

FEDERAL-STATE INTERACTION UNDER THE CLEAN AIR AMENDMENTS OF 1970

WILLIAM V. LUNEBURG*

INTRODUCTION

The preamble to the Clean Air Act,¹ enacted three years prior to the Clean Air Amendments of 1970,² provides that "the prevention and control of air pollution at its source is the primary responsibility of State and local governments"³ While that congressional finding is still somewhat accurate as a description of the respective spheres of the authority of state and federal governments in the control of air pollution, the enactment of the Clean Air Amendments of 1970 significantly increased the extent of federal regulation of this area.⁴ This altered federal role resulted from burgeoning public concern regarding the health hazards posed by air pollution and the previously inadequate response to the problem by both state and federal governments.⁵ The regulatory scheme established by the Clean Air Amendments involves total federal preemption of some areas (emission controls for new motor vehicles and aircraft emission standards),⁶ partial federal preemption of others (new source performance standards and hazardous emission standards)⁷ and, finally, a sphere in which states have

* A.B., Carleton College, 1968; J.D., Harvard University, 1971. The author is an attorney in the Enforcement Division, Environmental Protection Agency (EPA), Region I. The views expressed herein are those of the author. They do not represent the views of the EPA or any other agency.

¹ 42 U.S.C. §§ 1857 et seq. (1970).

² Act of Dec. 31, 1970, Pub. L. No. 91-604, 84 Stat. 1676.

³ 42 U.S.C. § 1857(a)(3) (1970).

⁴ For discussions of the federal programs in this area prior to 1970, see Comment, *A History of Federal Air Pollution Control*, 30 Ohio St. L.J. 516 (1969); O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 Law & Contemp. Prob. 275 (1968). For a critique of the 1970 legislation, advocating national source emission standards for *all* sources, rather than just for *new* sources, see Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 Geo. L.J. 153 (1972).

⁵ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 1-2 (1970); H. Rep. No. 91-1146, 91st Cong., 2d Sess. 1, 5 (1970).

⁶ 42 U.S.C. §§ 1857f-6a(a) and -11 (1970). The former provision forbids states and their political subdivisions to adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to §§ 1857f-5a to -7 of the Clean Air Act; the latter provision provides that no state or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under §§ 1857f-9 to -12 of the Clean Air Act.

⁷ 42 U.S.C. §§ 1857c-6 and -7 (1970). States are forbidden by these provisions from adopting or enforcing emission limitations with more lenient standards than the minimal standards set forth therein.

relative freedom to adopt and enforce emission limitations as long as they comply with certain basic strictures of the Amendments.⁸

This article will examine several issues arising from the interaction of state and federal law in the adoption and enforcement of emission requirements to attain and maintain national ambient air quality standards. Two broad categories of issues will be examined: first, those arising under air pollution control plans adopted by the states and approved by the federal enforcement agency; second, those arising in connection with federally promulgated plans. Specific topics in the former category include the extent to which state interpretations of regulations contained in air quality implementation plans are binding on the federal government, the extent to which federal law permits states to revise implementation plans, and finally the status as federal law of state regulations submitted to and approved by the Environmental Protection Agency (EPA) where the state agency's adoption of the regulations exceeded its authority. The issues to be examined in the second category concern state enforcement of federally promulgated implementation plans and the limits of the EPA's power under the Clean Air Amendments to revise the legal authority of state agencies to control air pollution.

Friction has already arisen between state and federal governments with regard to the issues in the first category. For example, as will be seen below, the Rhode Island Department of Health has been disturbed by federal enforcement actions in that state which have been based on an interpretation of the state's regulations contrary to the state's own interpretation.⁹ At one time the State of New Hampshire refused to forward certain point source variances to the EPA for approval, although, after considerable pressure had been applied, it did submit them.¹⁰ Limitations on the states' power to interpret and revise their own air pollution control regulations is a significant and, potentially at least, an unwelcome intrusion into a field where previously they possessed complete autonomy. Friction can only hinder the cooperation between the two levels of government which is so essential to the accomplishment of the goals of the Clean Air Amendments. It is hoped that this article's discussion of potential problems arising from federal-state interaction will suggest answers, or grounds for answers, that will help to reduce such friction. Indeed, it is a premise of the article that resolution of the problems it presents must not only be consistent with the congressional scheme but must also allow the federal government

⁸ 42 U.S.C. § 1857c-5 (1970). This section deals with state adoption of implementation plans to attain and maintain air quality standards and is the focus of discussion in this article.

⁹ See discussion in text at notes 26-34 *infra*.

¹⁰ See discussion in text at notes 59-62 *infra*.

and the states to present a united front in efforts to preserve and improve the air resources of the nation.

I. STATUTORY FRAMEWORK

Before examining these problems of state and federal interaction, it would be useful to outline briefly the sections of the Clean Air Amendments dealing with implementation plans. Pursuant to section 109 of the Clean Air Amendments,¹¹ the EPA, the federal agency charged with the overall responsibility for administration and enforcement, promulgated national primary and secondary ambient air quality standards for various pollutants.¹² Primary standards specify the levels of concentration of those pollutants in the ambient air¹³ above which there are identifiable health effects,¹⁴ while secondary standards specify levels beyond which the effects on public welfare are adverse.¹⁵ These standards are uniformly applicable throughout the nation.

Following promulgation of the national standards, each state was given nine months to adopt—after public hearing—and submit to the Administrator of the EPA plans for the implementation, maintenance, and enforcement of the standards within each air quality control region in the state.¹⁶ The Administrator was given four months following the date established for such submission to approve or disapprove the plans.¹⁷ He was required to approve a plan that met the specific requirements set forth in section 110(a)(2),¹⁸ one of which provided that a plan implementing primary standards must require that the standards be attained “as expeditiously as practicable” but no later than three years from the date of the Administrator’s approval of the plan, and that a plan implementing secondary standards must provide for attain-

¹¹ 42 U.S.C. § 1857c-4 (1970).

¹² The pollutants covered are those which have an adverse effect on public health or welfare. The presence of such pollutants in the ambient air results from numerous or diverse mobile or stationary sources. 42 U.S.C. § 1857c-3 (1970). The pollutants for which standards have so far been promulgated are carbon monoxide, hydrocarbons, photochemical oxidants, sulfur oxides, nitrogen dioxide, and particulate matter. See 36 Fed. Reg. 22384 (1971).

¹³ The federal regulations define “ambient air” to mean that portion of the atmosphere, external to buildings, to which the general public has access. 36 Fed. Reg. 22384 (1971).

¹⁴ 42 U.S.C. § 1857c-4(b)(1) (1970).

¹⁵ 42 U.S.C. § 1857c-4(b)(2) (1970). The definition of public welfare is very broad, including, but not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate; damage to and deterioration of property; and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

¹⁶ 42 U.S.C. § 1857c-5(a)(1) (1970).

¹⁷ 42 U.S.C. § 1857c-5(a)(2) (1970). The submission date for the original plans was January 30, 1972.

¹⁸ *Id.*

ing those standards within a reasonable time.¹⁹ Once the standards are achieved, the Amendments require their continued maintenance. The Amendments preserve the right of states to adopt and enforce plans which impose emission limitations stricter than necessary to attain and maintain national standards.²⁰ If a state fails to submit an implementation plan within the time prescribed or submits a plan, or portion thereof, which the Administrator determines does not comply with statutory requirements, the Administrator is required to promulgate a plan for that state which does meet the criteria of section 110(a)(2).²¹

At the heart of an implementation plan are the regulations by which it limits emissions from stationary and/or mobile sources to the extent necessary to attain and maintain national standards.²² Whether these are adopted by states and approved by the Administrator or, alternatively, promulgated by the Administrator when a state fails to submit an approvable plan, they become federal law on approval²³ or promulgation and thereafter are enforceable by the EPA pursuant to section 113 of the Amendments²⁴ and by private citizens pursuant to section 304.²⁵

¹⁹ 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

²⁰ 42 U.S.C. § 1857d-1 (1970). This provision states:

Except as otherwise provided in sections 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions or air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

²¹ 42 U.S.C. § 1857c-5(c) (1970). The Administrator formally approved or disapproved state plans on May 31, 1972. 37 Fed. Reg. 10892 (1972). Only a few plans were found to be totally approvable on that date, see, e.g., id. at 10856 (Connecticut), and id. at 10879 (New Hampshire). In the case of other plans, some states have corrected all of the deficiencies as of this writing, see, e.g., id. at 23088 (Maine). Finally, in some instances, the Administrator, on his own, has promulgated portions of plans to correct deficiencies, see, e.g., id. at 19811 (Rhode Island and Vermont).

²² The other required provisions of an implementation plan are set forth in 42 U.S.C. §§ 1857c-5(a)(2)(A)-(H) and elaborated in 36 Fed. Reg. 15486 (1971), "Requirements for Preparation, Adoption, and Submittal of Implementation Plans," as amended, id. at 20513, 25233, and 26310.

²³ Approval of a plan and the regulations contained therein results in the adoption of the state law as federal law and is considered rule-making subject to the requirements of the Federal Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. (1970).

²⁴ 42 U.S.C. § 1857c-8 (1970) provides in part as follows:

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the

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II. ISSUES ARISING UNDER FEDERALLY APPROVED STATE PLANS

A. *The Extent to Which State Interpretations of Regulations Contained in Air Quality Implementation Plans Are Binding on Federal Instrumentalities*

1. *Newport, Rhode Island: A Case in Point*

The problems analyzed in this section can be conveniently illustrated by a case that arose soon after the passage of the Clean Air Amendments of 1970. One of the first federal enforcement actions taken under section 113(a)(1) of the Amendments²⁰ raised the question of the extent to which a state agency's interpretation of its own regulation, which regulation has been included in a federally-approved implementation plan, is binding on the federal government in its enforcement of the plan. The action involved the City of Newport, Rhode Island.

Newport operated a municipal dump which was open to all residents of the city to deposit refuse for disposal without fee; commercial haulers were required to pay for the use of the dump. Material coming into the dump was separated into those materials which could be disposed of in the city's incinerator, principally household garbage, and material which could not be burned because it was either too large to fit into the incinerator or noncombustible. Incinerator residue was landfilled on one section of the land used for the dump. Before the EPA intervention, large combustibles, mainly demolition debris from wooden housing torn down during urban renewal, were burned in open fires on another section of the dump, on land owned by the city.

Regulation No. 4 of the Air Pollution Control Regulations of the Rhode Island Department of Health provides as follows:

It shall be unlawful for any person to burn any material in

requirements of such plan or he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

²⁰ 42 U.S.C. § 1857h-2 (1970).

²¹ 42 U.S.C. § 1857c-8(a)(1) (1970).

an open fire on premises operated as a public or semi-public refuse disposal facility, at other central refuse disposal sites, or in connection with any salvage, industrial, commercial, or institutional operation.²⁷

This regulation, which had been in effect for some years, was included in the portion of the Rhode Island implementation plan approved by the EPA in May 1972.²⁸ Since 1967 the Rhode Island Department of Health had interpreted Regulation No. 4 as not prohibiting open burning of demolition debris as long as the burning occurred on an area segregated from the part of a municipal dump used for disposal by other methods, *e.g.*, landfill, so that underground dump fires would not be kindled. The reason given for this interpretation was that disposing of demolition debris by any method other than open burning was difficult.²⁹

Given the facts that Regulation No. 4 applied to municipal corporations³⁰ and that the area where the burning in question occurred was clearly a public disposal area, the sole remaining question in the Newport case was whether the demolition material could be classified as "refuse." The open burning prohibition, by its terms, was applicable only to "refuse" disposal sites. The Department of Health took the position that as long as demolition material was burned separately from other types of solid waste, it would not be considered "refuse."³¹

Such an interpretation of the term "refuse" appeared to be contrary to the weight of authority on the subject.³² Moreover, the Department's interpretation, which permitted all the cities and towns in the state to open-burn large combustibles, had not been submitted to the EPA as part of Rhode Island's control strategy for particulate matter,³³

²⁷ This regulation is to be found in the Rhode Island Implementation Plan, which is on public view at the Health Building, Rm. 204, Davis Street, Providence, R.I.

²⁸ 37 Fed. Reg. 10891 (1972).

²⁹ Remarks of Mr. John Quinn, Director of the Solid Waste Division, R.I. Dep't of Health, In the Matter of the Town of Middletown, R.I., EPA Conference Transcript (unpublished), Nov. 6, 1972.

³⁰ R.I. Gen. Laws tit. 23, ch. 25, § 23-25-3 (1968).

³¹ Remarks of Mr. John Quinn, *supra* note 29.

³² See, *e.g.*, *United States v. Ballard Oil Co.*, 195 F.2d 369, 371 (2d Cir. 1952). "Refuse" is defined for purposes of 33 U.S.C. § 407 (1970) as "anything which has become waste, however useful it may earlier have been." A standard textbook on solid waste defines "refuse" to include, *inter alia*, demolition and construction wastes. Institute for Solid Wastes of the American Public Works Ass'n, *Municipal Refuse Disposal* 10 (1970).

³³ The federal regulations define "control strategy" as the combination of measures (including, but not limited to emission limitations) designated to achieve the aggregate reduction of emissions necessary to attain and maintain the national standards. 36 Fed. Reg. 22369 (1971). The federal regulations also require that emission limitations and other measures necessary for attainment and maintenance of national standards be

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and accordingly the EPA had not taken that interpretation into consideration when it evaluated the adequacy of the Rhode Island plan to attain and maintain national standards for particulate matter. Indeed, it is questionable whether the EPA could have approved that portion of the plan had that interpretation been brought to its attention. Rejecting the state agency's interpretation of Regulation No. 4, the EPA issued a notice of violation and abatement order to the City of Newport pursuant to powers granted by section 113 of the Clean Air Amendments.⁸⁴ Newport's compliance with the EPA's order mooted a challenge to the EPA's action. Nevertheless, the conceptual problem this case presented remained unanswered: to what extent is a state agency's or a state court's interpretation of a state-adopted regulation included in a federally approved implementation plan binding on the EPA or federal courts? The likelihood of judicial resolution of this issue in the near future appears substantial.

2. *Alternative Approaches to the Problem*

The Clean Air Amendments nowhere expressly provide an answer to the annoying question posed above. In cases arising under other federal laws involving federal adoption of state law,⁸⁵ the courts have found state interpretations to be binding on federal agencies where the statutory scheme demanded that result.⁸⁶ Where, however, the state

adopted as rules and regulations enforceable by the state agency. Copies of all such rules and regulations are required to be submitted with the plan.

The Rhode Island Plan, which is available for public inspection at the Health Building, Rm. 204, Davis Street, Providence, R.I., makes no reference to the Department's interpretation.

⁸⁴ In the Matter of the City of Newport, Rhode Island (unpublished EPA order, issued January 11, 1973). At the date of this writing, Newport has ceased all open burning of demolition debris at its dump and has made arrangements for landfilling material formerly burned.

⁸⁵ See, e.g., the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (1970), which provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offence and subject to a like punishment.

Cf. § 209 of the Coal Mine Safety Act, Act of May 7, 1941, ch. 87, 55 Stat. 177, as amended, Act of July 16, 1952, Pub. L. No. 552-877, 66 Stat. 703, which required certain precautions to be taken before electrically driven equipment could be operated in a "gassy mine." "Gassy mine," within the meaning of the Act, was defined as any mine found to be "a gassy or gaseous mine pursuant to and in accordance with the law of the State in which it is located." *Id.*

⁸⁶ See, e.g., *RFC v. Beaver County*, 328 U.S. 204 (1946), where the Supreme Court held that a state court interpretation of the term "real property" was controlling in determining what property of the Reconstruction Finance Corporation was subject to state and local taxation under § 10 of the Reconstruction Finance Corporation Act, Act of June 10, 1941, ch. 190, 55 Stat. 148, which permitted taxation of certain types of real

interpretation conflicts with express statutory language or other federal policies or constitutional requirements, the decisions clearly indicate that the federal government is not bound thereby.³⁷

In this connection it must be noted that section 110(a)(3) of the Clean Air Amendments³⁸ provides very stringent requirements applicable to plan revisions and, together with section 116,³⁹ requires federal overseeing of any plan modification in order to prevent a state from so weakening a plan that it would fail to attain air quality standards within the time required by Congress. It could hardly have been the intention of Congress to permit avoidance of those provisions by allowing states complete freedom to interpret their air pollution control regulations and making such interpretations binding on the federal government.

On the other hand, sections 110(a)(2)⁴⁰ and 116⁴¹ of the Amendments preserve the right of the states to adopt and enforce whatever emission standards they choose as long as those regulations are adequate to attain and maintain national ambient air quality standards within the time frame prescribed.⁴² It would appear, then, that the states

property; *Gauley Mountain Coal Co. v. Bureau of Mines*, 224 F.2d 887 (4th Cir. 1955), a case arising under the Coal Mine Safety Act, Act of May 7, 1941, ch. 87, 55 Stat. 177, wherein a state classification of a mine as a "gassy" mine within the meaning of the Act was held to be binding on the Federal Coal Mine Safety Board of Review. Cf. *McCoy v. Pescor*, 145 F.2d 250 (8th Cir. 1944), cert. denied, 324 U.S. 686, rehearing denied, 325 U.S. 891 (1945); *United States v. Andem*, 158 F. 916 (D.N.J. 1908); Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685 (1957).

³⁷ See, e.g., *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940), where the Supreme Court, in discussing the effect of state law on federal tax policies, stated that "[i]f it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by State law"; *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), where the court held that, in a proceeding under the Assimilative Crimes Act, the question of whether evidence was unlawfully obtained under an unreasonable search and seizure is a federal question; *Air Terminal Service, Inc. v. Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949), where it was held that federal policy against racial discrimination presented assimilation of Virginia segregation laws at Washington National Airport pursuant to the Federal Assimilative Crimes Act.

In a case where the state interpretation has been submitted to the EPA as part of the state's implementation plan and the EPA, taking the interpretation into account, has evaluated and approved the control strategy as satisfying the requirements of the Act, the federal government should be bound by the interpretation. As will be argued immediately below, the state should be free to interpret its plan as long as such interpretations will not prevent attainment of air quality goals.

³⁸ 42 U.S.C. § 1857c-5(a)(3) (1970).

³⁹ 42 U.S.C. § 1857d-1 (1970).

⁴⁰ 42 U.S.C. § 1857c-5(a)(2) (1970).

⁴¹ 42 U.S.C. § 1857d-1 (1970).

⁴² Section 116 of the Clean Air Amendments preserves the right of the states to adopt and enforce emission limitations *stricter* than the necessary to attain the minimum air quality standards required by the Amendments. 42 U.S.C. § 1857d-1 (1970), quoted in full in note 18 *supra*. Allowing federal instrumentalities freedom to avoid stricter state interpretations of their own regulations and to apply weaker federal interpretations,

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should retain some latitude in interpreting their federally approved regulations. Finally, any approach to the problem at issue should ensure uniformity in the interpretation of the same regulations by both federal and state governments and so avoid causing confusion on the part of the sources as to what is demanded with regard to emission control.

In order to solve these difficulties and to comply with the policies of the Clean Air Amendments, the following approach to this problem appears appropriate: The states should be free to interpret the regulations contained in their federally approved implementation plans, and such interpretations should be binding on the EPA and the federal courts in cases where the state interpretation will not prevent the attainment or maintenance of national air quality standards within the time frame established by the Clean Air Amendments.⁴³ If a state interpretation would prevent the attainment or maintenance of national standards within the congressionally mandated time schedule, the EPA should have the right to adopt and enforce any reasonable interpretation of the regulation necessary to attain and maintain required air quality levels, although no stricter than necessary.⁴⁴ Such an interpretation would bind the state agency and state courts under section 116 of the Amendments.⁴⁵

This approach will not interfere with the air quality goals of Congress. Adequate to attain only minimum federal air quality goals, would contravene the policy of section 116.

In addition, section 110(a)(2) of the Amendments appears to allow states the right to adopt plans barely adequate to attain and maintain national standards. 42 U.S.C. § 1857c-5(a)(2) (1970). To allow federal instrumentalities to interpret state plans in a more strict fashion than intended by the state and stricter than necessary to meet federal air quality standards would apparently violate the policy underlying section 110(a)(2).

In a recent case, *Sierra Club v. Ruckelshaus*, — F.2d —, 4 E.R.C. 1815 (D.C. Cir.), aff'g 344 F. Supp. 253 (D.D.C. 1972), cert. granted, 41 U.S.L.W. 3392 (U.S. Jan. 15, 1973), the Court of Appeals for the District of Columbia held that state plans must provide against significant deterioration of existing air quality. This decision would satisfy that the states would be required, under the Clean Air Amendments, to adopt plans not only adequate to attain and maintain national air quality standards, but also adequate to *preserve* air quality in locations where that quality had been above national standards prior to plan adoptions. Nevertheless, even under the rationale of this decision, the states appear to retain the right to determine how strict their plans should be, as long as national air quality goals are achieved within the time frame provided by the Amendments.

⁴³ If the nondegradation argument of *Sierra Club v. Ruckelshaus*, *supra* note 42, prevails, any such state interpretations must, of course, conform to that decision:

It would seem conceivable that an interpretation might not interfere with attainment of air quality standards, but would, in some areas, permit degradation of air quality. In this case, it appears that different interpretations applying to different parts of the same state might be justified without being susceptible to an equal protection challenge on the grounds of arbitrary discrimination.

⁴⁴ If the nondegradation argument succeeds, any EPA interpretation would have to conform to it.

⁴⁵ 42 U.S.C. § 1857d-1 (1970).

gress expressed in the Clean Air Amendments. It would preserve the right of states to adopt and enforce emission limitations as long as they are adequate to achieve those goals, and would provide for the uniform interpretation of federally approved regulations whether enforced by federal or by state governments.⁴⁶

B. *State Revision of a Federally Approved Plan*

Once the EPA has approved a state plan and the regulations contained therein have accordingly assumed the status of federal law, a question arises as to the extent of state power to modify the original plan. Given the purpose of the Clean Air Amendments to attain and maintain national air quality standards within a particular time frame, resolution of that issue becomes important in those cases where a state wishes to change an implementation plan to make its emission controls less stringent than those originally approved. For example, a state might wish to modify a regulation by permanently exempting certain sources from its coverage or by raising the level of allowable emissions for all sources subject to the regulation. Moreover, state laws usually permit temporary variances from air pollution control regulations in cases where a source would suffer "undue hardship" by complying with the prescribed degree of emission control.⁴⁷ In fact, since the EPA's original approval of implementation plans in May 1972, a considerable number of states have granted such variances; Massachusetts alone has granted more than a dozen regarding its regulations limiting the sulfur content of fuel.⁴⁸ The question of the extent to which states may grant such variances was raised by the Natural Resources Defense

⁴⁶ As an alternative to the approach suggested above, it might be argued that if a state interprets the federally approved regulations in its plan in such a manner that the plan is inadequate to achieve air quality standards, the EPA Administrator can require the state to revise the plan to remedy the deficiencies. See 42 U.S.C. § 1857c-5(a)(H)(ii) (1970). However, as long as a regulation is susceptible of an interpretation which results in a control strategy adequate to achieve air quality goals, a revision would not accomplish anything of substance that could not be achieved by merely adopting such an interpretation. Neither the express terms nor the intent of the Clean Air Amendments requires that the revision route be followed in lieu of such an equally effective means of remedying a deficiency in an approved plan. Furthermore, the revision approach may involve considerable delay, given the statutory requirements for reasonable notice, public hearing, and EPA review of any proposed revision. See 42 U.S.C. § 1857c-5(a)(3) (1970).

⁴⁷ See, e.g., R.I. Gen. Laws tit. 23, ch. 25, § 23-25-15 (1968); Vt. Stat. Ann. tit. 10, ch. 15, § 361 (1972).

⁴⁸ The EPA has approved several of these pursuant to section 110(a)(3) of the Clean Air Amendments, 42 U.S.C. § 1857c-5(a)(3) (1970). See, e.g., 37 Fed. Reg. 16178 (Pepperell Paper Co. in Pepperell, Mass., and Haverhill Paperboard Co. in Haverhill, Mass.). It has disapproved others. See, e.g., id. at 23837 (General Electric Co. in Pittsfield, Mass., disapproved in part).

Council in recent cases challenging EPA approval of certain implementation plans.⁴⁹

The provisions of the Clean Air Amendments that deal with the problem of defining the limits on the states' authority to modify approved plans are sections 110(a)(3),⁵⁰ 116,⁵¹ and 110(f).⁵² Section 110(a)(3) provides as follows:

The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.⁵³

It is important to take note of the time frames established in section 110(a)(2)⁵⁴ for the attainment of national ambient air standards: primary standards are to be attained as expeditiously as practicable but not later than three years from original plan approval (mid-1975), and secondary standards within a reasonable time.⁵⁵ EPA approval of a plan revision pursuant to section 110(a)(3)⁵⁶ does not start the three-year period running anew except in the case of revisions to take account of revised primary standards.⁵⁷

As section 110(a)(3) makes clear, the EPA Administrator *must*

⁴⁹ See, e.g., National Resources Defense Council, Inc. v. EPA, Civil Nos. 72-1224 and 72-1219 (1st Cir., filed June 30 and June 28, 1972). These cases challenged EPA approval of the Massachusetts and Rhode Island implementation plans, respectively.

⁵⁰ 42 U.S.C. § 1857c-5(a)(3) (1970).

⁵¹ 42 U.S.C. § 1857d-1 (1970).

⁵² 42 U.S.C. § 1857c-5(f) (1970).

⁵³ 42 U.S.C. § 1857c-5(a)(3) (1970).

⁵⁴ 42 U.S.C. § 1857c-5(a)(2) (1970).

⁵⁵ 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

⁵⁶ 42 U.S.C. § 1857c-5(a)(3) (1970).

⁵⁷ 42 U.S.C. § 1857c-5(a)(2) (1970) provides for the Administrator's approval of a plan if, inter alia:

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained.

The fact that this provision explicitly permits extensions of the three-year deadline in the case of one type of revision (a revision to take account of a revised primary standard) and not in the case of others indicates that extensions in other cases are not permissible. In fact, it would have made no sense for Congress to establish rigid deadlines for achievement of health related standards ("Air quality standards protective of the health of persons must be achieved within the 3-year period of the approval of plans to implement ambient air quality standards," S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2 (1970)) and permit extensions of those deadlines every time a state chooses to revise its plan.

approve any revision of a plan meeting the substantive and procedural requirements of section 110(a)(2). The EPA has taken the position that no revision can displace the requirements of an applicable plan until it has been so approved.⁵⁸ While the Clean Air Amendments and the regulations promulgated thereunder do not define the term "revision," it appears to be the EPA position that the term includes any modification, permanent or temporary, of the specific emission controls of an approved implementation plan, regardless of whether the change affects one particular source or a whole class of sources and regardless of whether the change strengthens or relaxes the controls of the plan.

New Hampshire has questioned that interpretation.⁵⁹ Alleging that section 110(a)(3) uses the term "revision" to refer only to changes in emission controls which are applicable to an entire state or air quality control region, the state denied the EPA's authority to regulate the granting of variances to particular point sources and has refused to submit several variances to the EPA for approval.⁶⁰ This interpretation appears to be based on the fact that section 110(a)(3) talks in terms of the EPA's power to approve "any revision of an implementation plan *applicable to an air quality control region*."⁶¹ Moreover, the state noted,⁶² even if individual variances to particular point sources are not submitted to the Administrator for his approval, the EPA can still ensure that implementation plans are adequate to achieve air quality standards, because the Administrator has authority to require states to revise their plans if it appears that they are substantially inadequate to achieve air quality goals.

However, it is submitted that such a narrow interpretation of section 110(a)(3) cannot be sustained. First, all air pollution sources are located in air quality control regions⁶³ and a variance given to a single point source can clearly be classified as a revision "applicable to an air quality control region," albeit not applicable to all sources in the region. Secondly, section 116 of the Amendments⁶⁴ forbids a state to *adopt or enforce any* emission standard or limitation less stringent than that in effect under an applicable plan. By its terms, section 116 is not limited to actions affecting more than one source. A variance generally includes a limit on emissions from the source to which it is

⁵⁸ 37 Fed. Reg. 22369 (1972).

⁵⁹ These questions arose in the context of informal discussions between New Hampshire state officials and EPA attorneys concerning the necessity for EPA approval of certain variances granted by the State.

⁶⁰ Eventually, after extensive pressure from the EPA, New Hampshire did submit the variances to the EPA for approval though reserving its rights.

⁶¹ 42 U.S.C. § 1857c-5(a)(3) (1970).

⁶² See note 59 *supra*.

⁶³ 42 U.S.C. § 1857c-2 (1970).

⁶⁴ 42 U.S.C. § 1857d-1 (1970).

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granted, and even if a particular variance does not control emissions to any degree, that absence of control can itself be classified as an "emission standard." Therefore the prohibition of section 116 would encompass the situation where a state grants a variance to a single point source and thereby exempts it from the emission controls of the applicable plan.

An "applicable implementation plan" is defined by the Amendments as the plan or the most recent revision thereof which has been approved or promulgated by the EPA.⁶⁵ Consequently, until the Administrator has approved a change in the emission controls of a plan—whether the change affects a single source or a class of sources—the state is foreclosed from granting any relief from its regulations as originally approved. Thus the contention of New Hampshire that the EPA has no authority to regulate the granting of variances by a state to individual point sources has no merit.

The Clean Air Amendments use the term "revision" in several places, most notably in instances where a plan is required to be made more stringent than as originally approved.⁶⁶ The argument has been made that section 110(a)(3) refers back and applies only to such modifications and therefore does not apply in those instances where a state is seeking to relax the controls of its plan, for example by granting variances.⁶⁷ However, the legislative history of section 110(a)(3) strongly indicates that Congress did not intend to confine the use of that provision in such a way. Rather, the Amendments appear to contemplate that, following EPA approval of the original plan, under section 110(a)(3) a state can modify the plan in any way it chooses, whether by relaxing or by strengthening its emission controls on a permanent or temporary basis, as long as the plan, as modified, meets the substantive and procedural requirements imposed for approval of the original plan.

Prior to the Clean Air Amendments of 1970, the Clean Air Act contained a provision, very similar to section 110(a)(3), that clearly allowed states to revise their implementation plans as long as

⁶⁵ 42 U.S.C. § 1857c-5(d) (1970).

⁶⁶ See, e.g., 42 U.S.C. § 1857c-5(a)(2)(H) (1970), which states that a state plan must

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

⁶⁷ See, e.g., Consolidated Reply Brief for Petitioners at 4-5; National Resources Defense Council, Inc. v. EPA, Civil Nos. 72-1224 and 72-1219 (1st Cir., filed June 30 and June 28, 1972).

the revisions complied with the criteria applicable to the original plans.⁶⁸ The House version of the bill that was to become the Clean Air Amendments of 1970 provided for the same type of statutory scheme.⁶⁹ The Senate bill contained no provision for revisions comparable to section 110(a)(3), but instead referred to revisions of an approved implementation plan only in those instances where the restrictions contained in the plan were tightened.⁷⁰ Nevertheless there

⁶⁸ Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108(c)(1), 81 Stat. 491. This section provided:

If, after receiving any air quality criteria and recommended control techniques issued pursuant to section 107, the Governor of a State, within ninety days of such receipt, files a letter of intent that such State will within one hundred and eighty days, and from time to time thereafter, adopt, after public hearings, ambient air quality standards applicable to any designated air quality control region or portions thereof within such State and within one hundred and eighty days thereafter, and from time to time as may be necessary, adopts a plan for the implementation, maintenance, and enforcement of such standards of air quality adopted, and if such standards and plan are established in accordance with the letter of intent and if the Secretary determines that such State standards are consistent with the air quality criteria and recommended control techniques issued pursuant to section 107; that the plan is consistent with the purposes of the Act insofar as it assures achieving such standards of air quality within a reasonable time; and that a means of enforcement by State action, including authority comparable to that in subsection (k) of this section, is provided, such State standards and plan shall be the air quality standards applicable to such State. *If the Secretary determines that any revised State standards and plan are consistent with the purposes of this Act and this subsection, such standards and plan shall be the air quality standards applicable to such State.*

(Emphasis added.)

⁶⁹ H.R. 17255, § 108(c)(1), quoted in H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 26 (1970), provided in part:

If a state which has such a plan fails within 60 days after notification by the Secretary or such longer period as the Secretary may prescribe to revise it as required pursuant to subparagraph (C)(iv) or the last sentence of this paragraph then such State shall be regarded for purposes of paragraph (2) as not having such a plan. *Any revised State plan which the Secretary determines is consistent with this subsection shall be the plan applicable to such State.* At such time as the Secretary, after consultation with the State, determines that the achievement of an air quality standard under section 107(e) requires inspection of motor vehicles in actual use and that such inspection is technologically and economically feasible, the State shall revise its plan to provide for such inspection.

(Emphasis added.)

While this provision might be interpreted in the same way as the provision in note 57 supra (i.e. the term "revision" applies only to modifications *strengthening* a state plan), such an interpretation could hardly have been the intention of the House. The House bill gave the states wide flexibility regarding the manner in which and the time when air quality standards were to be achieved. Such standards were to be attained in a "reasonable time." H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 8 (1970). To permit states to revise their plans only when the plans, as revised, would be more stringent than they originally provided would not be consistent with such a scheme.

⁷⁰ Those instances included situations: (1) where national standards are revised (§ 111(a)(2)(I)); (2) where the plan is inadequate to attain national standards within 3 years (§ 111(e)); (3) where improved or more expeditious methods of achieving the

was no indication during the Senate hearings,⁷¹ in the report accompanying the bill to the Senate floor,⁷² or in the floor debates on the bill,⁷³ that a state was precluded from modifying an approved plan where the modification only satisfied, instead of exceeding, the same standards as those applied to the original approved plan. The conference report made no explicit reference to the applicability of section 110(a)(3), but neither did it anywhere indicate a congressional intent to lock states into implementation plans as originally approved unless modifications would hinder timely achievement of air quality standards.⁷⁴

It is very hard to imagine why Congress would have intended to restrict states' power to change their plans as long as the revised plans would achieve the congressional goals of attaining healthful air quality as expeditiously as practicable but no later than 1975, and air quality protective of the public welfare within a reasonable time. For example, a small fossil fuel utilization facility may be located in an air quality control region where the air quality is better than either the primary or the secondary national standards for sulfur dioxide. Assuming that this source of pollution is subject to a strict state-wide regulation limiting the amount of sulfur in the fuel used, it would appear that regulation of that particular facility's output of sulfur dioxide is totally unnecessary to the attainment and maintenance of the region's air quality standards, and accordingly state regulation of such output is not a prerequisite to EPA approval of the state strategy in the first instance. Therefore for the state to modify its strategy by excluding the facility from regulation, whether on a temporary basis or permanently, would not appear to run counter to the purpose of Congress as expressed in the Clean Air Amendments.⁷⁵ Another example would arise where an air quality control region has particulate emissions exceeding the primary air standards and accordingly must be regulated by the state by

standards are developed (§ 111(a)(2)(I)); (4) where a state wishes to attain a higher level of air quality than is specified by a national standard (§ 112); and (5) where the state wishes to attain and maintain the level of air quality specified by a national standard in less than three years (§ 112). All references to sections above are to the Senate bill, S. 4358, reprinted in S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970).

⁷¹ Hearings on S. 4358 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess., Air Pollution—1970, pts. 1-5 (1970).

⁷² S. Rep. No. 91-1196, 91st Cong., 2d Sess. 5 (1970).

⁷³ 116 Cong. Rec. 32837, 32900-28, 33072-121, 42381-95 (1970).

⁷⁴ H.R. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970).

⁷⁵ The illustrative value of this example is not destroyed even if the non-degradation rationale of *Sierra Club v. Ruckelshaus* is considered. See note 42 *supra*. If the effective date of the regulation at issue has not arrived, removal of the source from the control strategy will not result in deterioration of existing air quality.

means of strict source controls. Assume that the state first sets January 1974 as the effective date of the regulation needed to attain those standards and that after its plan has been approved it finds that the control technology for achieving compliance within that time frame will not be available but could be installed by January 1975. It would appear consistent with both the express terms of the Clean Air Amendments and the goals of that legislation to permit the state to modify its original estimate of how "expeditiously" sources could be expected to comply by extending the final compliance date to 1975.⁷⁶ Whether the Administrator reviews an original plan under section 110(a)(2) or a proposed revision of an approved plan under section 110(a)(3), he has the same authority to ensure that the state's plan will be adequate to attain and maintain air quality standards within the prescribed time frame.

Another provision of the Amendments which is relevant to the question of the authority of a state to modify its plan is section 116, which forbids states from adopting or enforcing emission standards or limitations less stringent than those in effect under applicable plans.⁷⁷ A literal interpretation of this provision would appear to forbid a state to grant any variance or other relaxation of emission controls even though it intended to submit the revision to the EPA for approval. However, in the Amendments Congress evidenced no such intent to lock states into implementation plans as initially approved, as long as any revisions to those plans meet the substantive and procedural requirements of section 110 applicable to the original plans.⁷⁸ Rather, section 116 should be read as requiring states to condition any variances they grant on EPA approval, thereby forcing states to submit them to the Administrator for scrutiny under section 110(a)(3).

Under section 110(a)(3), the EPA has authority to approve postponements of final compliance dates of regulations included in state implementation plans as originally approved. That authority has re-

⁷⁶ The Clean Air Amendments require attainment of air quality goals as expeditiously as practicable, but no later than 3 years from plan approval. 42 U.S.C. § 1857c-5 (a)(2)(A) (1970). It has been argued that once a state submits a plan to the EPA, the schedules for compliance contained therein reflect the state's estimate of how "expeditiously" sources can be expected to comply, and the state cannot later change that estimate. See Consolidated Reply Brief For Petitioners at 3-4, National Resources Defense Council, Inc. v. EPA, Civil Nos. 72-1224 and 72-1219 (1st Cir., filed June 30 and June 28, 1972). Such a position has no support in the legislative history or express provisions of the Clean Air Amendments. It appears totally consistent with the Amendments to permit states to revise their estimates of how expeditiously sources can comply as long as there is adequate support for such revised judgments and final compliance is not delayed past mid-1975.

⁷⁷ 42 U.S.C. § 1857d-1 (1970).

⁷⁸ See text at notes 50-58 *supra*.

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cently been challenged.⁷⁹ Instead, it has been urged that such postponements, regardless of their effect on the attainment or maintenance of national standards, can be granted, if at all, only pursuant to section 110(f) of the Amendments, which states:

Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date;

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare, then the Administrator shall grant a postponement of such requirement. . . .⁸⁰

Given the strict nature of the substantive requirements this section establishes for granting one-year postponements and the inability of most sources to make the showings it requires, it would appear that the suggested interpretation, that would make section 110(f) applicable to *all* requests for postponement of compliance dates, is unreasonable. Such wholesale application would result in wholesale denial of those requests, even in cases where the source's failure to comply with applicable regulations would have no effect on the attainment or maintenance of the national standards within the time frame established by the Amendments. Such a result is certainly not required for the achievement of the congressional purpose of attaining certain levels of air purity by a particular date.

The legislative history of section 110(f) indicates that Congress intended it to apply only to a very narrow class of cases. Of all the

⁷⁹ See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, Civil Nos. 72-1224 and 72-1219 (1st Cir., filed June 30 and June 28, 1972).

⁸⁰ 42 U.S.C. § 1857c-9(f) (1970).

drafts of proposed legislation considered by Congress in 1970 to replace the 1967 Air Quality Act, only one contained a provision similar to section 110(f). Section 111(f) of S. 4358, the Senate bill that went to the Conference Committee from which the 1970 Clean Air Amendments emerged, contained language that is analogous to section 110(f) of the Amendments.⁸¹ Another provision of the Senate bill imposed a rigid three-year time frame in which to attain health-related air quality standards.⁸² The Senate report apparently proposed section 111(f) as a response to the problems inherent in that time scheme:

⁸¹ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 5-6 (1970). This provision stated: (f) (1) No later than one year before the expiration of the period for the attainment of ambient air of the quality established for any national ambient air quality standard pursuant to section 110 of this Act, the Governor of a State in which is located all or part of an air quality control region; designated or established pursuant to this Act may file a petition in the district court of the United States for the district in which all or a part of such air quality control region is located against the United States for relief from the effect of such expiration (A) on such region or portion thereof, or (B) on a person or persons in such air quality control region. In the event that such region is an interstate air quality control region or portion thereof, any Governor of any State which is wholly or partially included in such interstate region shall be permitted to intervene for the presentation of evidence and argument on the question of such relief.

(2) Any action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and appeal shall be to the Supreme Court. Proceedings before the three judge court, as authorized by this subsection, shall take precedence on the docket over all other causes of action and shall be assigned for hearing and decision at the earliest practical date and expedited in every way

(4) The court, in view of the paramount interest of the United States in achieving ambient air quality necessary to protect the health of persons shall grant relief only if it determines such relief is essential to the public interest and the general welfare of the persons in such region, after finding—

(A) that substantial efforts have been made to protect the health of persons in such region; and

(B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to attain an applicable standard; or

(C) that the failure to achieve such ambient air quality standard is caused by emissions from a Federal facility for which the President has granted an exemption pursuant to section 119 of this Act.

(5) The court, in granting such relief shall not extend the period established by this Act for more than one year and may grant renewals for additional one year periods only after the filing of a new petition with the court

(7) No extension granted pursuant to this section shall effect compliance with any emission requirement, timetable, schedule of compliance, or other element of any implementation plan unless such requirement, timetable, schedule of compliance, or other element of such plan is the subject of the specific order extending the time for compliance with such national ambient air quality standard.

⁸² S. 4358, § 111(a)(2)(A), quoted in S. Rep. No. 91-1196, 91st Cong., 2d Sess. 87 (1970).

Finally, the Committee would recognize that compliance with the national ambient air quality standards deadline may not be possible. If a Governor judges that any region or portions thereof within his State will not meet the national ambient air quality standard within the time provided, [section 111(f) of] the bill would authorize him—one year before the deadline—to file a petition against the United States in the District Court of the United States for the district where such region or portion thereof is located for relief from the effect of such expiration.⁸³

Thus the purpose of section 111(f) of the Senate bill was to permit a one-year postponement of the attainment date for health-related standards by extending the time for compliance with regulations aimed at achieving those standards in cases where sources lacked the technology necessary to comply or had been granted a presidential exemption from compliance. In presenting the Conference Committee's work to the Senate for its consideration, Senator Edmund Muskie, manager of the bill, made a statement revealing that section 110(f) of the Amendments was intended to serve the same function as section 111(f) of the Senate bill:

A governor may also apply for a postponement of the deadline [referring to the deadline for attaining primary standards] if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State.⁸⁴

The Conference Report further confirms this characterization of section 110(f):

Under the Senate amendment [t]he Governor of a State, however, was authorized to petition the Federal district court to extend for a year the period for attaining a standard. The court could grant relief only upon specified showings and each one-year extension could be granted only after the filing of a new petition and making the required showings

The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards but leaves the States free to establish

⁸³ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 14-15 (1970).

⁸⁴ 116 Cong. Rec. 42384-85 (1970).

a reasonable time period within which secondary ambient air quality standards will be implemented. *The conference substitute modifies the Senate amendment in that it allows the Administrator to grant extensions for good causes shown upon application by the Governors.*⁸⁵

The implication of this statement is that the conference substitute was intended to modify section 111(f) of S. 4358 in only one respect: the power of granting one-year postponements was to be in the Administrator in the first instance and not in the federal courts.

It would appear, then, that section 110(f) was intended to apply only in those instances where a variance or other postponement of the effective date of a regulation would prevent attainment or maintenance of primary air quality standards within three years from plan approval. This is the interpretation of section 110(f) that has been adopted by the EPA⁸⁶ and approved in a recent case arising under the Clean Air Amendments.⁸⁷

The express terms of section 110(f) do not demand a different result. If the legislative purpose underlying the section is kept in mind, its references to "any stationary source or class of moving sources" and to "any requirement of an applicable implementation plan" need not be interpreted as requiring that *all* postponements of final compliance dates of regulations satisfy the criteria it sets forth. Rather, the statutory language is intended to indicate that a one-year postponement which prevents attainment of primary air quality standards is available to any source with respect to any regulation contained in an approved control strategy as long as the substantive and procedural criteria of section 110(f) are met.

Section 110(e) of the Amendments⁸⁸ explicitly permits the Ad-

⁸⁵ H.R. Rep. No. 91-1783, 91st Cong., 2d Sess. 45 (1970) (emphasis added).

⁸⁶ The federal regulations provide:

A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section [Section 110(f)] unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however*, that any such determination will be deemed a revision of an applicable plan under § 51.6.

36 Fed. Reg. 22398 (1971).

⁸⁷ Getty Oil Co. v. Rückelshaus, 467 F.2d 349 (3d Cir.), aff'g 342 F. Supp. 1006 (D. Del. 1972). This interpretation of section 110(f) has recently been challenged. See, e.g., Natural Resources Defense Council, Inc. v. EPA, Civil Nos. 72-1224 and 72-1219 (1st Cir., filed June 30 and June 28, 1972), where petitioners asserted that all postponements of compliance must run the gauntlet of section 110(f).

⁸⁸ 42 U.S.C. § 1857c-5(e) (1970). This section provides:

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period

ministrator to grant a two-year extension of the three-year deadline for attaining primary air quality standards applicable to a particular air quality control region if the governor of a state requests such relief at the time when the original implementation plan is submitted to the EPA and if certain rigid criteria similar to those set forth in section 110(f) are satisfied. Thus it cannot be maintained that Congress ruled out all postponements of deadlines for achieving primary air quality goals. Section 110(e) permits such extensions at the time of plan submittal when it is foreseen that they will be necessary. Section 110(f) gives a state, following EPA approval of its plan, the opportunity to reassess its ability to obtain compliance with its regulations in time to meet the primary standard deadline imposed by the Amendments and to obtain limited relief from the expiration of that deadline.

Accordingly it seems reasonable to conclude that the 1970 Clean Air Amendments present a coherent scheme for revisions of state implementation plans by states. In this scheme, "revision" of a plan includes any modification of the specific emission controls contained therein, whether strengthening or weakening the plan, whether applicable to a single source or to a class of sources. A state may revise its plan in any manner it wishes (*e.g.*, by granting postponements of the final compliance dates of its regulations or by removing sources from the control strategy) as long as the plan, as revised, meets the criteria for original plan approval set forth in section 110(a)(2). Section 116, however, requires that all revisions be adopted subject to EPA approval. Until the Administrator approves of a plan revision as conforming to the requirements of section 110(a)(2), the original implementa-

referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

- (A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit within such three-year period, and
 - (B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.
- (2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—
- (A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and
 - (B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

tion plan is enforceable by the federal government and by private citizens pursuant to sections 113 and 304 respectively.⁸⁹

As noted earlier, one of the criteria for approval of an original plan is that the plan be adopted after reasonable notice and public hearing and provide for attainment of primary standards as expeditiously as practicable, but no later than three years after plan approval, and for the attainment of secondary standards within a reasonable time from plan approval.⁹⁰ Approval of a revision does not start the three-year period for reaching primary standards running anew except where the revision is made because a primary standard has itself been revised. Therefore, subject to EPA approval and the three-year primary standard deadline, a state may revise its estimates of how expeditiously sources can comply with emission limitations designed to attain primary standards and its estimates of the reasonableness of the period allowed for attainment of secondary standards. To the extent that a revision would, *inter alia*, prevent the attainment or maintenance of the national standards within the congressionally mandated time frame, it must be disapproved by the EPA.

The only relief from the three-year primary standard deadline is found in sections 110(e) and 110(f).⁹¹ When it is foreseen at the time of plan submission that the deadline for primary standards may not be met, in very limited circumstances the Administrator may extend that deadline for a period of up to two years. Following plan approval, the Administrator may postpone the applicability of any emission limitations included in a plan with respect to any source or class of sources for not more than one year, delaying attainment of primary air quality standards beyond three years from original plan approval if the conditions set forth in section 110(f) are satisfied.

C. *Status as Federal Law of Federally Approved State Regulations That Are Beyond the State Agency's Power to Adopt*

Troublesome problems arise from the scheme of federal-state interaction envisioned by the Clean Air Amendments of 1970 when a state promulgates an air pollution control regulation, such as an emission limitation, which is beyond the substantive regulatory authority of the promulgating state agency. The same problem occurs where a state adopts a regulation in a proceeding that fails to comply with applicable

⁸⁹ 42 U.S.C. §§ 1857c-8, h-2 (1970). These enforcement provisions attach to plans approved or promulgated by the Administrator.

⁹⁰ See text at notes 16-19 *supra*. If the *Sierra Club* challenge, *supra* note 42, is successful, there is one further requirement. A revision may not permit significant deterioration of air quality.

⁹¹ See text at notes 79-88 *supra*.

state administrative procedures. If the regulation is subsequently approved by the EPA as part of the state's implementation plan, and the defects in the state adoption of the regulation go unnoticed until after the time has expired for states to submit acceptable implementation plans, the question may then arise as to the status of the state regulation as federal law.⁹² The likelihood of this issue being presented in actual cases would appear to be significant, given the large body of regulations adopted by states and approved by the EPA in a relatively short period of time.

It would appear that as long as the regulation is sufficient to attain and maintain national air quality goals within the time periods prescribed by the Clean Air Amendments, but no stricter than necessary for that purpose, and that federal approval was not procedurally defective,⁹³ the regulation should be considered part of the state's implementation plan, enforceable by the federal government and private citizens. That is, federal approval should be considered tantamount to promulgation of the regulation and should override any defects in the state's procedure. Under section 110(c), the EPA may promulgate a regulation applicable to a state where the state fails to submit a satisfactory regulation. However, disapproval of the defective regulation in this case and promulgation of the same or a similar regulation would not accomplish anything of substance.

Where, however, a state regulation, in fact invalid under state law, is stricter than necessary for the timely attainment and maintenance of national air quality goals, it would appear that the EPA would have to disapprove the defective regulation and promulgate another one for the state complying with the requirements of the Amendments. While the EPA has authority to promulgate a plan or a portion thereof for a state where the plan submitted by the state fails to satisfy the requirements of the Amendments, the EPA does not appear to possess the power under the Act to promulgate a state plan *stricter* than necessary to satisfy section 110(a)(2).⁹⁴ As long as the excessively strict state

⁹² When a defect in a state regulation is discovered before the lapsing of the time period that § 110 of the Clean Air Amendments provides for states to adopt approvable plans, 42 U.S.C. § 1857c-5 (1970), the state obviously has an opportunity to correct the defect. If it fails to avail itself of this opportunity, the textual discussion should apply. Thus, where the regulation is *necessary* to attain air quality standards and federal approval of the regulations is not procedurally defective, that approval should be considered promulgation of the regulation pursuant to § 110(c) of the Amendments. 42 U.S.C. § 1857c-5(c) (1970).

⁹³ The Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. (1970), and § 110 of the Clean Air Amendments, 42 U.S.C. § 1857c-5 (1970), set forth the procedures for federal approval and promulgation of plans.

⁹⁴ The Clean Air Amendments nowhere explicitly place such a limit on the EPA's promulgation authority. However, to the extent that the EPA promulgates a plan that is more stringent than necessary to attain the air quality goals of the Clean Air Amend-

regulation is considered part of the federally enforceable implementation plan, federal approval would constitute the equivalent of federal promulgation of such a regulation, since in these circumstances the force and effect of the regulation would depend solely on federal law. Therefore such federal approval could not stand. The enforceability by the states themselves of regulations invalid under state law but valid under federal law will be considered in the following section.

III. ISSUES ARISING IN CONNECTION WITH FEDERALLY PROMULGATED PLANS

A. *Enforceability by States of Federally Promulgated Emission Limitations*

Section 110(c) of the Clean Air Amendments⁹⁵ provides for federal promulgation of emission limitations when a state either fails to submit an implementation plan within prescribed time limits or submits a plan which did not measure up to statutory requirements. At the date of this writing, the EPA has proposed or finally promulgated regulations, some of which are emission limitations,⁹⁶ to substitute for disapproved parts of more than thirty-five state plans.

The proposition that a state can enforce an emission limitation

ments (including non-degradation where applicable), it is using its authority under the Amendments to extend federal power beyond the purposes of the legislation. It could hardly have been the intent of Congress that § 110(c) be utilized in that manner. The philosophy of the Amendments is to leave to the states the authority to regulate sources more strictly than required by the goals of the Act: 42 U.S.C. § 1857d-1 (1970); see S. Rep. No. 91-1196, 91st Cong., 2d. Sess. 15 (1970), where it is stated that "[s]tates, localities, inter-municipal and interstate agencies may adopt standards and plans to achieve a higher level of ambient air quality than approved by the Secretary."

⁹⁵ 42 U.S.C. § 1857c-5 (1970). This section provides:

The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulation setting forth an implementation plan, or portion thereof, for a State if—

- (1) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,
- (2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or
- (3) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

⁹⁶ See, e.g., 37 Fed. Reg. 11826-48, 15080-91, 19806-15, 19824-37, 23085-93 (1972).

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promulgated for it by the EPA Administrator has been adopted by the EPA⁹⁷ and is supported by the legislative history of the 1970 Clean Air Amendments as well as by several specific provisions of the Amendments. Legislation considered by both the House and Senate contained provisions expressly indicating such an intention.⁹⁸ Furthermore, the requirement under section 113(a) of the Amendments⁹⁹ that the EPA give thirty days' notice to a state before undertaking federal enforce-

⁹⁷ Id. at 10846.

⁹⁸ Section 7 of a bill considered by both the House and Senate provided in part:

(A) Whenever, on the basis of surveys, studies, or reports the Secretary finds that the ambient air quality in any State or the area under the jurisdiction of any interstate air pollution control agency fails to meet the air quality standards established pursuant to section 107, and he determines, on the basis of facts thus ascertained, that such failure results from *the failure of a State or interstate agency to carry out its plan (or the plan provided for it by the Secretary) under section 108(c)*, the Secretary shall notify the State or the interstate agency, and the persons contributing to the lowering of the air quality or to the alleged violations of such findings.

(B) If such State or interstate agency has not taken appropriate remedial action within ninety days of such notification, the Secretary may request the Attorney General to bring suit on behalf of the United States in the appropriate United States district court to enjoin violation of applicable standards or regulations by any person within that State or the area under the jurisdiction of any interstate air pollution control agency.

Hearings on S. 4358 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess., Air Pollution—1970, pt. 1, at 39 (1970); Hearings on Air Pollution Control and Solid Wastes Recycling Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., pt. 1, at 178 (1970) (emphasis added).

Section 112 of the House bill, which eventually was a guideline for the 1970 Clean Air Amendments, provided:

(c)(1) If, within such period as may be prescribed by the Secretary, any State or interstate air pollution control agency, adopts a plan for enforcement of the emission standards promulgated by the Secretary under this section, such plan shall, if the Secretary determines it provides adequately for the enforcement of such emission standards, be applicable within such State or other area.

(2) If a State does not adopt a plan in accordance with paragraph (1) of this subsection, the Secretary shall, after reasonable notice and a conference with representatives of appropriate Federal departments and agencies and State agencies, prepare regulations establishing an enforcement plan for such State. If, prior to the date the Secretary publishes such regulations the State has not adopted such plan, the Secretary shall promulgate such regulations.

(d) If at any time the Secretary determines that any person is violating the emission standards established by him pursuant to this section, and that *the State or interstate agency is failing to carry out the plan adopted as provided in subsection (c)(1) or established as provided in subsection (c)(2)*, he shall notify the affected State or the interstate agency and the person violating the emission standard, and shall specify the time within which such violation must cease.

H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 35 (1970) (emphasis added). While this provision dealt with enforcement of federally promulgated new source standards rather than with ambient air quality standards, it clearly indicates that the House contemplated state enforcement of plans promulgated by the federal government.

⁹⁹ 42 U.S.C. § 1857c-8 (1970).

ment action under an applicable plan, even when the plan has been promulgated by the EPA,¹⁰⁰ indicates that Congress contemplated that states would be able to enforce federally promulgated regulations. The purpose of such notification is to give the state the opportunity to abate violations of the plan on its own.¹⁰¹ It seems reasonable to conclude, then, that the states are to enforce plans promulgated by the EPA under section 110(c). Two questions arising from that conclusion—what legal bases support such state enforcement, and what latitude of interpretation is available to states in enforcing federally promulgated plans—are examined below.

1. *Legal Bases for State Enforcement of Federally Promulgated Implementation Plans*

Three legal bases provide grounds for state enforcement of federally promulgated implementation plans: section 304 of the Amendments concerning citizens' suits,¹⁰² permissible delegation of federal authority and, finally, displacement of disapproved state law by federal law.

Citizens' Suits.—Section 304 of the Amendments¹⁰³ permits "any person" to commence a civil action against a polluter who is alleged to be in violation of an "emission standard or limitation under the Act." "Person" is defined by section 302(e) of the Amendments¹⁰⁴ to include a state. "Emission standard or limitation under this Act" includes a schedule or timetable of compliance, emission limitation, standard of performance or emission standard that is in effect under an applicable implementation plan.¹⁰⁵ An "applicable implementation plan" is the implementation plan, or most recent revision thereof, which has been approved under section 110(a) or promulgated under section 110(c) and which implements a national primary or secondary air quality standard in a state.¹⁰⁶

While section 304 was envisioned by Congress primarily as a

¹⁰⁰ 42 U.S.C. §§ 1857c-8(a)(1), (2) (1970). These sections apply to the enforcement of plans approved or *promulgated* by the Administrator.

¹⁰¹ H.R. Rep. No. 91-1783, 91st Cong., 2d Sess. 47-48 (1970) explains:

The conference substitute follows the House bill relating to enforcement in areas of primary State responsibility and the Senate amendment where primary Federal responsibility exists. In case of a violation of any requirement of a State implementation plan, the Administrator is to notify the State in which the violation occurs as well as the violator. If the violation extends beyond the day after notification, the Administrator may issue an order requiring compliance by such person or may bring court action against such person.

¹⁰² 42 U.S.C. § 1857h-2 (1970).

¹⁰³ *Id.*

¹⁰⁴ 42 U.S.C. § 1857h(e) (1970).

¹⁰⁵ 42 U.S.C. § 1857h-2(f) (1970).

¹⁰⁶ 42 U.S.C. § 1857c-5(d) (1970).

means by which private individuals could enforce an implementation plan if a state and the EPA failed to take appropriate abatement action,¹⁰⁷ there appears to be nothing in the legislative history of the provision indicating that Congress intended that states *qua* "persons" under section 304 could not avail themselves of its provisions. The legislative reports and floor debates on the 1970 Clean Air Amendments are replete with references to the necessity for state involvement to achieve the air quality goals,¹⁰⁸ as well as to the primary responsibility of the states in preventing and controlling air pollution at its source.¹⁰⁹ Accordingly state enforcement of federally promulgated emission limitations under section 304 seems consistent with the congressional scheme.

It would appear, then, that a state can use section 304 of the Act to bring suits for injunctive relief against polluters in violation of a federally promulgated plan, or a portion thereof, applicable to that state. Such suits, which are limited to civil relief by section 304, may be brought in a federal district court.¹¹⁰ However, neither the express terms of section 304 nor the intent of Congress evidenced in the legislative history underlying that section demands that exclusive jurisdiction of these actions be vested in the federal courts. It is submitted that these suits may be brought in state courts.¹¹¹ Furthermore, state courts should not be able to refuse to hear such cases, at least where

¹⁰⁷ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970).

¹⁰⁸ During floor debate on the 1970 legislation, Senator Gurney noted: "If the fight against polluted air . . . is to be won we must have a united attack upon it by all levels of Government: Federal, local, and State . . ." 116 Cong. Rec. 33075 (1970). Such sentiments were also voiced in similar circumstances by Senator Muskie, *id.* at 32902, and by Senator Cooper, *id.* at 32918.

¹⁰⁹ During consideration of the Senate bill, S. 4358, on the floor, Senator Muskie stated:

The third major area in which the committee has recommended significant changes is the area of enforcement. Standards alone will not insure breathable air. All levels of government must be given adequate tools to enforce those standards.

The committee remains convinced that the most effective enforcement of standards will take place on the State and local levels . . .

Id. at 32902-03 (1970).

In recommending that the House agree to the conference substitute, Congressman Staggers, one of the bill's managers, noted that the states were to have the primary responsibility for enforcement of implementation plans. *Id.* at 42520 (1970). See also 42 U.S.C. § 1857(a)(3) (1970).

¹¹⁰ 42 U.S.C. § 1857h-2(a) (1970).

¹¹¹ See *Claflin v. Houseman*, 93 U.S. 130, 136 (1876), where the Supreme Court stated:

The general principle . . . [is] that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither expressed nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.

such a refusal would constitute a discrimination against a federal cause of action.¹¹²

The only remaining question is whether the sixty-day notice requirement of section 304 applies to suits instituted by a state to enforce a requirement of a federally promulgated plan applicable to that state. Section 304(b) of the Clean Air Amendment provides in part:

No action may be commenced—

(1) under subsection (a)(1) pertaining to enforcement of emission standards and limitations—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation¹¹³

The purpose of this provision is to permit the violator, the state, and the EPA to take effective abatement action and thus obviate the need for citizen enforcement. In the case of a state invoking section 304 to enforce a federally promulgated implementation plan against a pollution source located in that same state, the state's notification to itself would obviously be unnecessary, though seemingly required under a literal interpretation of the section. However, notification to the Administrator would indicate the state's intention to enforce the plan, thus eliminating the need for federal enforcement pursuant to section 113. Notification to the alleged violator allows him sixty days to initiate efforts to comply with regulations. Thus the latter two requirements of section 304(b) would be necessary even where a state brought a section 304 action.

Delegation of Authority.—A second possible basis for state enforcement of a federally promulgated emission limitation applicable to the state is that the power to enforce such regulations has been implicitly delegated to the state. There is ample precedent for federal delegation to state agencies and state courts of the power to enforce federal laws,¹¹⁴ and indeed the Clean Air Amendments expressly au-

¹¹² See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947). See also Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 Harv. L. Rev. 966 (1947).

¹¹³ 42 U.S.C. § 1857h-2(b) (1970).

¹¹⁴ The Volstead Act authorized actions to enjoin nuisances defined in the Act (i.e., places selling liquor) to be brought in state courts in the name of the United States by any prosecuting attorney of any state or subdivision thereof. Act of Oct. 28, 1919, ch. 66-85, 41 Stat. 305. See *Carse v. Marsh*, 189 Cal. 743, 210 P. 257 (1922); *United States v. Richards*, 201 Wis. 130, 229 N.W. 657 (1930), both involving such actions. See also *Robertson v. Baldwin*, 165 U.S. 275 (1897), where the Supreme Court noted that Congress can authorize state officers to take affidavits, to arrest, and commit for trial, offenders against the laws of the United States, to naturalize aliens, and to perform other duties, incidental to the judicial power; *Holmgren v. United States*, 217 U.S. 509 (1910),

thorize such a delegation with respect to federally established new source performance standards¹¹⁵ and hazardous emission standards.¹¹⁶ The fact that delegation is expressly provided for in those two instances and not with respect to state enforcement of federally promulgated implementation plans does not necessarily foreclose reading the Clean Air Amendments as delegating the latter authority. It is submitted that such a delegation to the states may readily be implied from the congressional policy that the prevention and control of air pollution at its source are the primary responsibility of state and local governments.¹¹⁷ Support for this proposition is also apparent in the legislative history of the 1970 Clean Air Amendments, wherein Congress explicitly recognized the necessity of state action to attain air quality goals within the time frame prescribed by the Amendments.¹¹⁸ Finally, such an interpretation is not foreclosed by section 301 of the Amendments,¹¹⁹ which allows the Administrator to delegate his powers only to officers and employees of the EPA, except for the power to promulgate regulations. The delegation of enforcement authority suggested here is made implicitly by the Amendments.

Assuming an implied delegation of authority to the states to enforce federally promulgated plans, the question arises as to the manner in which the states may exercise that authority. The delegation would seem to entail, at a minimum, authorization of a state to institute actions in federal district courts for injunctive relief against violators of the provisions of the federal plan located in the state. Similarly state courts would appear to have the authority to grant such relief.¹²⁰ The advantage of this delegation theory over a section 304 action is that no sixty-day notice would be required.¹²¹

The theory of implied delegation might also be seen as authorizing states to request United States attorneys to institute criminal actions. Section 113(c) of the Amendments¹²² prescribes criminal penalties for violation of an implementation plan. These sanctions apply,

upholding congressional power to authorize naturalization by state courts; C. Warren, *Federal Criminal Laws and the State Courts*, 38 *Harv. L. Rev.* 525 (1925), noting that Congress may authorize state judicial and other officers to execute federal criminal and civil laws. In these cases, exercise of the power delegated was not prohibited by state law. It is hard to see how state enforcement of a federal plan could be considered as contrary to state law.

¹¹⁵ 42 U.S.C. § 1857c-6(c) (1970).

¹¹⁶ 42 U.S.C. § 1857c-7(d) (1970).

¹¹⁷ 42 U.S.C. § 1857(a)(3) (1970).

¹¹⁸ See note 108 *supra*.

¹¹⁹ 42 U.S.C. § 1857g(a) (1970).

¹²⁰ See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947).

¹²¹ While § 113 of the Clean Air Amendments requires thirty days' notice prior to the institution of a civil action, 42 U.S.C. § 1857c-8 (1970), that requirement is, by its terms, limited to enforcement actions instituted by the Administrator, not the states.

¹²² 42 U.S.C. § 1857c-8(c) (1970).

however, only where a person knowingly violates a requirement of a plan during a period of "[f]ederally assumed enforcement"¹²³ or more than thirty days after the person has been notified by the EPA that he is violating such requirement,¹²⁴ and accordingly criminal sanctions are available to a state under the theory of implied delegation only in these limited circumstances.

Displacement of Disapproved State Law.—It may be argued that when the EPA disapproves one or more state-adopted emission limitations and promulgates substitutes, the federal regulations displace the disapproved state law for all purposes and may be enforced by the state in accordance with the state's established enforcement procedures. Accordingly the state should be able to seek injunctive relief in its own courts for violation of the federal plan to the same extent that it could do so had those federal regulations been originally adopted by the state. Moreover, the state's criminal sanctions for violation of its air pollution control regulations would attach to violation of the federal requirements.

Support for this theory may be found in the legislative history of the 1970 Clean Air Amendments. Section 111(c) of the Senate bill provided in part:

A plan promulgated by the Secretary for any air quality control region *shall be the plan applicable to such region in the same manner as if such plan had been adopted by the subject State and approved by the Secretary . . .*¹²⁵

This statement may be interpreted to imply that the federally promulgated plan has the same status as state law that a plan adopted by a state and approved by the EPA would have.

This premise is supported by the language of section 110(c) of the Amendments, which provides for the Administrator's promulgation of a plan "for a State" if the state fails to submit a satisfactory plan.¹²⁶ Moreover, by virtue of the preemptive power of section 116,¹²⁷ the states may not adopt or enforce any emission standard less stringent than that in effect under an approved or promulgated implementation plan. An intent to displace state law by a federally promulgated plan for all purposes might similarly be implied from that provision. Thus section 111(c) of the Senate bill, and sections 110(c) and 116 of the Clean Air Amendments, together with the numerous instances in the committee reports and floor debates on the Amendments indicating

¹²³ 42 U.S.C. § 1857c-8(c)(1)(A)(i) (1970).

¹²⁴ 42 U.S.C. § 1857c-8(c)(1)(A)(ii) (1970).

¹²⁵ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 88 (1970) (emphasis added).

¹²⁶ 42 U.S.C. § 1857c-5(c) (1970).

¹²⁷ 42 U.S.C. § 1857d-1 (1970).

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congressional intent to assist states in attaining air quality goals,¹²⁸ and congressional awareness of the need for vigorous state enforcement activity if those goals were to be achieved,¹²⁹ provide significant support for the "displacement" theory.

2. Interpretation of Federally Promulgated State Plans

The EPA's power to promulgate a plan for a state is limited to those emission limitations *necessary* to attain and maintain national air quality standards. Federal interpretation of those regulations would appear to be constrained in the same way. However, to the extent that a state has authority to enforce a federally promulgated plan, it is submitted that it may adopt and enforce interpretations of the federal regulations *more stringent* than necessary to attain and maintain air quality standards, and that such state interpretations would be binding on the federal government. The reasons for such a result have been discussed above—the policy of the Clean Air Amendments that states should have the freedom to adopt and enforce emission limitations stricter than necessary to achieve air quality goals, and the need for uniformity of interpretation of the same regulations.¹³⁰

B. The Application of Section 110(c) to State Enabling Acts

The exact reach of federal power under section 110(c) of the Clean Air Amendments¹³¹ has not been clearly defined. Section 110(c) requires the Administrator to impose an implementation plan or portion thereof on a state if the state fails to submit any plan under section 110(a)(1), or if the state plan submitted fails to meet federal requirements, or if the state fails, after notification by the Administrator, to revise a defective implementation plan. It is a necessary adjunct to any state's compliance with the mandate of the Clean Air Amendments that that state formulate some kind of enabling legislation establishing a state environmental enforcement agency and setting forth its authority and standards by which it is to operate.¹³² A ques-

¹²⁸ In discussing the Senate bill, S. 4358, Senator Muskie noted: "[W]e have learned from experience with implementation of the law that States and localities need greater incentives and assistance to protect the health and welfare of all people." 116 Cong. Rec. 32901 (1970). See also H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 5 (1970): "[I]t is urgent that Congress adopt new clean air legislation which will make possible the more expeditious imposition of specific emission standards both for mobile and stationary sources and the effective enforcement of such standards by both State and Federal agencies."

¹²⁹ See note 108 *supra*.

¹³⁰ See text at notes 20, 42-43 *supra*.

¹³¹ 42 U.S.C. § 1857c-5(c) (1970).

¹³² See, e.g., 36 Fed. Reg. 22398 (1971), requiring that each plan show that the state agency has the requisite legal authority to carry out the plan.

tion arises whether, should this basic state enabling legislation fall short of that required to attain national air quality standards within the state, the Administrator has power under 110(c) to amend the underlying state legislative grant of authority.

This question arose in the context of a still undecided case in the First Circuit.¹⁸⁸ The Rhode Island Clean Air Act provides that the Director of the Department of Health has the authority

[t]o issue, modify, amend or revoke such orders prohibiting or abating air pollution as are in accord with the purposes of this chapter and the rules and regulations promulgated hereunder. In making the orders hereunder authorized, the director shall consider all relevant factors including, but not limited to, population density, air pollution levels, the character and degree of injury to health or physical property and the economic and social necessity of the source of air pollution . . .¹⁸⁴

Section 23-25-8(a) of the same statute provides as follows:

If any person is causing air pollution and if after investigation and hearing the director shall so find, he may enter an order directing such person to adopt or to use, or to operate properly, as the case may be; some practicable and reasonably available control system or device or means to prevent such pollution, having due regard for the rights and interests of all persons concerned . . .¹⁸⁵

The National Resources Defense Council (NRDC), plaintiffs in the First Circuit case, challenged the Administrator's approval of these provisions on the ground that they contravene the policy of the Clean Air Amendments, arguing that the Amendments do not permit economic, social, and technical factors to be taken into consideration in determining whether violators should be compelled to comply with applicable emission limitations.¹⁸⁶ The NRDC alleged that the provisions of the Rhode Island Act quoted above permit the Rhode Island Director of Health, when enforcing state regulation, to take into account just such rejected considerations.

The legislative history of the 1970 Clean Air Amendments, as they apply to regulations designed to attain primary standards, appears

¹⁸⁸ *Natural Resources Defense Council, Inc. v. EPA*, Civil No. 72-1219 (1st Cir., filed June 28, 1972).

¹⁸⁴ R.I. Gen. Laws tit. 23, ch. 25, § 23-25-5(h) (1968).

¹⁸⁵ R.I. Gen. Laws tit. 23, ch. 25, § 23-25-8(a) (1968).

¹⁸⁶ Brief for Petitioners at 24-31, *Natural Resources Defense Council, Inc. v. EPA*, Civil No. 72-1219 (1st Cir., filed June 28, 1972).

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to support the NRDC's position. The Senate Public Works Committee Report stated:

In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health. Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . . ¹³⁷

Assuming that the Rhode Island enabling legislation does limit the state agency's enforcement powers by requiring it to consider economic, social, and technological factors specifically ruled out by Congress, and that consideration of such factors might prevent the timely attainment of maintenance of national air quality standards, a serious question arises under section 110 of the Clean Air Amendments. This question is whether section 110(c) gives the Administrator the power, in effect, to amend the state's grant of authority to a state agency, in this case the Rhode Island Department of Health, so as to give the agency sufficient authority to comply with the purposes of the Clean Air Amendments.

There is no provision in the Clean Air Amendments expressly excluding such a use of section 110(c). Some of the same arguments used to support the state enforcement of federally promulgated regulations might be invoked here to support using section 110(c) to enable the Administrator to give a state agency more authority than the legislature had delegated to it.¹³⁸ Section 110(a)(2)(F),¹³⁹ which specifically requires states to provide assurances that they will give their agencies adequate legal authority to carry out their implementation plans, indicates a congressional assumption that adequate statutory authority must be provided. Furthermore, while the legislative history suggests that Congress expected states to provide their own enforcement agencies with sufficient statutory authority to implement the requirements of the Clean Air Amendments,¹⁴⁰ such expectation would

¹³⁷ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2-3 (1970).

¹³⁸ See text at notes 102-29 *supra*.

¹³⁹ 42 U.S.C. § 1857c-5(a)(2)(F) (1970).

¹⁴⁰ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 21 (1970): "[T]he States would be expected to have or to obtain adequate authority to insure that the provisions of the Act are enforced."

not necessarily mean that Congress relegated so essential a matter wholly to the states. Failure of states to provide adequate authority might prevent attainment of the air quality goals of the Amendments. Limitations in funding and manpower make it very unlikely that reliance on federal enforcement as the principal method of forcing compliance with regulations will be sufficient to achieve national air standards. Congress realized that the assistance of the states was absolutely essential in attaining air quality goals.¹⁴¹ Given the high priority which Congress placed on those goals, it is hard to impute to it an intent to deny the means of achieving them. Thus it is submitted that the goals of the Clean Air Amendments require that section 110(c) be interpreted as giving the Administrator the authority to amend defective state grants of authority. Finally—despite the fact that legislative history provides little guidance on this matter—section 110(c) should be read to give as broad as possible authority; otherwise, given the questionable adequacy of some state air pollution control statutes, the purposes of the Clean Air Amendments may never be attained in those states.

CONCLUSION

The 1970 Clean Air Amendments opened a Pandora's box of questions pertaining to the interrelationship of state and federal law in the area of air pollution control. Extensive litigation appears to be required to hammer out clear answers to these questions. It is hoped that the answers will hasten rather than delay the expeditious attainment and maintenance across the nation of air quality levels consistent with public health and welfare.

To the extent that judicial resolutions of issues create friction between federal and state governments, they will hinder the attainment of the air quality goals of the Clean Air Amendments. It is submitted that the approaches to various issues suggested in this article may avoid unnecessary federal-state friction by permitting states a relative degree of freedom to adjust their programs to problems as they arise, as well as by creating opportunities for increased participation by the states in air pollution regulation.

¹⁴¹ See text at note 3 *supra*.

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