supervision and control of air pollution.

One of the principal vehicles of increased federal control in the 1970 Amendments was the creation of the National Ambient Air Quality Standards ("NAAQS"). Under the AQA, the states set their own ambient air quality standards. The 1970 Amendments made the establishment of air standards the exclusive responsibility of the newly-created EPA.<sup>99</sup>

The 1970 Amendments retained the AQA requirement that the states prepare SIPs, but made attainment of the federally established NAAQS obligatory.<sup>100</sup> To assure that the states would attain the NAAQS, Congress established the now-familiar requirement that the states submit their SIPs to EPA. Congress then charged EPA to review and approve the SIPs to assure that they were adequate to attain the NAAQS by the dates specified in the statute.<sup>101</sup>

The 1970 Amendments granted EPA another power: the power to order sources to comply with SIP requirements and to seek enforcement

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98. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q).

99. The 1970 Amendments empowered EPA to establish primary (or more stringent) standards for the protection of human health, and secondary standards for the protection of agriculture, ecosystems and aesthetic values. *Id.* § 4, 84 Stat. 1676, 1679-80 (adding § 109) (codified as amended at 42 U.S.C. § 7409).

100. *Id.* § 4, 84 Stat. 1676, 1680 (adding § 110(a)(1)) (codified as amended at 42 U.S.C. § 7410(a)(1)).

101. The 1970 Amendments required attainment of the primary NAAQS "no later than three years from the date of [plan approval]," which meant 1975, or 1977 if certain extensions were granted. *Id.* § 4, 84 Stat. 1676, 1680-83 (adding § 110(a)(2)) (codified as amended at 42 U.S.C. § 7410(a)(2)).

of the SIPs in federal court.<sup>102</sup> In addition to granting EPA independent authority to enforce SIP provisions, the 1970 Amendments added a provision that allowed EPA to take over a state's SIP enforcement program if EPA found widespread violations of the SIP and a wholesale failure on the part of the state to enforce its SIP.<sup>103</sup>

Although the 1970 Amendments did not alter the statement that pollution control was the "primary responsibility of States and local governments," Senator Baker's description of that statement as a "vestigial remainder" of the prior scheme is understandable. EPA's power to set the NAAQS, its approval authority over SIPs, and its independent and supervisory enforcement established EPA as the big brother of the states in the NAAQS attainment program.<sup>104</sup> More specifically, the relative powers and responsibilities created by the 1970 Amendments in section 110 inserted EPA into the process of designing and implementing SIPs.<sup>105</sup>

### 3. *The 1977 Clean Air Act Amendments: Response to Failure*

In the 1977 Clean Air Act Amendments<sup>106</sup> ("1977 Amendments"), Congress added Part D<sup>107</sup> to the Act ("Part D"). Congress designed Part D to deal with the failure of the 1970 Act to produce attainment. As implementation of the 1970 Amendments occurred throughout the 1970s, Congress and state and EPA officials realized that the problem of

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102. *Id.* § 4, 84 Stat. 1676, 1686-87 (adding § 113) (codified as amended at 42 U.S.C. § 7413).

103. *Id.* § 4, 84 Stat. 1676, 1686 (adding § 113) (codified as amended at 42 U.S.C. § 7413).

104. The 1970 Amendments granted EPA other responsibilities, including producing its own SIP for a state in the event the state failed to do so; approving SIP revisions; funding implementation of the state programs; and extending NAAQS compliance deadlines. *See id.* § 4, 84 Stat. 1676, 1686-87 (adding §§ 110(a)(3), (c), (e)-(f), 109), *partially repealed* by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(d)(3)-(5), 104 Stat. 2399, 2409 (codified as amended at 42 U.S.C. § 7410(a)(3), (c), (f)).

105. R.H. Rosenberg, *Cooperative Failure: An Analysis of Intergovernmental Relationships and the Problem of Air Quality Non-Attainment*, 1990 ANN. SURV. AM. L. 13, 23 (1990); *see also supra* note 104.

106. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C. §§ 7401-7671q).

107. *Id.* at § 129, 91 Stat. 685, 746-51 (adding §§ 171-178) (codified as amended at 42 U.S.C. §§ 7501-7508).

nonattainment was much broader than any had envisioned.<sup>108</sup> The congressional response to this predicament was to continue the same scheme of state planning and federal supervision, but to expand federal control over SIP formulation by states and enhance federal enforcement power to bring the dilatory states into line.

The 1977 Amendments required the states to revise their SIPs to achieve attainment by the new statutory deadline of December 31, 1982.<sup>109</sup> Most significantly, Part D required the states to adopt a number of specific requirements for nonattainment areas. Part D mandated that SIPs should "require ... such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT)."<sup>110</sup> Part D also required a stringent permitting process for new or modified sources and schedules for compliance.<sup>111</sup>

EPA's responsibilities under the 1977 Amendments included examining these circumscribed SIP revisions to assure that they would provide for attainment. EPA, however, did not simply wait for the states to propose SIPs by the statutory deadline. Instead, the agency took an active role in clarifying the Part D requirements, particularly the requirement that SIPs provide that sources adopt RACT and, thus, dramatically expanded its role in the drafting of SIPs.

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108. In 1976, EPA instituted an interim policy to limit development in severely polluted areas while trying to maintain the goal of attainment. The policy was termed "offset" or "trade-off," and it allowed new facilities in polluted areas if their new emissions were offset by a corresponding reduction in emissions from existing facilities. 41 Fed. Reg. 55,524, 55,528-29 (1976).

109. 1977 Amendments § 129(b), 91 Stat. 685, 747-48 (adding § 172(b)) (codified as amended at 42 U.S.C. § 7502(b)). The 1977 Amendments established the classifications of attainment, nonattainment and unclassifiable areas. *Id.* § 103, 91 Stat. 685, 687-88 (amending § 107(d)(1)) (codified as amended at 42 U.S.C. § 7407(d)(1)). These classifications were proposed to EPA by the states based upon data they gather through highly technical analyses, such as direct monitoring data or diffusion computer model projections. *Id.* The 1977 Amendments continued EPA's traditional role of reviewing and approving the designations. *Id.* Redesignations occurred in the same way, with states submitting requests, and EPA approving or disapproving them. *Id.* § 103, 91 Stat. 685, 688 (amending § 107(d)(3)) (codified as amended at 42 U.S.C. § 7407(d)(3)).

110. *Id.* § 129(b), 91 Stat. 685, 747-48 (adding § 172(b)(3)) (codified as amended at 42 U.S.C. § 7502(b)(3)).

111. *Id.* § 129(b), 91 Stat. 685, 747 (adding § 172) (codified as amended at 42 U.S.C. § 7502).

Section 108(b) of the 1977 Act directed EPA to "issue to the States and appropriate air pollution control agencies information on air pollution control techniques" for particular industries.<sup>112</sup> Between 1977 and 1982, EPA issued Control Techniques Guidelines ("CTGs") for twenty-three industry categories, covering topics such as "Control of Volatile Organic Emissions from ... Surface Coating of Cans, Coils, Paper, Fabrics and Light-Duty Trucks" and "Control of Hydrocarbons from Tank Truck Gasoline Loading Terminals." When the states submitted their SIPs, EPA used the CTGs as guidelines in determining whether the states had fulfilled the statutory mandate to require sources to employ RACT to reduce emissions. The states generally accepted the CTGs as defining RACT.<sup>113</sup>

The 1977 Amendments also granted EPA broader enforcement powers to coerce the states into preparing and implementing tougher SIPs. First, Congress enhanced EPA's power to promulgate implementation plans in the event states failed to submit adequate plans for attainment.<sup>114</sup> Second, EPA was granted new authority to prohibit construction of major stationary sources in any nonattainment area for which the state failed to

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112. 1970 Amendments § 4, 84 Stat. 1676, 1679 (adding § 108(b)(1)) (codified at 42 U.S.C. § 7408(b)(1)).

113. EPA's authority to define RACT was confirmed in *National Steel Corp. Great Lakes Steel Div. v. Gorsuch*, 700 F.2d 314 (6th Cir. 1983). In *National Steel*, a steel manufacturer challenged EPA's authority to define RACT for iron and steel sources in Michigan. After compiling a guidance document summarizing data on control technology at iron and steel sources of particulate matter, EPA announced that it "would combine this data with that presented by the state and then approve, disapprove or conditionally approve all elements of the SIPs submitted." *Id.* at 319. EPA then disapproved some Michigan emission limitations "because data contained in EPA's RACT materials indicated that more stringent limitations would be achievable." *Id.*

Great Lakes Steel argued that "the imposition of EPA's own standards has improperly usurped the statutory role of the state." *Id.* at 322. In response, the court of appeals dutifully recited the *Train* formula that the states "have the primary responsibility for attaining and maintaining air quality. The role of the EPA ... is purely a secondary one." *Id.* But it also noted that "EPA's statutory obligation before approving a SIP is to ensure that RACT is actually provided for," *id.*, and concluded that "EPA's use of its own data for making its RACT determinations [is] in keeping with its statutory role." *Id.* at 323.

114. 1977 Amendments § 108(d)(1), 91 Stat. 685, 694-95 (amending § 110(c)) (codified as amended at 42 U.S.C. § 7410(c)). The statute generally empowered EPA to promulgate a "federal implementation plan" or "FIP" within two years of determining that a state has failed in its obligations. *See* 42 U.S.C. § 7410(c).

prepare and submit an adequate SIP.<sup>115</sup> Third, EPA and the Department of Transportation were empowered to deny the states federal funding for use in nonattainment areas for which states failed to consider needed transportation controls to achieve attainment.<sup>116</sup> Fourth, Congress prohibited states from receiving funding under the Act in cases in which EPA determined that the state was not implementing its plan.<sup>117</sup> Finally, EPA was given discretionary authority to deny a state funds for the construction of sewage treatment plants if it found that the state's plan did not adequately deal with emissions associated with the plants.<sup>118</sup>

By mandating new provisions for incorporation into SIPs, and giving EPA the authority to enforce those mandates in the SIP approval process, Congress dramatically limited the states' theretofore "considerable latitude" to formulate SIPs to attain the NAAQS, at least in nonattainment areas. By granting EPA new authority to coerce state compliance with their obligations, Congress altered the balance of power under the Clean Air Act even further.

Thus, the Clean Air Act after the 1977 Amendments was not the same Clean Air Act that the United States Supreme Court had interpreted in *Train*. While the 1977 Amendments reiterated that "the prevention and control of air pollution ... is the primary responsibility of the States and local governments ...," the Act drastically curtailed the liberty of the states "to adopt whatever mix of emission limitations it deems best suited to its particular situation."<sup>119</sup> Far from occupying a "secondary" role in the drafting and enforcement of SIPs in nonattainment areas, EPA was "transformed [by the 1977 Amendments] into the superior force endowed with punitive powers."<sup>120</sup> Thirteen years later, when Congress would next amend the Act, the "superior force" would grow even stronger.

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115. 1977 Amendments § 108(b), 91 Stat. 685, 694 (amending § 110(a)(2)(I)) (codified as amended at 42 U.S.C. § 7410(a)(2)(I)).

116. *Id.* § 129(a), 91 Stat. 685, 749-50 (adding § 176(a)), *repealed by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 110, 104 Stat. 2399, 2470.

117. *Id.* § 129(b), 91 Stat. 685, 749-50 (adding § 176(b)), *repealed by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 110, 104 Stat. 2399, 2470.

118. *Id.* § 306, 91 Stat. 685, 777-78 (adding § 316(b)) (codified as amended at 42 U.S.C. § 7616(b)).

119. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

120. Rosenberg, *supra* note 105, at 28.

4. *The 1990 Amendments: The End of the Myth of Cooperative Federalism*

Despite the detailed nonattainment provisions in the 1977 Amendments, the Clean Air Act again was substantially ineffective at achieving attainment of the NAAQS in large urban areas. By the time Congress finally passed the 1990 Amendments,<sup>121</sup> about one hundred areas remained nonattainment areas for ozone. Many other nonattainment areas existed for carbon monoxide, particulate matter, and sulfur dioxide.<sup>122</sup> The intractability of the ozone and carbon monoxide attainment problem made it clear that Congress had to respond.

One of the states' biggest complaints about the 1977 Amendments was that EPA did not provide enough technical guidance to help them formulate SIP rules that would provide for attainment. In response, Congress charged EPA with preparing a number of new technical guidance documents. First, the 1990 Amendments required EPA to promulgate guidelines for better air quality monitoring techniques and air emission source inventories.<sup>123</sup> Second, EPA was expected to publish information within one year regarding sixteen transportation control measures that could be employed by the states.<sup>124</sup> Third, EPA was given three years to develop and issue new CTGs for aerospace and shipbuilding coatings and solvents, and eleven other unidentified categories of stationary source Volatile Organic Compounds ("VOC") emissions.<sup>125</sup>

These measures met the states' call for more technical assistance in writing SIPs. The measures also, presumably, reduced the likelihood of state-federal disputes over the meaning of SIP provisions. If a state incorporates a federally-developed CTG into its SIP, the state's argument that it knows best what a particular SIP provision means loses some of its force.

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121. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C. §§ 7401-7671q).

122. JOHN QUARLES & WM. H. LEWIS, A GUIDE TO THE CLEAN AIR ACT PROGRAM AS AMENDED IN 1990 17 (Morgan, Lewis & Bockius 1990). As of 1989, the estimate was that over 150 million Americans lived in areas with air quality that violated the primary NAAQS. See S. REP. NO. 228, 101st Cong., 1st Sess. 4, 11 (1989).

123. CAA § 108(b), 42 U.S.C. § 7408(b).

124. *Id.* § 108(f)(1), 42 U.S.C. § 7408(f)(1).

125. *Id.* § 183(a)-(b), 42 U.S.C. § 7511b(a)-(b).

Congress also gave EPA additional input over the content of SIP revisions by directing EPA to issue minimum criteria for reviewing SIPs.<sup>126</sup> The 1990 Amendments do not require EPA to act on a SIP revision until it receives a state's submission of the information identified in the minimum criteria.<sup>127</sup> The apparent effect of this requirement is that EPA has additional control over the contents of SIP revisions.

Congress also specified additional control measures for the new subcategories of nonattainment areas created by the 1990 Amendments. Whereas the 1977 Amendments classified areas as "attainment," "nonattainment," and "unclassifiable," the 1990 Amendments divided nonattainment areas into more precise subcategories for certain pollutants. For example, the 1990 Amendments classified ozone nonattainment areas as "marginal," "moderate," "serious," "severe," or "extreme."<sup>128</sup> These designations determine the specific measures of emissions control that the state SIPs must include. For instance, in serious, severe and extreme ozone nonattainment areas, nonattainment area plans must implement a clean-fuel fleet program,<sup>129</sup> and adopt "enhanced" programs for motor vehicle inspection and maintenance.<sup>130</sup>

Futhermore, Congress expanded EPA's authority to approve SIPs in another important regard. One of the arguments that the court in *Bethlehem* offered in support of its conclusion that state law should govern the SIP was EPA's inability to partially approve or disapprove a SIP proposal if the approval or disapproval made the SIP more stringent.<sup>131</sup> The 1990 Amendments confirmed EPA's power to partially approve a SIP submission.<sup>132</sup>

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126. *Id.* § 110(k)(1)(A), 42 U.S.C. § 7410(k)(1)(A).

127. *Id.*

128. Carbon monoxide areas can be classified as either moderate or serious. *Id.* § 186(a)(1), 42 U.S.C. § 7512(a)(1).

129. This provision applies only for those areas having populations greater than 250,000 people. The program requires that motor vehicle fleets with more than 10 vehicles have a certain number of vehicles that run on "clean fuels." *Id.* § 182(c)(4), 42 U.S.C. § 7511a(c)(4).

130. "Enhanced" programs are required to incorporate computerized emission analyzers, or minimum repair expenditures. *Id.* § 182(c)(3), 42 U.S.C. § 7511a(c)(3).

131. *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1035-36 (7th Cir. 1984); *see also* *Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987); *United States v. Riverside Laboratories Inc.*, 678 F. Supp. 1352, 1356-57 (N.D. Ill. 1988).

132. CAA § 110(k)(3)-(4), 42 U.S.C. § 7410(k)(3)-(4).



Finally, the 1990 Amendments gave EPA a more active role in managing, as opposed to enforcing, SIPs by requiring increased federal oversight of the states' administration. For example, each state must incorporate annual reporting to EPA of new air pollution control measures taken during the year into its SIP, and if applicable, explain its failure to meet certain SIP obligations during the year.<sup>133</sup> Additionally, states must submit periodic emission inventories<sup>134</sup> to EPA and revise automobile use assumptions every three years if they find that they have underestimated use.<sup>135</sup>

Thus, the 1990 Amendments, like the 1977 Amendments, serve to increase federal participation in implementing SIPs, and reduce state latitude in formulating the preferred mix of measures to achieve compliance with the NAAQS. Although the basic scheme remained unchanged, the 1990 Amendments drastically reduced each state's discretion over the content of its SIP. The present version of the Clean Air Act is a world removed from that which the Supreme Court interpreted in *Train v. Natural Resources Defense Council*.<sup>136</sup>

Although the 1990 Amendments still echo the idea that "air pollution at its source is the primary responsibility of the States and local governments,"<sup>137</sup> Senator Howard Baker's characterization of that language as a "vestigial remainder"<sup>138</sup> rings much truer in 1994 than it did in 1976. In the future, courts faced with state-federal disputes over the application of SIP provisions should thoroughly consider the long evolution of the Clean Air Act before they invoke the language of *Interlake*,<sup>139</sup> or even the language of *Train*.<sup>140</sup>

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133. *Id.* § 110, 42 U.S.C. § 7410.

134. *Id.* § 187(a)(1), 42 U.S.C. § 7512a(a)(1).

135. *Id.* § 182(c), 42 U.S.C. § 7511a(c).

136. 421 U.S. 60 (1975).

137. CAA § 101(a)(3), 42 U.S.C. § 4701(a)(3).

138. *See supra* note 3-5 and accompanying text.

139. *United States v. Interlake, Inc.*, 432 F. Supp. 985 (N.D. Ill. 1977).

140. *See supra* Section I.

C. *The State Bureaucrats Speak: Confessions of Weakness*

The Court in *United States v. Ford Motor Co.*<sup>141</sup> rejected the defendants' argument that courts should, in all cases, defer to the state on the interpretation of SIP provisions.<sup>142</sup> Perhaps the best argument against deference to the states in state-federal battles on the implementation of SIP provisions was set forth by the district court in *Ford*: states have strong motives for leniently interpreting SIP provisions.<sup>143</sup> The court did not cite any independent studies of this issue. It simply used common sense. Substantial empirical support exists, however, for the court's conclusion. Ironically, the testimony of state regulators themselves provides the strongest evidence. In fact, the statements that state regulators made to Congress and congressional investigators in the years leading up to the 1990 Amendments call into question the viability of the congressional declaration which has become the foundation of the pro-state position: "air pollution prevention ... and ... control ... is the primary responsibility of States and local governments."<sup>144</sup>

In March and April of 1987, the Environmental Protection Subcommittee of the Senate Committee on Environment and Public Works held hearings on the topic of "ozone and carbon monoxide standards; [and] nonattainment issues."<sup>145</sup> Among the witnesses who testified before the subcommittee were a number of state regulatory agency representatives. Intuitively, one might assume that these witnesses would guard state prerogatives under the Clean Air Act. For example, one might expect these regulators to warn against the imposition of rigid federal standards, stress the importance of "flexibility," and insist that the states should continue to have wide latitude in developing and implementing SIPs. Instead, to the apparent surprise of the senators, the witnesses said things like the following:

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141. 736 F. Supp. 1539 (W.D. Mo. 1990).

142. The court observed that blanket deference to states would undermine the federal enforcement role, a role which is critical because "the tension between a state's concern for its environment and its desire to maintain and build an industrial base is ever present." *Id.* at 1550.

143. *Id.*

144. CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3).

145. *Ozone and Carbon Monoxide Standards: Nonattainment Issues: Hearings on S. 54 Before the Subcomm. on Envtl. Protection of the Senate Comm. on Envtl. and Public Works*, 100th Cong., 1st Sess. (1987).

Mr. Theiler: I think Congress also ought to very clearly direct EPA to promulgate certain control measures, some of them that I touched upon. In addition, Congress should very specifically mention areas that they should come up with guidance for the State to implement. There are 13 areas for reasonable [sic] available control technology guidelines, that we need Federal guidance on. It makes it almost impossible to develop individual State recommendations without that.

Senator Baucus: You are basically saying States want more direct guidelines and more precise standards and more direct direction?

Mr. Theiler: Exactly. That's exactly what I'm saying.

Senator Baucus: You want less discretion?

Mr. Theiler: Less discretion in terms of the areas we need to deal with. Adequate discretion to deal with localized conditions and some ability to deal with the real world but not as much discretion and not as much lack of leadership as we are getting at this time from EPA. We need stronger penalties for failure to produce.<sup>146</sup>

The testimony of Donald Theiler, the Director of the Bureau of Air Management of the Wisconsin Department of Natural Resources, mirrored that of other state regulators who testified before the subcommittee. Stan Nikkila, Staff Director of the Missouri Air Pollution Control Program and Vice-President of the multistate State and Territorial Air Pollution Program Administrators, stated:

[O]ur past experience has shown that the system works best when U.S. EPA establishes reasonably available control technologies through the promulgation of control technique guidelines ....

From direct personal experience, I can tell you it is extremely difficult for a State to adopt and implement control measures which have not been specifically required by U.S. EPA .... Like it or not, EPA continues to be perceived as the font of all environmental knowledge and

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146. *Id.* at 39-40.

therefore, if a particular measure is not required by EPA, it is asked, how can it be credible.<sup>147</sup>

One wonders what the justices in *Train* would have thought of Theiler's and Nikkila's testimony. The two state regulators do not seem enamored of their "liberty to adopt whatever mix of emission limitations" they deem "best suited."<sup>148</sup> Instead, they asked for specific requirements. They did not seem to view EPA's role as "secondary;" rather, they are completely dependent on the Agency's guiding hand.

In 1989, the Congressional Office of Technology Assessment ("OTA") conducted workshops with state and local air pollution control agency officials to explore the reasons why the state-federal effort since the passage of the 1977 Amendments has not resulted in more areas achieving the standard.<sup>149</sup> According to the OTA report, the comments by those officials in the workshops confirmed and elaborated on the points raised in the 1987 hearings. The report further supported the argument in *Ford* that states are under substantial pressure to make their SIPs as liberal as possible for industry.

State workshop participants ... argued that they were unable to promulgate the additional regulations necessary to achieve the requisite VOC emission reductions. First, they suggested that many State regulators face legislative prohibitions or political pressure not to adopt particular control measures unless they are clearly forced to do so by EPA. Second, they suggested that State agencies often do not have the resources or technical expertise needed to develop new regulations on their own. State participants complained that EPA stopped issuing CTGs in recent years, leaving them without a clear Federal directive to issue particular regulations and without the resources to develop their own regulations. They also argued that it is more resource efficient for EPA to develop regulations or CTGs once than for each State to duplicate the activity ....<sup>150</sup>

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147. *Id.* at 14.

148. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

149. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PUB. NO. OTA-O-412, *CATCHING OUR BREATH: NEXT STEPS FOR REDUCING URBAN OZONE*, at 32 (1989).

150. *Id.* at 34.

State workshop participants' comments on the states' use of atmospheric models to predict emissions and to predict the emission reductions expected from SIP provisions also reflected a cynical view of the state regulatory process.

State participants suggested that a second problem with models was that delegation of responsibility for applying models to the States provided them with ample opportunities to cheat in developing their implementation plans, a practice known as "gaming." States were able to choose favorable model assumptions and inputs to arrive at the least stringent predictions of emission reduction requirements ....<sup>151</sup>

The state officials' testimony strongly suggests that the purposes of the Clean Air Act would be ill served if the courts adopted the rule that in state-federal disputes over the implementation of the Act, the states' position should control. Sustaining the argument that the states' position should trump EPA's is hard when the states themselves acknowledge that they need mandates from EPA in order to make the Clean Air Act work.<sup>152</sup> Presumably, as the court in *Ford* believed, the same political pressures which inhibit the regulation-development process are likely to play a role in the individual enforcement cases in which disputes over SIP provisions arise. States are just as likely to cheat in enforcing their SIPs as they are in preparing the atmospheric models on which SIP provisions are based.

As stated above, the reasoning of the pro-federal judicial decisions appears to be inherently more compelling than that of the pro-state decisions. The state officials' testimony, and the history of the Clean Air Act itself, provide additional support for the proposition that in cases of

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151. *Id.*

152. Note, however, that the existence of cases such as *General Motors*, *Ford*, and *General Dynamics* makes clear that state regulators do not always welcome direction from EPA. In individual cases, some of them, at least, have fought for their right to exercise whatever discretion they think EPA has given them. This fact, however, is not really inconsistent with the regulators' comments in the OTA workshop. Their actions in those cases may have been motivated by precisely the kind of pressure they acknowledge. Thus, although this discussion does not suggest that all state officials hold the same views, the significant fact remains that a number of officials, some representing multistate organizations, adhere to the "anti-discretion" school.

conflict, the federal interpretation of SIP provisions should be entitled to greater deference.

Ideally, however, EPA and the states should be able to avoid such conflicts entirely. The states should propose, and EPA should insist on, unambiguous, enforceable SIP provisions. The next Section suggests that this has not always been the case.

### III. RUNNING AMOC: THE DANGERS OF "FLEXIBILITY"

In some of the state-federal disputes previously discussed, the dispute arose simply because one of the sovereigns was determined to be unreasonable. In *General Dynamics*, for instance, the state supported an interpretation of a SIP provision which had the effect of encouraging the facility to emit excess VOCs.<sup>153</sup> The district court found the state's position "clearly nonsensical."<sup>154</sup> EPA would have found it difficult to avoid that dispute through more careful SIP review.

In other cases, however, the solution to the state-federal dispute was far less obvious. In these cases -- *American Cyanamid*, *General Motors*, and *Ford* -- EPA approved SIP provisions which delegated discretionary authority to the states, but then sought to challenge the manner in which the states chose to exercise that discretion.<sup>155</sup>

During the 1980s, many states submitted, and EPA approved, SIP provisions which provided that a state official, usually the director of the state's air pollution agency, could approve means or methods of emissions control that differed from the methods specifically described in the SIP, and thus specifically approved by EPA, if such alternative means of control ("AMOCs") were "equivalent" to those prescribed by the SIP.<sup>156</sup> These provisions were proposed by the states, and approved by EPA to give states and industry greater flexibility. The theory was that if a source could maintain a level of emissions that did not exceed that allowed for by the SIP, by adhering to a restriction somewhat different from that prescribed by the SIP, the states should be permitted to allow them to do

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153. 755 F. Supp. at 720.

154. *Id.* at 723.

155. *American Cyanamid*, 810 F.2d at 493; *General Motors*, 702 F. Supp. at 133; *Ford*, 736 F. Supp. at 1539.

156. See CAA § 110, 42 U.S.C. § 7410 (providing the states with the authority to develop their own emissions control plans subject to the approval of EPA).

so. The assumption was that individual sources might be able to identify means of control which were equivalent to, but more efficient, and thus less costly, than the generic restrictions in the SIPs.

Once the states began to exercise this authority, however, they found themselves in conflict with EPA over the extent of their discretion and over the meaning of "equivalence."

#### A. *American Cyanamid: A Close Call*

The first battleground in the "equivalence" wars was the State of Louisiana. In *American Cyanamid v. United States Env'tl. Protection Agency*,<sup>157</sup> EPA cited American Cyanamid for a violation of Louisiana SIP rule L.A.Q.R. 22.3, which limited VOC emissions from "large" storage tanks i.e those containing more than 40,000 gallons. The rule required that such tanks be equipped with one of several listed "vapor loss control devices".<sup>158</sup> The list of devices included "other equivalent equipment or means as may be approved by [Louisiana]."<sup>159</sup>

The "other equivalent equipment or means" which American Cyanamid proposed was the application of a "bubble" concept.<sup>160</sup> Instead of installing physical vapor control devices on the tanks, American Cyanamid proposed to limit VOC emissions from another and much larger VOC source at the same facility.<sup>161</sup> The Louisiana SIP called for a seventy percent overall reduction of VOC emissions at the facility. American Cyanamid's "bubble" proposal would have reduced overall emissions by at least that amount, while allowing the company to avoid installing control equipment on the large tanks.<sup>162</sup>

The State of Louisiana sided with the company and approved American Cyanamid's bubble as an "equivalent means."<sup>163</sup> EPA, however, argued that a "device" could only be a physical piece of

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157. 810 F.2d 493 (5th Cir. 1987).

158. These devices included as an external floating roof, an internal floating roof, or a vapor gathering and disposal system. *Id.* at 496.

159. *Id.* at 497.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

equipment, and the "bubble" did not qualify.<sup>164</sup> The court stated its view that "the bubble concept encourages emissions reduction in the most efficient manner and that specific equipment standards may increase the cost of pollution control,"<sup>165</sup> but found that EPA's interpretation was not "clearly wrong or unreasonable," and therefore controlled.<sup>166</sup>

EPA's insistence on a narrow interpretation of the term "device" may have been well founded. EPA could have believed, for instance, that the idea of allowing a state to permit a source to use a "bubble" concept to avoid installing control equipment specifically described in a SIP was potentially inconsistent with the concept of RACT. As discussed above, the 1977 Amendments required every major source in a nonattainment area to utilize reasonably available control technology.<sup>167</sup>

If the fifth circuit had been less deferential, however, EPA might well have lost. EPA's interpretation was not unreasonable, but arguably, neither was Louisiana's. The phrase "other equivalent equipment *or means*"<sup>168</sup> could well have been interpreted to allow for "means" other than a physical piece of equipment. EPA's dispute with the state was a result of the sovereigns' failure to define exactly what "equivalent" meant.

## B. *The AMOC Automotive Cases*

In *United States v. General Motors Corp.*,<sup>169</sup> the definition of "equivalency" *per se* was not at issue. The issue was the extent of the authority that EPA had given the states to approve equivalency plans, and this time, EPA lost.<sup>170</sup>

The SIP provision EPA sought to enforce was a Texas SIP rule<sup>171</sup> that limited the VOC content of coatings used by General Motors in painting operations at its Arlington, Texas automobile assembly plant.<sup>172</sup>

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164. *Id.* at 498.

165. *Id.*

166. *Id.*

167. See *supra* text accompanying notes 110-113; see also 1977 Amendments § 129(b), 91 Stat. 685, 747-48 (adding § 172(b)(3)) (codified as amended at 42 U.S.C. § 7502(b)(3)).

168. 810 F.2d at 496 (citing L.A.Q.R. 22.3.1.4) (emphasis added).

169. 702 F. Supp. 133 (N.D. Tex. 1988).

170. *Id.* at 134.

171. 31 T.A.C. § 115.191(8) (approved in 1980).

172. *General Motors*, 702 F. Supp. at 134.



General Motors acknowledged that it was using coatings with a VOC content greater than that specified by the rule.<sup>173</sup> General Motors asserted that it had obtained an exemption from the rule from the Executive Director of the Texas Air Control Board ("TACB"), pursuant to another SIP provision.<sup>174</sup>

Any person affected by any control requirements of Chapter 115 of this title [relating to Volatile Organic Compounds] may request the Executive Director to approve alternate methods of control. The Executive Director shall approve such alternate methods of control if it can be demonstrated that such control will be substantially equivalent to the methods of control specified in this regulation.<sup>175</sup>

In October, 1985, the TACB issued an AMOC to General Motors.<sup>176</sup> The TACB accepted General Motors' claim that it applied its coatings with a higher "transfer efficiency" than rule 115.191(8) assumed such facilities would achieve.<sup>177</sup> "Transfer efficiency" refers to the amount of paint that ends up on the vehicle as a percentage of the amount used.<sup>178</sup> The higher the transfer efficiency, the less VOCs are emitted into the air.<sup>179</sup> General Motors claimed that its transfer efficiency was high enough to offset the effect of the higher VOC content of its paint.<sup>180</sup>

EPA did not contest that the TACB's AMOC for General Motors was substantially equivalent to rule 115.191(8), or that General Motors was in compliance with its AMOC.<sup>181</sup> EPA nevertheless sued General Motors for using coatings with higher VOC content than allowed under the rule.<sup>182</sup> EPA argued that it must expressly approve an AMOC as a SIP

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173. *Id.* at 135.

174. 31 T.A.C. § 115.401(a).

175. *General Motors*, 702 F. Supp. at 136. The court in *General Motors* interpreted this language not only as a delegation of authority to the TACB to approve equivalent AMOCs, but as a *requirement* that the TACB do so when equivalency is demonstrated. *Id.* at 136 n.6.

176. *Id.* at 135.

177. *Id.*

178. *Id.* at 135 n.3.

179. *Id.*

180. *Id.* at 135.

181. *Id.* at 136.

182. *Id.* at 137.

revision before it could be adopted as an alternative means of compliance.<sup>183</sup>

The district court, citing the dicta in *Florida Power*, concluded that EPA's interpretation of the SIP was not entitled to deference.<sup>184</sup> But it was hardly necessary for the court to take a position on the "deference" issue because the court did not consider the case a close call.<sup>185</sup> It found that EPA's interpretation flew in the face of "the express language of section 115.401(a), which expressly permits an alternative method of control to achieve substantially equivalent compliance with national ambient air standards,"<sup>186</sup> and upheld the AMOC.<sup>187</sup>

Read in a vacuum, EPA's action in *General Motors* is rather puzzling. Why would EPA have risked such a defeat in a case where it did not even allege that the defendant's emissions were greater than those contemplated by the original SIP? Why was the principle of whether AMOCs should be required to be SIP revisions so important?

The answer is that EPA was beginning to realize that it simply could not trust the states to determine "equivalency." EPA thought that if it did not take control of the AMOC process, the states would, perhaps unknowingly, approve plans which did permit excess emissions. *United States v. Ford Motor Co.*,<sup>188</sup> showed that EPA was right to be concerned.

The facts of *Ford* were similar to those of *General Motors*. EPA brought an enforcement action against Ford for violating SIP limitations on the VOC content of coatings at Ford's Claycomo, Missouri plant.<sup>189</sup> The SIP emission limits were based on EPA's determination of RACT for car coating operations.<sup>190</sup>

As in *General Motors*, the defendant did not dispute that its coatings did not meet the RACT limits.<sup>191</sup> But the Missouri SIP at issue in *Ford* contained an AMOC provision which allowed for a source to submit an Alternate Compliance Plan ("ACP") to the Missouri Department

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183. *Id.* at 136.

184. *Id.* at 138.

185. *Id.*

186. *Id.* at 137.

187. *Id.* at 138.

188. 736 F. Supp. 1539.

189. *Id.* at 1540.

190. *Id.* at 1543.

191. *Id.* at 1544.

of Natural Resources ("MDNR").<sup>192</sup> The ACP which Ford submitted and which MDNR approved paralleled that in *General Motors*. It provided for Ford to use coatings with a higher "transfer efficiency" than the "baseline" efficiency which Ford claimed the original SIP limit envisioned.<sup>193</sup>

The original SIP, however, did not specify what that baseline efficiency was.<sup>194</sup> Ford claimed, and the approved ACP provided, that the baseline should be thirty percent.<sup>195</sup> EPA claimed, however, that the baseline *should have been* fifty percent.<sup>196</sup> EPA claimed that the ACP, using the lower baseline, permitted Ford to emit higher levels of VOCs than would have been permitted under the original limit.<sup>197</sup>

As in *General Motors*, EPA also argued that each ACP must be approved by EPA as a SIP revision. But as in *General Motors*, the court held that this argument was contradicted by the express terms of the ACP provision of the SIP.<sup>198</sup> The court, however, seems to have been convinced by EPA's argument that the ACP did not provide for "equivalence." It stated that "EPA presented compelling evidence that Ford has been operating in violation of the SIP."<sup>199</sup> Bluntly put, the court seems to have been fairly well convinced that Missouri did not know what it was doing.

The court concluded, however, that "the equivalence of these two plans [is not] the central issue."<sup>200</sup> Judge Wright viewed the matter in the following manner:

The issue raised by the EPA's argument is how the EPA can attack what it perceives to be a defective ACP. Obviously, the EPA believes it can pursue this issue in an enforcement action against the source. The Court disagrees. It is this Court's opinion that because EPA delegated authority to Missouri to approve ACPs, and because Missouri acted in good faith in approving the plan, EPA's

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192. *Id.* at 1545.

193. *Id.*

194. *Id.* at 1544.

195. *Id.*

196. *Id.*

197. *Id.* at 1547.

198. *Id.*

199. *Id.* at 1546.

200. *Id.* at 1548.

only recourse if it believes the ACP is substantially inadequate to attain NAAQS is to pursue revision of the ACP through administrative procedures.<sup>201</sup>

The court argued that any other result would be unfair to the sources involved, which would be unable to rely on the state's ACP.

Review of state-approved ACPs on the grounds advanced by EPA would undermine the provisions for ACPs in many state SIPs, whatever the outcome of that review. No rational source would avail itself of an ACP if a court could invalidate that ACP in a judicial enforcement action at the behest of EPA .... [E]very day of operation under an ACP would increase the penalty for its noncomplying operations.<sup>202</sup>

The *Ford* decision demonstrated that EPA's concern about the principle involved in *General Motors* was justified. If states had the power to approve AMOCs without submitting them to EPA for review, they might approve AMOCs which actually permitted emissions in excess of those allowed by the original SIP. But once EPA had approved an AMOC, the courts, or at least the court in *Ford*, would not allow EPA to pursue an enforcement action against the source based on the violation of the original SIP. That is, the court would allow the source would be allowed to rely on the state's determination.<sup>203</sup> EPA's only remedy would be to demand a separate SIP revision itself.<sup>204</sup>

One does not have to agree with the *Ford* decision to conclude that EPA's approval of the AMOC SIP provisions was a mistake. EPA should have recognized that "equivalence" might prove to be a slippery concept to apply. Furthermore, it should have recognized that the courts might view the provisions as sweeping delegations of discretionary authority,

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201. *Id.* The recourse to which the court was referring is EPA's power to order revision of a SIP "[w]henver the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve [the goals of the Clean Air Act]." CAA § 110(a)(2)(H)(ii), 42 U.S.C. § 7410(a)(2)(H)(ii).

202. 736 F. Supp. at 1548 (W.D. Mo. 1990).

203. *Id.*

204. *Id.*

which states were entitled to exercise and on which sources were entitled to rely.

Losing *General Motors* and *Ford* convinced EPA that AMOCs were trouble. In the past few years, the EPA air program has struggled, through guidance, negotiations with the states, and other means, to eliminate *Ford*-style AMOC provisions from SIPs.<sup>205</sup> But the concept of "flexibility" had not completely lost its appeal and would reemerged as EPA prepared to implement the 1990 Amendments.

#### IV. THE TITLE V OPERATING PERMIT REGULATIONS: DID WE LEARN ANY LESSONS?

The sheer volume of the 1990 Amendments suggests that Congress learned some lessons from the experience of implementing the 1977 Amendments. The attainment program in Title I received a large share of congressional attention.<sup>206</sup> And at least one section, section 183, indicates that Congress apparently listened to state regulators' pleas for more federal mandates when it instructed EPA to "issue control techniques guidelines" for thirteen new categories of air pollution "within three years after November 15, 1990."<sup>207</sup> As of March 1994, however, EPA had published only two new CTGs in final form. Nevertheless, comprehensive and sound CTGs offer one of the best ways to avoid state-federal conflicts by providing clear statements of RACT, and thus unambiguous means of compliance to states writing SIP revisions.

Congress also made the job of nonattainment planning easier for state and federal regulators by specifying more particular program elements for nonattainment area plans.<sup>208</sup> While some of these requirements are complicated and others will undoubtedly cause some economic hardship, they will tend to make nonattainment plans more uniform and specific throughout the country. While there may be complaints that this goal does not allow for enough flexibility to meet local needs, the testimony of the state regulators suggests that this is not among their chief concerns.

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205. Interviews with EPA personnel (April 1994).

206. See, e.g., 1990 Amendments §§ 102-107, 104 Stat. 2412-65 (codified at scattered sections of 42 U.S.C. §§ 7401-7671q).

207. CAA § 183(a), (b)(3)-(4), 42 U.S.C. § 7511b(a), (b)(3)-(4).

208. 1990 Amendments § 102, 104 Stat. 2412-23 (amending §§ 171-178) (codified at 7501-7508).

Besides, when the air pollution problems of the large urban centers in the nonattainment sector are studied in detail, the causes are hardly unique from one city to the next. In any event, a likely advantage of greater uniformity in the SIPs will be less uncertainty as to what they mean and, therefore, less state-federal conflicts in their implementation.

However, in implementing another aspect of the 1990 Amendments, section 502, which requires all states to establish permit programs covering thousands of air pollution sources,<sup>209</sup> EPA may have set the stage for a new round of disputes with the states by adopting a permit provision providing for "equivalency determinations."<sup>210</sup>

Prior to the 1990 Amendments, the Clean Air Act required federal permits only for new or modified sources.<sup>211</sup> Section 502 now requires operating permits for, *inter alia*, all "major source[s],"<sup>212</sup> as opposed to just new or modified sources. Section 504 states that each permit shall include "enforceable emission limitations and standards ... and such other conditions as are necessary to assure compliance with applicable requirements of this Act, including the requirements of the applicable implementation plan."<sup>213</sup> Section 502 requires each state to develop its own permit program, subject to EPA approval, and directs the Administrator to promulgate regulations establishing the minimum elements of a permit program.<sup>214</sup> Section 505 further requires that each state or local permitting authority provide EPA with a copy of its proposed permit and that EPA will have forty-five days to object to the issuance of the permit.<sup>215</sup>

When EPA published its initial draft of that regulation, it acknowledged that "dealing with [permit] applications ... is likely to tax

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209. CAA § 502, 42 U.S.C. § 7661a.

210. *Id.*

211. *See* 1977 Amendments § 129(b), 91 Stat. 746-48 (adding §§ 172(b)(6), 173) (codified as amended at 42 U.S.C. §§ 7502(b)(6), 7503)

212. As defined in § 501(2), 42 U.S.C. § 7661(2), "major sources" includes all sources defined as "major" under § 302, 42 U.S.C. § 7602 (which includes facilities which have the potential to admit one hundred tons of any air pollutant per annum) or under Part D of Title I. CAA §§ 171-178, 42 U.S.C. §§ 7501-7508.

213. *Id.* § 504(a), 42 U.S.C. § 7661c(a).

214. *Id.* § 502, 42 U.S.C. § 7661a.

215. *Id.* § 505, 42 U.S.C. § 7661d.

Federal and State resources up to or beyond their limits."<sup>216</sup> One would think that EPA, recognizing the enormity of this task and the short forty-five day review period in which this task must be completed, would make every effort to make the permit review process as simple as possible and would take steps to ensure that the permitting process is free of the discord and confusion reflected in the cases discussed above. The student of *General Motors* and *Ford* might, then, be somewhat shocked to read the following passage in the Preamble to EPA's final permit rule:

Equivalency determinations. In order to take advantage of the flexibility provided by the Title V permit program, EPA has added a provision [section 70.6(a)(1)(iii)] which allows States to develop alternative emissions limits through the permit program. Under this section, a State may choose to adopt a SIP provision that would authorize sources to meet either the SIP limit or an equivalent limit to be formulated in the permit process. Such a provision would allow a State to build additional flexibility into its SIP program.<sup>217</sup>

To quote the comic strip *Pogo*, "What in the ever-lovin', blue-eyed world is a-goin' on here?" EPA has spent years in federal court arguing with states about their equivalency determinations.<sup>218</sup> EPA has heard state regulators complain to Congress that they want less, not more, discretion. EPA is well aware that it will be hard pressed to undertake a meaningful review of the thousands of permit applications it expects to receive. EPA is also aware that it will only have forty-five days to review each proposed permit. Even so, EPA has triumphantly announced that the states will be able to build flexibility into their SIP programs by allowing them, in the permitting process, to replace SIP limits with "equivalency determinations"

The only recognition apparent in this regulation of EPA's previous difficulty in enforcing AMOCs appears in the Code of Federal Regulations and states:

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216. EPA estimated that "over 34,000 sources are included in the definition of major source," and recognized that "limited numbers of qualified [state and federal] staff will be available." 56 Fed. Reg. 21,725 (1991) (to be codified at 40 C.F.R. § 70).

217. 57 Fed. Reg. 32,276 (1992) (to be codified at 40 C.F.R. § 70).

218. See *supra* Section III.

any permit containing such equivalency determinations shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures[.]<sup>219</sup>

and in EPA's Preamble, which provides somewhat reassuring definitions of those terms.<sup>220</sup> Furthermore, unlike in the *Ford* situation, EPA must review, and may object to, each permit-authorized "equivalency determination" in advance. Also, if EPA finds that "cause exists," it may "terminate, modify, revoke and reissue" a permit which has already been issued.<sup>221</sup>

Still, one cannot help but think that section 70.6(a)(iii) is a very risky bit of regulating. Will forty-five days always be enough time to determine if an "equivalent" limit is "quantifiable, accountable, enforceable," and, in fact, equivalent? If not, can we really expect EPA to review permits that have already been issued, and revoke them for cause when the cause is that EPA itself failed to recognize that the equivalent limit was inappropriate? Even if EPA was bold enough to do that, would states and sources dutifully comply or would they engage in spirited litigation, arguing about what Congress meant by "cause," and arguing the merits of EPA's belated assessment of the equivalency determination?

EPA officials are aware of, and are concerned by, these questions.<sup>222</sup> The debate is on-going within the EPA as to what degree of flexibility to allow under this regulation and how to write sufficient criteria to determine equivalency of alternative means of compliance. It is not impossible that through such guidance and a careful review of individual equivalency proposals, EPA will be able to avoid conflicts with the states. If conflict arises, the courts may be convinced that EPA should always win on the grounds that section 505 gives EPA sweeping powers over permits. In any event, the adoption of section 70.6(a)(iii) certainly enhances the likelihood of additional litigation.

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219. 40 C.F.R. § 70.6(a)(iii) (1993).

220. 57 Fed. Reg. 32,276 (1992) (to be codified at 40 C.F.R. § 70).

221. CAA §§ 505-506, 42 U.S.C. §§ 7661d-7661e.

222. Interviews with EPA personnel (April 1995).



## V. CONCLUSION

On balance, the reasoning of the pro-federal cases, such as *Congoleum* and *American Cyanamid*, is more persuasive than that of the pro-state cases. Thus, in cases where the federal interpretation of a SIP provision conflicts with the state interpretation, other things being equal, the federal interpretation should control.

The pro-state courts, however, can certainly find support for their reasoning in the language of the Clean Air Act. The Act still states "that the prevention and control of air pollution ... is the primary responsibility of States and local governments."<sup>223</sup> EPA itself still pays substantial deference to that principle. Its permit program regulations reflect a continuing commitment to allowing states substantial flexibility in implementing the Clean Air Act.

Unfortunately, hard experience seems to have shown that the Clean Air Act works best when it is least flexible. To the extent that the states have had broad discretionary authority to develop SIP provisions, they have found it difficult to do so. When EPA has given states broad discretionary authority to implement SIPs provisions, it has often regretted it.

The conflict in the cases discussed above mirrors a fundamental conflict inherent in the Clean Air Act itself. As the case law on state-federal conflict progresses, it will reflect the direction that the Act, slowly but surely, has taken: a movement away from state flexibility and toward increasing federal control.

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223. CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3).