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STATE IMPLEMENTATION PLANS UNDER THE CLEAN AIR ACT: CONTINUED ENFORCEABILITY AS FEDERAL LAW AFTER STATE COURT INVALIDATION ON STATE GROUNDS

INTRODUCTION

In 1970 Congress enacted the Clean Air Amendments¹ in order to more adequately deal with the growing problem of air pollution.² These amendments preserve the general scheme that prior federal legislation contained by requiring states to submit plans for approval to the Environmental Protection Agency (EPA) that will implement air quality standards.³ The EPA Administrator must approve a state plan if he finds that the plan and its adoption satisfy the requirements of the Clean Air Act (CAA) as amended.⁴ Once approved, the plan becomes enforceable as both state and federal law.⁵ Because of this cooperative federalism, many significant and difficult issues have arisen in the courts.⁶ One such issue is whether a state implementation plan (SIP) is enforceable if it is approved by the EPA and subsequently invalidated by a state court on state grounds.⁷

Recently, the Seventh Circuit Court of Appeals decided that a SIP that had been held invalid on state procedural grounds in state court was unenforceable even though it had been approved by the EPA.⁸ The effects of this decision are extremely significant and far-reaching: the citizens of the state are left without an enforceable plan;

1. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

2. H.R. REP. NO. 91-1146, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5356, 5356 [hereinafter cited as NEWS].

3. Under the Clean Air Amendments, as distinguished from prior federal legislation, these air quality standards were set by the federal government. *See infra* notes 38-39 and accompanying text.

4. 42 U.S.C. §§ 7401-7642 (1982). For the requirements that the plan must satisfy, *see infra* notes 48-49 and accompanying text.

5. *See infra* notes 64-78, 81 and accompanying text.

6. *See, e.g.,* Union Elec. Co. v. EPA, 427 U.S. 246 (1976) (concerning whether state adopted plans can be more strict than the CAA requires); Train v. NRDC, 421 U.S. 60 (1975) (concerning the states' authority to revise approved plans).

7. Although this article will deal with the invalidation of an implementation plan as a whole, the discussion which follows is fully applicable to the situation in which only part of a plan is declared invalid.

8. *Sierra Club v. Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145 (7th Cir. 1983). In *Sierra Club*, the appellant brought an action against alleged polluters to enforce a clean air standard contained in the Indiana SIP. *Id.* at 1147. The standard the Sierra

the responsibility of promulgating a new plan is placed upon the already overburdened EPA,⁹ and finally, the enforceability of all other approved plans is called into question.

This note examines the reasons for holding approved SIPs unenforceable after a state court invalidates the SIP on state grounds. The note also questions the soundness of these reasons in light of the impact that these decisions would have on the effectiveness of the CAA. While the CAA is by no means clear on the issue, the development of federal authority in the field of air pollution control, the statutory scheme of the CAA, and the congressional purpose behind the Act all support the view that an approved SIP later invalidated by a state court on state grounds is generally enforceable as federal law until a new plan is submitted by the state and approved by the EPA.

DEVELOPMENT OF FEDERAL AUTHORITY

Because of the exceptional growth in industry and energy consumption during World War II and thereafter, the problem of air pollution became a serious problem.¹⁰ By 1955, Congress recognized that air pollution endangers human health and safety and damages crops, livestock, and property.¹¹ Even though the state and federal efforts

Club sought to enforce, however, had been held invalid by Indiana state courts because the state officer presiding at the hearing regarding the standard had failed to submit written findings to the Indiana Environmental Management Board in violation of Indiana procedural law. *Id.* The district court dismissed the complaint basically on the ground that the Sierra Club sought "to enforce invalid regulations." *Id.* at 1148. For the rationale of the seventh circuit's decision, see *infra* notes 57-61 and accompanying text.

Several other courts have also been faced with the issue. See *Illinois v. Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981) (unenforceable); *Illinois Env'tl. Protection Agency v. Pollution Control Bd.*, 100 Ill. App. 3d 735, 426 N.E.2d 1264 (3d Dist. 1981) (unenforceable). But see *Illinois v. Commonwealth Edison Co.*, 490 F. Supp. 1145 (N.D. Ill. 1980) (enforceable).

While the cases relied upon in this note address the enforceability of SIPs invalidated by state courts on state *procedural* grounds, the rationale of these decisions, as well as the analysis in this note, is fully applicable to a state court invalidation on state *substantive* grounds.

9. See, e.g., NATIONAL COMMISSION ON AIR QUALITY, TO BREATHE CLEAN AIR § 2.1 at 15 (1980) (confirming the existence of delays in approving plans).

10. 1 F. GRAD, TREATISE ON ENVIRONMENT LAW § 2.03(1), at 58, § 2.01(1), at 8-9 (1984). Prior to the first federal legislation dealing with air pollution in 1955, see *infra* notes 14-17 and accompanying text, few states and localities had air pollution control programs of any significance. *Id.* § 2.01(1), at 9.

11. Pub. L. No. 84-159, 69 Stat. 322, 322 (1955).

to combat air pollution began in the 1950s,¹² the damage caused by air pollution was estimated by the EPA in 1973 to exceed sixteen billion dollars annually.¹³ Because of the need to control air pollution and because of the magnitude of the problem, Congress responded over the past three decades by enacting federal air pollution legislation. In order to adequately understand the congressional purpose behind the current formulation of the CAA, the development of federal authority in the field of air pollution control must be explored. Consideration must also be given to how this development affects the states' authority to deal with air pollution.

Although the federal government had not been involved with air pollution control previously,¹⁴ in 1955 Congress enacted the Air Pollution Control-Research and Technical Assistance Act.¹⁵ This Act authorized federal air pollution studies and provided federal technical assistance and grants in aid to state and local agencies for research, training, and demonstration projects.¹⁶ At this time, the declared policy of Congress was to "preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution."¹⁷ Thus, the role of the federal government was to provide information and money to assist the states' efforts in controlling air pollution.

In the 1960s, however, the federal government began taking a far more active role in controlling air pollution. Congress realized that the existing control efforts were inadequate.¹⁸ Federal assistance alone was simply insufficient to deal with air pollution. Congress, while still proclaiming that the states were primarily responsible for fighting air pollution, no longer declared that it was the states' *right* to control air pollution.¹⁹ The Clean Air Act of 1963,²⁰ together with its 1965

12. See *infra* notes 14-41 and accompanying text.

13. Damages were estimated as follows:

Human health	\$ 6.1 billion
Materials and Vegetation	4.9
Property values	<u>5.2</u>
Total	\$16.2 billion annually

GRAD, *supra* note 10, § 2.01(3), at 17-19.

14. *Id.* § 2.03(1)(a), at 57.

15. Pub. L. No. 84-159, 69 Stat. 322 (1955).

16. *Id.* § 5(a)(1), at 323.

17. Pub. L. No. 84-159, 69 Stat. 322, 322 (1955).

18. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, 392-93; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, 485.

19. Compare Clean Air Act of 1963, 77 Stat. 392, 393 and Air Quality Act of 1967, 81 Stat. 485, 485 with *supra* note 17 and accompanying text.

20. Pub. L. No. 88-206, 77 Stat. 392 (1963).

amendments,²¹ expanded federal grants and authorized the Department of Health, Education and Welfare (HEW) to publish nonmandatory air criteria.²² More important, though, was the fact that the Amendments authorized direct federal involvement, albeit in limited areas. The Secretary of HEW was empowered to promulgate and enforce federal motor vehicle emission standards²³ and was entitled in limited circumstances to intervene and abate interstate air pollution.²⁴

Federal authority continued to expand under the Air Quality Act of 1967.²⁵ The Secretary of HEW was directed to designate air quality control regions and to issue mandatory air quality criteria for those regions.²⁶ Though somewhat diminished, the states' role under the Air Quality Act was to set air quality standards satisfying the criteria established by HEW and then to implement those standards.²⁷ If a state failed to set adequate standards, the Secretary could issue standards applicable to the state.²⁸ While federal authority had increased, the states still possessed the ultimate power to decide whether or not they would control air pollution. The Air Quality Act established only limited federal enforcement mechanisms,²⁹ and the states retained wide discretion in determining both the air quality standards and the dates for attaining them.³⁰

By 1970, it was "abundantly clear" to Congress that federal legislative efforts to fight air pollution were inadequate.³¹ State planning and implementation under the 1967 Act had made little progress.³² Congress attributed this "regrettably slow" progress to a number of factors including the "cumbersome and time-consuming procedues" in the 1967 Act, inadequate funding at the federal, state, and local levels, and the lack of skilled personnel to enforce pollution requirements.³³ Commentators have also suggested that federal legislation prior to 1970 failed because of both an inability and an unwillingness on the part of the states to deal with air pollution.³⁴

21. Pub. L. No. 89-272, 79 Stat. 992 (1965).

22. Pub. L. No. 88-206, § 3(c)(2), 77 Stat. 392, 395 (1963).

23. Pub. L. No. 89-272, § 202, 79 Stat. 992, 992-93 (1965).

24. Pub. L. No. 88-206, § 5, 77 Stat. 392, 396 (1963).

25. Pub. L. No. 90-148, 81 Stat. 485 (1967).

26. Pub. L. No. 90-148, § 107, 81 Stat. 485, 490 (1967).

27. *Id.* § 108(c)(1), at 492.

28. *Id.* § 108(c)(2).

29. GRAD, *supra* note 10, § 203(1)(a), at 62-64.

30. *See Train v. NRDC*, 421 U.S. 60, 64 (1975).

31. NEWS, *supra* note 2, at 5356.

32. *See Train*, 421 U.S. at 64.

33. NEWS, *supra* note 2, at 5360.

34. One of the reasons that federal legislative efforts failed prior to the Clean Air Amendments of 1970 was that air pollution is a national problem that the states are unable to effectively deal with in the absence of national standards. Strohbehn,

Congress responded by "taking a stick to the States"³⁵ in the form of the Clean Air Amendments of 1970.³⁶ While still adhering to the principle that each state has the primary responsibility for assuring air quality within its borders,³⁷ the Amendments sharply increased federal authority and responsibility and correspondingly decreased the states' discretion in controlling air pollution.³⁸ For the first time, the states were not only required to attain specified air quality standards, but they were required to do so within a specified period of time.³⁹ According to the Supreme Court, the scheme created by the 1970 Amendments was intended to guarantee that specified air quality standards be met and that these standards be adequate to protect the public health and welfare.⁴⁰ Moreover, Congress expressly stated that its purpose in enacting the 1970 Amendments was to assure that the air throughout the country "is wholesome once again."⁴¹

The Bases for Federal/State Relationships in Environmental Law, 12 ENVTL. L. REP. 15,074, 15,076 (1982); Butler, *The "New Federalism"—Can It Really Work in Implementing Environmental Statutes?*, 12 ENVTL. L. REP. 15,095, 15,097 (1982).

However, others have recognized that not only were the states unable to handle the problem, but some were unwilling to deal with it and might actually interfere with the federal efforts in order to benefit local industry and encourage other industry to move into the state. *Id.*; Luneberg, *The National Quest for Clean Air 1970-1978: Intergovernmental Problems and Some Proposed Solutions*, 73 NW. U.L. REV. 397, 399 (1978).

35. See *Train*, 421 U.S. at 64.

36. The Clean Air Act was again amended in 1977. Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 95-190, 91 Stat. 1399 (1977). These amendments primarily establish requirements for areas which had not attained the national standards and requirements to prevent the deterioration of air quality in regions that had met the standards. The 1977 amendments will not be directly involved in the discussion which follows. Hereinafter, references and citations will be to the Clean Air Act as codified at 42 U.S.C. §§ 7401-7642 (1982).

37. Clean Air Act § 107(a), 42 U.S.C. § 7407(a) (1982). Congress has consistently reaffirmed the policy that the states are primarily responsible for fighting air pollution. See *supra* notes 17, 19 and accompanying text. The theoretical underpinnings of this policy are that local decisionmakers are more likely to be aware of local concerns, that citizens have greater access to a local decisionmaker, and that local decisions are more likely to promote greater efficiency. Strohbehn, *supra* note 34, at 15,076; Luneberg, *supra* note 34, at 404-06.

38. See *Train*, 421 U.S. at 64.

39. *Id.* at 64-65.

40. *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976), *reh'g denied*, 429 U.S. 873 (1976). See Clean Air Act § 109(b), 42 U.S.C. § 7409(b).

41. NEWS, *supra* note 2. See also H.R. REP. NO. 95-294, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1077, 1080 ("The primary and overriding purpose of the bill remains the prevention of illness or death which is air pollution related and protection of the public interest.").

The legislative history also clearly reveals that Congress foresaw the possibility that facilities emitting air pollution would have to close down in order to accomplish the statute's ultimate purpose. See S. REP. NO. 91-1196, 91st Cong., 2d Sess. 2-3 (1970).

The foregoing historical background reveals two equally important propositions that must be considered when dealing with the CAA and its statutory framework. First, over the past three decades, federal authority in the field of air pollution control has increased dramatically while the discretion of the states has been cut back rather severely. Second, the ultimate congressional purpose in passing the 1970 Amendments was, and still is, to protect the public health and welfare by achieving specified federal air quality standards.

STATUTORY FRAMEWORK OF THE CAA

The CAA requires the Administrator⁴² of the EPA to propose and promulgate regulations prescribing national ambient air⁴³ quality standards⁴⁴ for air pollutants listed under section 108(a)(1).⁴⁵ The standards are of two types: primary and secondary. Primary standards are those which are required "to protect the public health;"⁴⁶ secondary standards are those required "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."⁴⁷

Within nine months after the promulgation of a national ambient air quality standard, the states are required to submit a plan to the EPA providing for the implementation, maintenance, and enforcement of the standard.⁴⁸ The Administrator is then required to approve the

42. The functions performed by the Secretary of HEW were transferred to the Administrator of the EPA in 1970. Reorganization Plan No. 3 of 1970, § 2(a)(3), 35 Fed. Reg. 15,623.

43. "Ambient air" is the statute's term for the outdoor air used by the general public. *Train*, 421 U.S. at 65.

44. Clean Air Act § 109(a), 42 U.S.C. § 7409(a).

45. *Id.* § 108(a)(1), 42 U.S.C. § 7408(a)(1) reads as follows:

(a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

46. *Id.* § 109(b)(1), 42 U.S.C. § 7409(b)(1).

47. *Id.* § 109(b)(2), 42 U.S.C. § 7409(b)(2).

48. *Id.* § 110(a)(1), 42 U.S.C. § 7410(a)(1). State legislatures generally authorize a state agency such as a pollution control board to create the SIP. The national ambient air standards are implemented, maintained, and enforced by the authorized state agency imposing emission limitations and other requirements on stationary sources

state plan if he determines that it was adopted after reasonable notice and hearing and that it meets the eleven criteria specified in section 110(a)(2).⁴⁹ Nothing in the CAA prevents a state from submitting a plan that is more strict than the federal air standards actually require, and the Administrator is not permitted to disapprove a plan

of pollution that will result in compliance with the national standards. The formal requirements of these plans are found in § 110(a)(2) of the CAA. See *infra* note 49.

49. *Id.* § 110(a)(2), 42 U.S.C. § 7410(a)(2) reads as follows:

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(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) of this section) 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;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with

measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), 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 or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

simply because it is more strict than necessary.⁵⁰ If, however, a state fails to submit an adequate plan, the Administrator is obligated to publish and promulgate regulations establishing a satisfactory implementation plan for the state.⁵¹

Along with an intricate array of enforcement provisions,⁵² the CAA contains a specified procedure for challenging the Administrator's actions. Under section 307(b)(1), anyone challenging the Administrator's

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August 7, 1977) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

50. *Union Elec. Co. v. EPA*, 427 U.S. 246, *reh'g denied*, 429 U.S. 873 (1976). The issue in *Union Electric* was whether claims of economic or technological infeasibility could be raised in a § 307(b) review after the appellate period had expired. *Id.* at 249. The Court held that the reviewing court can consider such claims only if the Administrator could consider them when approving or disapproving a state plan. *Id.* at 256. After indicating that the CAA places a duty upon the Administrator to approve state plans that meet the stated criteria and finding that none of those criteria included considerations of economic or technological infeasibility, the Court decided that such claims were not appropriate for the Administrator to consider in approving a plan or for a court to consider in reviewing the approval. *Id.* at 265. The Court also concluded that state plans more stringent than federal law requires must be approved by the EPA if the minimum requirements of § 110(a)(2) are satisfied. *Id.* See also *supra* note 49 for the text of § 110(a)(2).

51. Clean Air Act § 110(c)(1), 42 U.S.C. § 7410(c)(1).

52. The implementation plan or its most recent revision that was approved or promulgated by the EPA is designated the "applicable implementation plan." *Id.* § 110(d), 42 U.S.C. § 7410(d).

States are permitted to revise any part of the implementation plan, and the EPA is required to approve such revisions provided the state plan after revision comports with the requirements applicable to the initial plan formulation. *Train*, 421 U.S. 60 (interpreting CAA § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A)). See also *infra* note 108.

The applicable implementation plan is the plan that can be enforced under sections 113 and 304 of the CAA. See Clean Air Act §§ 113, 304, 42 U.S.C. §§ 7413, 7604.

Section 113 requires the Administrator of the EPA to notify any person that he finds to be in violation of any requirement of an applicable implementation plan. *Id.* § 113(a)(1). If the violation continues beyond thirty days after the notification, the Administrator may issue an order requiring compliance or may bring a civil action seeking an injunction or a civil penalty or both. *Id.* Violations committed knowingly are subject to criminal punishment in the form of fines and imprisonment. *Id.* § 113(c).

Section 304 authorizes citizen suits to be brought to enforce emission limitations or standards subject to certain procedural requirements such as notice to the Administrator, to the state in which the violation occurs, and to the alleged polluter sixty days before commencing the action. *Id.* § 304(a) and (b).

For a more in-depth review of the CAA enforcement provisions, see D. CURRIE, *AIR POLLUTION: FEDERAL LAW AND ANALYSIS* § 8 (1981).

actions must file a petition for review in a federal court of appeals within sixty days after notice of such action appears in the Federal Register.⁵³ Any action with respect to which a person could have obtained judicial review under section 307(b)(1) is precluded from review in civil or criminal proceedings for enforcement of the SIP.⁵⁴ Recently, in these enforcement proceedings, the enforceability of SIPs invalidated on state grounds after EPA approval has been questioned.

SIPS UNENFORCEABLE AFTER INVALIDATION ON STATE GROUNDS

Although the issues have not been raised frequently, courts have addressed both the question of the status of an approved SIP and the question of its enforceability if invalidated by a state court on state procedural grounds.⁵⁵ The courts' decisions reveal two primary reasons for holding such invalidated plans unenforceable under both state and federal law. First, one court found that an approved implementation plan is enforced as state, not federal, law.⁵⁶ If this is the case, undoubtedly an invalidation on state grounds renders the plan unenforceable. Second, in *Sierra Club v. Indiana-Kentucky Electric Corp.*,⁵⁷ the Seventh Circuit Court of Appeals reasoned that if a state submits regulations in a SIP which were invalid when adopted, the approval by the EPA is of no effect because it is as if the state never submitted the regulation.⁵⁸ Thus, an applicable implementation plan was never created.

The seventh circuit based its decision on two additional arguments as well. The court relied upon decisions in several other circuits to conclude that there is a meaningful role for state court review of SIPs under the CAA.⁵⁹ The seventh circuit felt that state court review would be meaningless if the SIP was still enforceable

53. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

54. *Id.* § 307(b)(2), 42 U.S.C. § 7607(b)(2). With respect to the constitutionality of this provision, see *infra* note 79.

55. Many states impose both substantive and procedural limitations on the authority delegated to their own state agencies to combat air and water pollution. See Currie, *State Pollution Statutes*, 48 U. CHI. L. REV. 27 (1981). These limitations sometimes give rise to litigation which results in the invalidation of part or all of an approved state plan. See, e.g., *Indiana Envtl. Management Bd. v. Indiana-Kentucky Elec. Corp.*, 181 Ind. App. 570, 393 N.E.2d 213 (2d Dist. 1979) (finding part of the Indiana implementation plan invalid under state law because of a failure by a state officer to comply with Indiana procedural requirements).

56. *Luckie v. Gorsuch*, 13 ENVTL. L. REP. 20,406 (D. Ariz. 1983).

57. 716 F.2d 1145 (1983).

58. *Id.* at 1148.

59. See, e.g., *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 814 (9th Cir. 1980) ("State law must provide the remedy petitioners seek."). See also *Ohio Envtl.*

as federal law after invalidation by a state court on state grounds.⁶⁰ The court also thought that the CAA's legislative history indicates Congress intended the EPA to remedy any problem with a SIP, and therefore, the EPA must act if a plan is invalidated on state grounds.⁶¹

Though the CAA is not explicit, the conclusion that an approved SIP is purely state law contradicts the implications of the statute.⁶² In addition, while the arguments of the seventh circuit certainly have merit, the weight given to these arguments is too great. The decision ultimately reached could undermine the effectiveness of and the purposes behind the CAA.⁶³ But before considering in detail the seventh circuit's decision that an enforceable SIP must have valid state law underlying it, the issue regarding the status of an approved SIP must be resolved.

APPROVED SIP AS FEDERAL LAW

Some commentators addressing the issue have concluded that EPA approval of a state submitted plan constitutes federal rulemaking and therefore creates federal law.⁶⁴ Section 307⁶⁵ of CAA supports this

Council v. EPA, 593 F.2d 24, 28-29 (6th Cir. 1979) (criticizing the failure to take state procedural challenges to state court); Appalachian Power Co. v. EPA, 579 F.2d 846, 854-55 (4th Cir. 1978) (similar criticism).

60. *Sierra Club*, 716 F.2d at 1149-53. The seventh circuit did not consider the possibility that meaningful state court review can be accomplished without holding the plan unenforceable at the moment the state court decision is rendered. The plan could be changed subject to EPA approval or simply re-adopted in accordance with state law by the state agency pursuant to an order of the court. This scheme would not leave the state without enforceable provisions in the interim while the plan is reformulated. Likewise, this scheme would not impose an unnecessary duty upon the EPA. See *infra* notes 98-106 and accompanying text.

61. *Sierra Club*, 716 F.2d at 1153-54. The court relies upon § 110(c) of the CAA and the legislative history of the statute which clearly shows Congress intended the EPA to act if the state fails to act. *Id.* The court then states:

Thus, while the Congress did not explicitly foresee the possibility of a successful state court challenge *after* an implementation plan was approved by EPA, it did rather clearly embrace the general proposition that federal action was intended to remedy *any* problem with a state implementation plan.

Id. at 1154 (emphasis in original). The real issue, though, is whether any problem actually exists in the plan that requires EPA action. See *infra* notes 98-120 and accompanying text.

62. See *infra* notes 64-78 and accompanying text.

63. See *infra* notes 98-120 and accompanying text.

64. See, e.g., Pedersen, *Why the Clean Air Act Works Badly*, 129 U. PA. L. REV. 1059, 1078-79 (1981); Luneberg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. INDUS. & COM. L. REV. 637, 640 (1973).

65. 42 U.S.C. § 7607.

view by requiring notice of an approval to appear in the Federal Register. More than a simple statement of approval appears in the Federal Register, however; the entire plan is specified.⁶⁶ Because the Federal Register must be judicially noticed,⁶⁷ the plans appear to be federal regulations. Nevertheless, because approval is not necessarily the equivalent of adoption,⁶⁸ it can be argued that the publication merely recites the Administrator's approval of the state plan rather than converting the state law into federal law.⁶⁹

On the other hand, there is persuasive evidence contained in the CAA which indicates that Congress intended approved plans to be considered federal law. Revisions of implementation plans are authorized in section 110(a)(3)(A),⁷⁰ but as the Supreme Court stated in *Train v. Natural Resources Defense Council, Inc.*,⁷¹ a revision is not effective until approved by both the state and the EPA.⁷² If an approved plan were merely state law, then a revision granted by a state would take effect immediately whether or not the EPA subsequently approved it. Because this analysis rests on a judicial interpretation of the CAA, however, it is not entirely fair to say that the revision authority indicates a congressional intention to make an approved plan federal law.

Instead, the strongest evidence from the Act that an approved SIP becomes federal law can be found in the citizen suit provision.⁷³

66. See, e.g., 40 C.F.R. § 52 from 1973 through 1983. The plans are incorporated by reference into the Federal Register when the formal requirements of 1 C.F.R. § 51 are met. They are treated then as if they had been published in full in the Federal Register. 5 U.S.C. § 552(a)(1) (1982).

67. 44 U.S.C. § 1507 (1982).

68. "Approve. To be satisfied with; to confirm, ratify, sanction, or consent to some act or thing done by another." BLACK'S LAW DICTIONARY 94 (5th ed. 1979).

"Adopt. To accept, appropriate, choose, or select. To make that one's own (property or act) which was not so originally." *Id.* at 45.

Thus, using the above definitions, approval could be an indication of mere satisfaction with a state plan that meets the federal requirements without any intention on the part of Congress to make the state plan into a federal plan.

69. A plan originally promulgated by the EPA, of course, has the status of federal law. See, e.g., *Pringle v. United States*, 419 F. Supp. 289, 291 (1976) ("The promulgation of rules and regulations in the C.F.R. has the full force and effect of law.").

70. 42 U.S.C. § 7410(a)(3)(A).

71. 421 U.S. 60 (1975).

72. See *infra* note 108.

73. Clean Air Act § 304(a), 42 U.S.C. § 7604(a) reads as follows:

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to

On its face, section 304⁷⁴ purports to grant jurisdiction to the federal district courts without regard to the citizenship of the parties.⁷⁵ How-

the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such standard or limitation;

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator; or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

The term "emission standard or limitation under this chapter" is defined in Clean Air Act § 304(f), 42 U.S.C. § 7604(f) as follows:

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), any condition or requirement of section 7413(d) of this title (relating to certain enforcement orders), section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under part B of subchapter I of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise)

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

74. 42 U.S.C. § 7604.

75. *Id.* § 7604(a).

ever, a congressional grant of jurisdiction to the federal courts which is not based on the citizenship of the parties can only include cases arising under the Constitution, laws of the United States, and treaties made under their authority.⁷⁶ Therefore, the citizen suit provision is either unconstitutional with respect to suits where there is no diversity between the parties, or it reflects a congressional view that an approved implementation plan is federal law. When faced with a conflict of this type, the Supreme Court consistently reiterates the duty of the court to adopt the construction which saves the act.⁷⁹ The citizen suit provision indicates that Congress assumed an applicable implementation plan to be federal law.⁷⁸ But this analysis still leaves two important questions remaining to be answered. First, assuming that Congress did not condition the existence of federal law on the validity of the state law contained in the SIP, under what circumstances and to what extent does the CAA create enforceable federal law? Second, is such an assumption well founded?

ENFORCEABILITY OF THE PLAN AS FEDERAL LAW

While still subject to both constitutional⁷⁹ and statu-

76. *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir. 1981) (relying on U.S. CONST. Art. III, § 2, cl. 1), *cert. denied*, 454 U.S. 836 (1981).

77. *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *Crowell v. Benson*, 285 U.S. 22, 62 (1931); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346 (1928); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927); *Missouri Pacific R.R. v. Boone*, 270 U.S. 466, 471-72 (1926); *Panama R.R. v. Johnson*, 264 U.S. 375, 390 (1924).

78. *Cf. CURRIE, supra* note 52, at § 8.13 ("Once a plan is federally approved, it becomes federal law. . . .").

79. Commerce clause challenges to the CAA have been rejected by the courts without any difficulty. *See, e.g., Sierra Club v. EPA*, 540 F.2d 1114, 1139 (D.C. Cir. 1976); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974).

The CAA has also been upheld when challenged on the grounds that Congress has improperly delegated authority to the EPA. *See South Terminal Corp.*, 504 F.2d at 676-77.

The argument that the CAA as a whole violates the Tenth Amendment would likewise fail. Under the CAA, if a state fails to submit an adequate plan the duty falls upon the EPA to create and enforce a plan for the state. *See supra* note 51 and accompanying text. Thus, the states are not directly compelled to enact and enforce a federal regulatory program. This kind of statutory scheme, known as "cooperative federalism," has been upheld by the Supreme Court. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264 (1981).

A more difficult constitutional issue arises, however, when dealing with the Act from a due process standpoint, since section 307(b) limits judicial review of SIPs. *See supra* notes 53-54 and accompanying text. Here, the question arises whether notice

tory⁸⁰ challenges, an approved SIP can be enforced as both state⁸¹ and federal law.⁸² Assuming for the moment that Congress did not condition the existence of federal law on the validity of state law, then a state plan invalidated on state grounds remains enforceable federal law.⁸³ Nevertheless, a limitation may exist with respect to the degree to which compliance can be mandated under such a plan. This limitation is based on the statutory requirements of the CAA itself. Because the CAA allows states to submit implementation plans more strict than the federal standards require and because the Administrator must approve these plans,⁸⁴ the federal law that exists after the state law beneath the plan is declared invalid is itself more strict than the federal standards demand. Although states are authorized to adopt overly strict plans,⁸⁵ nothing in the CAA authorizes the EPA to do so.⁸⁶ Therefore, in this situation, the federal plan can be viewed as

in the Federal Register and a review period limited to sixty days comply with the due process requirements that the procedures afford a reasonable opportunity to be heard and present evidence. *Yakus v. United States*, 321 U.S. 414, 433 (1944). A similar scheme under the Emergency Price Control Act was upheld by the Supreme Court in *Yakus*. For the view that the CAA review procedures are constitutional, see *Luneburg & Roselle, Judicial Review Under The Clean Air Amendments of 1970*, 15 B.C. INDUS. & COM. L. REV. 667, 679-84 (1974). *But cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289 (1978) (Powell, J., concurring) (expressing doubts as to constitutionality of section 307(b)(2)). See generally CURRIE, *supra* note 52, at § 9.15 (recommending that time limit of section 307(b)(1) be repealed).

80. Statutory challenges would focus on whether the Administrator's approval complied with the procedural and substantive requirements of CAA. These issues could be raised in a section 307(b) review. See *supra* note 53 and accompanying text. If section 307(b) is constitutional, the Administrator's approval would not be subject to review in an enforcement proceeding. See *supra* note 54 and accompanying text.

81. Clean Air Act § 110(a)(1), 42 U.S.C. § 7410(a)(1).

82. See *supra* notes 64-78 and accompanying text.

83. The argument that this construction of the Act would in effect constitute an improper delegation of authority to the states is apparently foreclosed by *United States v. Sharpnack*, 355 U.S. 286 (1958). In *Sharpnack*, the Court held the Assimilative Crimes Act constitutional insofar as it makes applicable to a federal enclave a subsequently enacted criminal law by the state in which the enclave is located. The Court disposed of the improper delegation argument by considering the Act as a deliberate continuing adoption of state laws by Congress. An improper delegation argument with respect to the states is even weaker under the CAA insofar as the state law does not become federalized until approved by the EPA.

84. See *supra* notes 49-50 and accompanying text.

85. *Id.*

86. If the Administrator imposes emission controls more stringent than necessary to assure compliance with the air quality standards, he has exceeded his statutory authority. CURRIE, *supra* note 52, at § 4.13. *Accord Pedersen, supra* note 64, at 1086; Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 HARV. L. REV. 316, 350-51 (1975); *Luneburg, supra* note 64, at 659 n.94. See also *Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1164 n.5 (6th Cir. 1978) (upholding a federal pollution control regulation and commenting

exceeding the statutory authority conferred on the EPA by Congress to the extent it requires compliance with standards stricter than the CAA mandates. Because a challenge to the Administrator's approval of an overly strict implementation plan cannot be made in a section 307(b) review,⁸⁷ the alleged polluter should be allowed to challenge the federal requirements in the enforcement proceeding.⁸⁸ Only to the extent that the plan requires more of the alleged polluter than the CAA demands should the plan be held ineffective.⁸⁹ Except for this limited exception, the plan should be fully applicable. After having considered the extent to which an approved SIP can be enforced as federal law after invalidation on state grounds *assuming* that Congress did not condition the existence of federal law on the validity of the SIP as state law, the preeminent issue now becomes whether such an assumption is well founded.

EXISTENCE OF FEDERAL LAW NOT CONDITIONED ON THE VALIDITY OF STATE LAW

Some writers addressed the issue regarding the necessity of having valid state law contained in the SIP in order to create a SIP that has the status of federal law by looking to section 110(a)(2)(F)⁹⁰ of the CAA.⁹¹ Because this section requires a submitted SIP to provide "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan,"⁹² the argument is that all issues of federal and state law regarding the

that the goal of the regulation is to attain the national standards, not to exceed them), *cert. denied*, 439 U.S. 910 (1978).

87. See *supra* note 50.

88. See *supra* notes 53-54 and accompanying text.

89. Administrative actions taken in violation of statutory authority are of no effect. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 410 (1917). In the case of an overly strict implementation plan, though, the Administrator has not exceeded his authority in approving it because he was required to do so under the statute. See *supra* notes 49-50 and accompanying text. However, when the state law supporting the overly strict plan is invalidated, federal enforcement of the overly strict requirement would be in effect allowing the EPA to exceed the statutory authority that Congress conferred.

90. See *supra* note 49 for text of section 110(a)(2)(F).

91. *Lunenburg & Roselle*, *supra* note 79, at 687-92; Comment, *Illinois v. Celotex Corp.*, 13 ENVTL. L. 279 (1982).

92. Clean Air Act, 42 U.S.C. § 7410(a)(2)(F). To implement the statutory requirement, 40 C.F.R. § 51.11 (1982) provides in part:

(a) Each plan shall show that the State has legal authority to carry out the plan, including authority to:

(1) Adopt emission standards and limitations and any other measures necessary for attainment and maintenance of national standards.

validity of the plan are appropriate for resolution in a section 307(b) review, since if the plan is invalid under state law, the state has no authority to implement it. If no challenge is made within the sixty day time limit or if a timely challenge fails, then these federal and state law issues could not be raised in an enforcement proceeding.⁹³

This argument, however, overlooks a major restriction regarding the scope of review in a section 307(b) proceeding. The issue before the court of appeals when reviewing the Administrator's approval is not whether the state law in the plan is valid, but whether the Administrator's approval is arbitrary and capricious regarding the authority the state has to carry out the plan.⁹⁴ Therefore, the failure to challenge the Administrator's approval in a section 307(b) review does not preclude a challenge on state law grounds in an enforcement proceeding. Moreover, nothing in the CAA prevents a state court from invalidating the state law comprising the SIP prior to enforcement.⁹⁵ In cases where these situations occur, the issue that must be decided in the enforcement action is whether Congress conditioned the existence of the federal law on the validity of the state law underlying the plan.

Nowhere in the CAA does Congress expressly indicate that the creation of federal law through the Administrator's approval of an implementation plan depends upon the validity of the state law comprising the plan.⁹⁶ Thus, the consequences of such a restriction on the

(2) Enforce applicable laws, regulations, and standards
and seek injunctive relief.

Because of these requirements, appellate courts in section 307(b) reviews have considered whether the state has adequate legal authority to implement the plan. *See, e.g.,* Ohio Env'tl. Council v. EPA, 593 F.2d 24 (6th Cir. 1979) (considering whether appropriate state procedures were followed); NRDC v. EPA, 483 F.2d 690 (8th Cir. 1973) (considering whether state law provides adequate procedures for reviewing new sources); NRDC v. EPA, 478 F.2d 875 (1st Cir. 1973) (considering whether the state has legal authority to compel public disclosure of emission data). While this type of review may serve to identify some plans that are inadequate under state law and thus help to prevent the problem faced by the seventh circuit in *Sierra Club*, it does not dispose of the issue regarding the enforceability of an approved plan subsequently held invalid on state grounds. *See infra* note 94 and accompanying text.

93. *See supra* notes 53-54 and accompanying text.

94. Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Lunenburg, supra* note 34, at 407 n.52.

95. *See Lunenburg & Roselle, supra* note 79, at 691.

96. The pertinent provisions of the CAA dealing with the creation of federal law through the Administrator's approval are sections 110(a)(2) and (d). *See supra* notes 49, 52 and accompanying text. The Administrator's approval is not conditioned upon the SIP's validity as state law. *See supra* notes 92-94 and accompanying text.

existence of federal law must be examined in light of the CAA and its legislative history to determine whether a congressional intention to impose such a restriction can be inferred.⁹⁷

If the existence of federal law depends on the validity of state law, then when an approved SIP is invalidated on state grounds, there are no enforceable requirements remaining. This invalidation may occur years after the Administrator's approval.⁹⁸ The ultimate effect of this invalidation would be to give an unfair competitive advantage to the polluter who did nothing and violated the plan while imposing a corresponding detriment on those who relied upon the plan and satisfied its requirements.⁹⁹ Not only would this result be unfair, but it could conceivably discourage polluters from trying to comply with the CAA because litigation, even with its inherent risks, may offer a comparative advantage over the costs of compliance.¹⁰⁰ This fundamental unfairness and its consequential discouragement counsel against a congressional limitation on the federal law.¹⁰¹

97. When construing a statute, the appropriate method ". . . is to look to the 'common sense' of the statute or regulation, to its purpose, to the practical consequences of the suggested interpretations, and to the agency's own interpretation for what light each inquiry might shed." New York State Comm'n on Cable Television v. Federal Communications Comm'n, 571 F.2d 95, 98 (2d Cir. 1978).

98. See, e.g., Commonwealth Edison Co. v. Pollution Control Bd., 25 Ill. App. 3d 271, 323 N.E.2d 84 (1st Dist. 1974) (invalidating a pollution control rule two years after adoption), *rev'd on other grounds*, 62 Ill. 2d 494, 343 N.E.2d 459 (1976); Indiana Env'tl. Management Bd. v. Indiana-Kentucky Elec. Corp., 181 Ind. App. 570, 393 N.E.2d 213 (2d Dist. 1979) (affirming the invalidation of a pollution control regulation adopted in 1972).

99. One of the reasons that Congress included in the CAA section 307(b), which restricts review of the Administrator's actions to the courts of appeal within a sixty day period following the action, was to prevent artificial competitive advantages that would result if district courts in a state gave differing decisions regarding the validity of the Agency's action. See *Lunenburg & Roselle*, *supra* note 79, at 675. Because Congress was concerned with preventing artificial competitive advantages, it seems unlikely that Congress would have intended the states to have the ability to create similar competitive advantages by invalidating a state plan years after its adoption.

100. Without the section 307(b) restriction on judicial review of the Administrator's actions, see *supra* notes 53-54 and accompanying text, "many polluters would be encouraged to wait until federal or state enforcement was initiated or imminent and then attack the validity of the applicable regulations on substantive and/or procedural grounds." *Lunenburg & Roselle*, *supra* note 79, at 675. Identically, polluters would be encouraged to delay compliance and challenge the SIP just prior to enforcement if invalidation of the SIP on state grounds precludes enforcement.

101. Cf. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). In *International Harvester*, the decision made by the Administrator of the EPA to deny petitioners' applications for a one-year suspension of 1975 emission standards for light-duty vehicles was challenged. *Id.* at 622. In holding that the case must be

Another factor to consider in trying to determine the congressional intent is the effect that such a limitation of federal law would have on the EPA.¹⁰² In the context of an approved SIP subsequently invalidated on state grounds, the state would be given the first opportunity to replace the plan. If the state failed to do so, the Administrator would be obligated to promulgate a plan for the state.¹⁰³ Considering the fact that the original purpose in allowing the states to adopt their own plans was to permit the accommodation of local concerns¹⁰⁴ and the fact that a viable plan is available for use by the Administrator as a model, a high probability exists that a plan promulgated by the Administrator would closely resemble or be identical to the original plan. The irony of the situation is that, with the possible exception of some additional procedures,¹⁰⁵ the Administrator would be required to send the plan through the same administrative

remanded for further proceedings, the court, at least in part, relied upon the competitive disadvantages that might fall upon vehicle manufacturers that had accomplished the most toward meeting the standards if the standards were made less stringent just prior to their applicability in order to accommodate the manufacturers that had not made similar accomplishments. *Id.* at 637-38.

102. *See supra* note 97.

103. This is the solution advocated by the seventh circuit in *Sierra Club* for the problem of an approved plan subsequently invalidated on state grounds. *Sierra Club*, 716 F.2d at 1153-54. The court relied upon section 110(c)(1) of the CAA which provides:

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) 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

(C) 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.

The seventh circuit felt section 110(c)(1)(A) was applicable. The difficulty with this reasoning is the fact that the state submitted a plan which met the requirements of section 110; otherwise it would not have been approved by the Administrator and sustained in a section 307(b) review. *Cf. Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839 (7th Cir. 1975).

104. *See supra* note 37.

105. The Clean Air Act § 307(d), 42 U.S.C. § 7607(d) provides specific procedures for certain agency action, including the promulgation or revision of an implementation plan. This section explicitly provides that sections 553 through 557 (informal rulemaking and adjudication procedures) and section 706 (judicial review) of the APA shall

procedures used in the initial approval process to resurrect even the identical plan. Although an implementation plan would result from this process, the plan would be obtained at the expense of an unnecessary delay in enforcing air pollution controls and at the expense of an unjustifiable use of administrative time and resources.¹⁰⁶

A third factor that must be taken into account in this search for congressional intent is the interpretation the EPA has given to the Act.¹⁰⁷ Since Congress has placed the responsibility for enforcing the Act on the EPA, the Agency's determinations on basic questions of administration have traditionally been accorded great deference by the federal courts unless clearly erroneous.¹⁰⁸ Even though the EPA has not retained its original position,¹⁰⁹ the Agency now appears to conclude that an approved SIP subsequently invalidated on state grounds remains fully enforceable unless the state or EPA revises it in accord with the process set forth in the CAA.¹¹⁰ This interpretation is not clearly erroneous; it is both reasonable and consistent with

not apply to the agency actions delineated in section 307(d) unless expressly provided in section 307(d). *Id.* § 307(d)(1). Section 307(d), however, does not apply to the approval or disapproval of state implementation plans. *See* H.R. REP. NO. 95-564, 95th Cong., 1st Sess. 177, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1502, 1558.

106. Comment, *supra* note 91, at 283-84.

107. *See supra* note 97.

108. *Ohio Env'tl. Council v. EPA*, 593 F.2d 24, 31 (6th Cir. 1979) (relying on *Train*). In *Train*, the Supreme Court was asked to decide whether a state could grant individual variances from generally applicable plan provisions under the revision authority of section 110(a)(3). The EPA took the position that a state was permitted to grant such variances as long as the variance does not cause the plan as a whole to fail to comply with the general requirements for an original plan under section 110(a)(2). The Court held that the Agency's interpretation of the Act was sufficiently reasonable that it should have been accepted by the reviewing courts. *Train*, 421 U.S. at 75. The Court also indicated that the revisions are not effective until approved by both the state and the Agency. *Id.* at 92. *See also* *Chevron, U.S.A., Inc. v. NRDC*, 104 S. Ct. 2778, 2793-94 (1984) (holding in accordance with EPA's permissible construction of the statute); *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) ("We have previously accorded great deference to the Administrator's construction of the Clean Air Act.").

109. The original EPA position was as follows:

As the EPA concedes, if "part of a state implementation plan is held invalid by a state court, the state would have to revise that part. Should the state fail to do so, the Administrator must propose and promulgate a revision In either case, a hearing, or a least an opportunity for a hearing, is a prerequisite to adoption of the new regulation."

Brief for Respondents, *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 847 (7th Cir. 1975).

The fact that the EPA changes its position from time to time does not lead to the conclusion that no deference is to be accorded to the Agency's present position. *Chevron*, 104 S. Ct. at 2792.

110. After the Illinois courts invalidated a pollution control rule in 1976 in

the statute,¹¹¹ its history,¹¹² and its objectives.¹¹³ Thus, the interpretation is entitled to great deference by the courts.

Finally, the most important consideration in attempting to ascertain Congress' intention is the effect that a federal law's dependency on valid state law would have on the effectiveness of the CAA.¹¹⁴ The overriding congressional purpose for enacting the CAA was to ensure that the health and welfare of the public would be protected.¹¹⁵ If the existence of federal law is conditioned on the validity of the state law, the congressional purpose would be partially undermined by the delay and unfairness that would result.¹¹⁶ However, even more devastating to the congressional purpose is the ability of the states to completely undermine the CAA if they wished to do so.¹¹⁷ A state could accomplish this by submitting an implementation plan which appears on its face to be valid under the existing state law, and then later, prior to enforcement, holding the plan invalid because of some procedural or substantive technicality. When told by the EPA to submit a new plan or revise the invalid one, the state could begin the same process anew.¹¹⁸ Neither the EPA nor the citizens of a state would

Commonwealth Edison Co. v. Pollution Control Bd., 25 Ill. App. 3d 271, 323 N.E.2d 84 (1st Dist. 1974), the Regional Administrator issued a Notice of Deficiency which expressly stated that "all of the current applicable implementation plan remains in effect until the plan revision is submitted by the state to the EPA and is approved by EPA or until EPA promulgates substitutes or additional regulations." 41 Fed. Reg. 32,304 (Aug. 2, 1976). When the reissued rule was invalidated again in *Ashland Chem. Co. v. Pollution Control Bd.*, 64 Ill. App. 3d 169, 381 N.E.2d 56 (3d Dist. 1978), the Regional Administrator issued a second Notice of Deficiency requesting another revision. 44 Fed. Reg. 40,724 (July 12, 1979). A request for a revision implies that the approved plan is still in effect because revisions do not alter the underlying plan until approved by the EPA. See *supra* note 108. While the second notice seemed to imply that the plan actually lacked certain enforceable provisions, it can be read as simply offering the state the opportunity to revise the plan with respect to its status as federal law.

111. See *supra* notes 73-78 and accompanying text.

112. See *supra* notes 10-41 and accompanying text.

113. See *infra* notes 115-20 and accompanying text.

114. "As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1971).

115. See *supra* note 41.

116. See *supra* notes 98-101 and accompanying text.

117. See *supra* note 34 and accompanying text.

118. This undermining of the Act could be accomplished because the Administrator is not allowed to promulgate a plan or revision for a state if the state adopts and submits a plan which the Administrator finds to be in accordance with section 110 prior to the Agency's promulgation. Clean Air Act § 110(c)(1), 42 U.S.C. § 7410(c)(1).

ever be entirely sure the implementation plan was effectively in place.¹¹⁹ To conclude that Congress intended that the enforceability of a federally approved implementation plan rested upon the validity of state law leads one to the absurd result that a state could undermine the overriding congressional purpose of the CAA. Moreover, this result is out of harmony with the development of federal authority in the field of air pollution control and the corresponding congressional intention to eliminate the states' discretion in determining whether air pollution would be controlled.¹²⁰ Because of the fundamental unfairness, the unnecessary delay and dissipation of administrative resources, the inconsistency with the Agency's construction of the statute, and the potential undermining of the CAA, one cannot fairly infer a congressional intention that an approved plan's status as federal law depends on the validity of the underlying state law.

CONCLUSION

A state submitted implementation plan becomes enforceable as federal law upon approval by the Administrator of the EPA. A subsequent invalidation on state grounds should not be held to preclude enforcement of the plan as federal law, except to the extent the plan demands more than the CAA itself actually requires. If enforcement is denied on the grounds that the federal law depends upon valid state law, then many diverse and counter-productive results occur. One extremely unsatisfactory result is the potential for a state to undermine the CAA. Admittedly, the CAA has its shortcomings,¹²¹ but unless and until Congress amends the Act to clarify it, the courts must interpret it in a manner which enhances its effectiveness rather than in a way which undermines its existence.

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119. This argument was presented to the seventh circuit in *Sierra Club*. Acknowledging that the decision was "in some ways a setback to environmental protection," the court did not agree that it would be years before Indiana had a workable implementation plan. *Sierra Club*, 716 F.2d at 1154 (suggesting that the EPA propose and promulgate the invalidated regulation after notice, comment, and hearing). The court apparently did not consider the possibility that a state could undermine the CAA because of the court's ruling. See *supra* notes 93-94 and accompanying text.

120. See *supra* notes 10-41 and accompanying text. See also CURRIE, *supra* note 52, at § 8.10 (when referring to *Commonwealth Edison*, Currie states, "One district court has held with considerable justification that a plan requirement may be enforced under the citizen suit provision of § 304 even after a state court has held it invalid as a matter of state law."); Pedersen, *supra* note 64, at 1084 ("The position that the SIP remains federally binding is probably the only one that is consistent with a rapid national effort to place major new controls on air pollution through SIPs.").

121. See, e.g., Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740 (1983); Pederson, *supra* note 64.