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## Refining the Combustion Mixture: Environmental Federalism and Oxygenated Gasoline in Exxon Mobil Corp. v. EPA

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REFINING THE COMBUSTION MIXTURE: ENVIRONMENTAL  
FEDERALISM AND OXYGENATED GASOLINE IN  
*EXXON MOBIL CORP. v. EPA*

I. INTRODUCTION

“A remarkable, and largely unnoticed, change in environmental protection has occurred over the past five to [ten] years. The states have become the primary environmental protection agencies across the nation.”<sup>1</sup>

Over the past decade, courts have grappled with the issue of whether states may preempt a federal environmental regulatory minimum with their own more rigorous standard. The United States Court of Appeals for the Ninth Circuit in *Exxon Mobil Corp. v. EPA*<sup>2</sup> said they could, at least concerning the minimum oxygen content of commercial fuel.<sup>3</sup> Despite ambiguity in the text of the Clean Air Act<sup>4</sup> (CAA), the Ninth Circuit marshaled legislative history, deference to the EPA’s Final Rule, and overlapping sections of CAA to uphold a broad reading of the statute, much to the dismay of fuel marketers.<sup>5</sup>

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1. R. Steven Brown, *ECOS: The States Protect the Environment* (visited Oct. 10, 2000) <<http://www.sso.org/ecos/publications/statesarticle.htm>>. For a discussion of the new “cooperative federalism,” see *infra* note 10 and notes 201-20 and accompanying text.

2. 217 F.3d 1246 (9th Cir. 2000).

3. See *Exxon Mobil Corp. v. United States EPA*, 217 F.3d 1246, 1256 (9th Cir. 2000) (concluding that Clark County, Nevada’s requirement that gasoline contains at least 3.5% oxygen by weight does not conflict with or is not preempted by Clean Air Act, codified at 42 U.S.C. §§ 7401-7671(q) (1994) [hereinafter CAA]).

4. See 42 U.S.C. §§ 7401-7671q (mandating that states reduce CO emissions to meet National Ambient Air Quality Standards) [hereinafter NAAQS].

5. See *Exxon*, 217 F.3d at 1256 (concluding that preemption would undermine CAA’s purposes because states may need to raise oxygenate level in gasoline to meet NAAQS). Fuel marketers encountered difficulties using fuel additives such as MTBE, because MTBE creates noxious odors when it invades water supplies and is linked to various health and environmental problems. See Alan Bock, *California Gas Lobby, Environmental Groups Grapple With Fuel Additives*, THE ORANGE COUNTY REGISTER (California), February 7, 2001, available at 2001 WL 12166798 (noting implications of MTBE in health and environmental problems). The problem, however, is that the most likely alternative, ethanol, is highly cost-inefficient. See *Quick Germ Technology May Decrease Future Gas Prices*, THE PANTAGRAPH (Bloomington, IL), February 5, 2001, at 5 (noting that current rise in gasoline prices is believed due to rising production costs incurred through use of ethanol fuel additive). Furthermore, in addition to incurring increased production costs for the inclusion of fuel additives, the most recent data from the American Petroleum Institute suggests a dramatic nationwide drop in the demand for gasoline. See *MTBE Prices Sink Back On Slight Demand, Returning Output*, OXY-FUEL NEWS, Febru-

In the face of federally-prescribed oxygenate minimums for gasoline, the Ninth Circuit held that CAA actually assigns primary responsibility for meeting National Ambient Air Quality Standards (NAAQS) to the states.<sup>6</sup> This significant flexibility is tempered only by EPA approval of a proposed revision to a State Implementation Plan (SIP).<sup>7</sup> In the wake of recent Supreme Court decisions such as *New York v. United States*<sup>8</sup> and *Printz v. United States*,<sup>9</sup> the Ninth Circuit balanced federal will against state flexibility and promoted “co-operative federalism.”<sup>10</sup> This decision evidenced a practical assessment of the tenuous compromise of environmental regulatory

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ary 5, 2001, available at 2001 WL 9809906 (noting that national gas stocks have climbed 8.14 million barrels over last year and that demand is at its lowest rate since 1997). The battle between ethanol and MTBE manifested itself politically as a struggle between The Renewable Fuels Association, an ethanol lobbyist, and the state of California, which applied to the new EPA Administrator for a waiver of EPA’s mandate that motor fuels have oxygenates. See Bock, 2001 WL 12166798, at \*1 (discussing current political climate concerning ethanol and MTBE in California). The Ninth Circuit’s holding in *Exxon*, which allows states to select higher oxygenate minimums than the EPA minimums of which California already complains, will likely further increase production costs for fuel marketers. See *infra* notes 219-24 and accompanying text.

6. See *Exxon*, 217 F.3d at 1256 (discussing assignment of NAAQS responsibilities directly to states).

7. See 42 U.S.C. § 7545(m)(1) (discussing plan revisions for CO non-attainment areas).

8. 505 U.S. 144 (1992).

9. 521 U.S. 898 (1997).

10. See Frona M. Powell, *Property Rights, Federalism, and the Endangered Species Act*, 29 REAL EST. L.J. 13, 14 (2000) (discussing “cooperative federalism,” whereby federal government regulations are implemented by states). “Cooperative federalism” also impacts other areas of federal regulation. For example, the Hate Crimes Prevention Act of 1999, which included Senator Edward M. Kennedy’s Hate Crimes Proposal, cites as its key strategy “a greater emphasis on the indirect impact of federal cooperation in state enforcement” manifested by the proposal’s “intention to bring only an occasional federal prosecution chosen from thousands of cases. . . .” See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, Or Tool For Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1265 (2000) (discussing cooperative federalism in context of Kennedy amendment to Hate Crimes Act of 1999). The National Association of Attorneys General [hereinafter the Association] also embraced cooperative federalist strategies in its adoption of a resolution to regulate online pharmaceutical companies. See Sean P. Haney, *Pharmaceutical Dispensing in the “Wild West”: Advancing Health Care and Protecting Consumers Through the Regulation of Online Pharmacies*, 42 WM. & MARY L. REV. 575, 605 (2000) (discussing Association’s attempts to reduce duplicative state lawsuits against identical defendants via cooperative federalist efforts). In particular, the Association stated that it intends for states remain the primary enforcers of laws concerning the health of their citizens, and that the federal government provide nationwide injunctive relief. See *id.*; see also Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 422 (2000) (promoting inter-jurisdictional certification on grounds of benefits of cooperative federalism in interests of judicial economy and efficiency); Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819 (2000) (discussing cooperative federalism in telecommunications regulation).

power between national federal policy and local environmental concerns.

## II. FACTS

Clark County, Nevada is a serious non-attainment area for carbon monoxide (CO).<sup>11</sup> Winter weather conditions there trap CO emissions in the Las Vegas Valley and further increase the CO air concentration.<sup>12</sup> CAA specifies that each state with a non-attainment area for CO and whose CO concentration is greater than 9.5 parts per million (ppm) shall submit to the EPA Administrator (the Administrator) a SIP revision regarding oxygenated gasoline.<sup>13</sup> The Las Vegas Valley exhibited a CO concentration of 12.7 ppm as of November 15, 1990.<sup>14</sup>

In September of 1997, Clark County drafted an amendment to its SIP that required 3.5 percent minimum oxygen content for wintertime gasoline sold between October 1 and March 31.<sup>15</sup> EPA issued a Final Rule in June of 1999 approving the Clark County increase.<sup>16</sup> Exxon Mobil Corporation and Chevron U.S.A., Inc. initiated an action to seek review of EPA's Final Rule.<sup>17</sup> Exxon claimed that the 1990 Amendments to CAA provided a nationwide minimum oxygenated fuel content of 2.7 percent for non-attainment areas and that CAA does not permit states to select a higher

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11. See *Exxon*, 217 F.3d at 1248 (stating that Clark County, Nevada is a serious non-attainment area for CO). For a description of a "non-attainment" area, see *infra* note 45.

12. See *id.* (explaining that winter weather inversions trap CO emissions in Las Vegas Valley). An "inversion" is a departure from the typical thermocline in the vertical column of air at a given location. See *Weather.com Glossary: "Inversion"* (visited Sept. 17, 2000) <[http://www.weather.com/glossary/wx\\_glossary\\_i.html](http://www.weather.com/glossary/wx_glossary_i.html)> (discussing nature of weather inversion).

This phenomenon can have potentially lethal consequences; in 1948, a four-day weather inversion killed eighteen people in Donora, Pennsylvania when it trapped the choking emissions from the Pittsburgh steel mills over the town. See Lynn Scarlett, *Reason Public Policy Institute: "Green Guilt" Only Makes Things Worse* (visited Sept. 30, 2000) <<http://www.rppi.org/opeds/gguilt.html>>.

13. See 42 U.S.C. § 7545(m)(1) (stating method of revision of State Implementation Plans [hereinafter SIP] for CO non-attainment areas that have higher concentration of CO than 9.5 parts per million).

14. See *Environmental Protection Agency: 40 CFR Ch. 1* (last modified Jul. 1, 1998) <<http://www.epa.gov/epacr40/chapt-1.info/subch-C/40P0081/40P0081C/40P81329.pdf>> (displaying chart of Nevada pollution concentrations, including CO).

15. See *Exxon*, 217 F.3d at 1248 (noting Clark County's 3.5% proposed amendment to its SIP in September 1997).

16. See *id.* (discussing EPA approval of Clark County SIP amendment).

17. See *id.* (noting basis for plaintiff's action).

minimum.<sup>18</sup> The Ninth Circuit affirmed the Final Rule, holding that EPA's approval of Nevada's revised SIP does not conflict with and is not preempted by any provision of CAA.<sup>19</sup>

### III. BACKGROUND

#### A. The Problem of CO Emissions

CO is an invisible, odorless, and extremely poisonous gas.<sup>20</sup> When a human inhales air containing as little as 0.1 percent CO by volume, CO replaces the oxygen in the bloodstream, resulting in a lethal oxygen deficiency throughout the body.<sup>21</sup> Nearly three hundred people die each year from residential exposure to CO generated by combustion appliances.<sup>22</sup>

In the United States, two-thirds of CO emissions into the atmosphere originate from anthropogenic sources, specifically transportation sources, such as motor vehicle exhaust.<sup>23</sup> In cities, motor vehicle exhaust can contribute as much as 95 percent of all CO

18. *See id.* at 1249 (stating petitioner's claim that statute does not authorize states to choose higher minimums).

19. *See id.* at 1256 (discussing Ninth Circuit's affirmation of EPA Final Rule regarding Nevada's revised SIP that accepts Clark County's heightened oxygenated gasoline content minimum).

20. *See* Larry Biland, *United States Environmental Protection Agency Air Programs: Finding On Las Vegas CO Plan* (last modified August 31, 1999) <<http://www.epa.gov/region09/air/vegasco/fact.html>> (discussing physical properties of CO gas).

21. *See id.* (discussing physiological consequences of inhaling air containing CO).

22. *See* THE AMERICAN LUNG ASSOCIATION: FACT SHEET: CARBON MONOXIDE (last modified Sept. 1999) <[http://www.lungusa.org/air/carbon\\_factsheet99.html](http://www.lungusa.org/air/carbon_factsheet99.html)> (discussing number of deaths and injuries each year resulting from CO poisoning). The health threat is most serious for people with cardiovascular disease. *See* 1995 *Air Quality: Status and Trends* (visited February 9, 2001) <<http://www.epa.gov/oar/aqtrnd95/co.html>> (discussing health and environmental effects of CO). Exposure to abnormal CO levels induces visual impairment, reduced manual dexterity, and difficulty in performing complex tasks. *See id.* (discussing external symptoms of CO poisoning).

23. *See* THE AMERICAN LUNG ASSOCIATION, *supra* note 22, at <[http://www.lungusa.org/air/carbon\\_factsheet99.html](http://www.lungusa.org/air/carbon_factsheet99.html)> (noting that motor vehicles account for two-thirds of nation's CO emissions); *see also* SCOTT J. CALLAN & JANET M. THOMAS, *ENVIRONMENTAL ECONOMICS & MANAGEMENT: THEORY, POLICY, AND APPLICATIONS* 293 (Gary Nelson, ed., Times Mirror Higher Education Group 1996) (discussing CO as anthropogenic pollutant). "Anthropogenic" means "caused by human activity." *See id.* Transportation sources in the United States contribute 81% of all CO emissions nationwide. *See* EPA: 1995 NATIONAL AIR QUALITY STATUS AND TRENDS: CARBON MONOXIDE (last modified Dec. 12, 1996) <<http://www.epa.gov/oar/aqtrnd95/co.html>> (discussing highway motor vehicle CO emissions and their contribution to national CO pollution).

emissions.<sup>24</sup> Gasoline that burns incompletely within the engine releases CO directly into the atmosphere via the tailpipe.<sup>25</sup> In response to this problem, Congress delegated authority to EPA under CAA to create the NAAQS Program, which regulates CO, and other pollutants, to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.”<sup>26</sup>

## B. The Statutory Scheme Regarding Oxygenated Fuel

Before 1970, most federal air pollution legislation consisted of directives for increased federal research and impractical protocols for settling interstate pollution problems.<sup>27</sup> After 1970, Congress passed a series of comprehensive pollution control acts regulating the environment on a broad, national level.<sup>28</sup> The 1970 CAA amendments usurped significant authority to regulate air pollution from the states and delivered it to the federal government but retained a substantial state role.<sup>29</sup> These more stringent amendments firmly established the federal government as the principal force in

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24. See EPA, *supra* note 23, at <<http://www.epa.gov/oar/aqtrnd95/co.html>> (discussing inner city motor vehicle CO emissions).

25. See EPA: AUTOMOBILES AND CARBON MONOXIDE (last modified Jul. 20, 1998) <<http://www.epa.gov/oms/03-co.htm>> (discussing source of CO within motor vehicles).

26. 42 U.S.C. § 7401(b)(1) (outlining CAA purpose and objectives). Under the NAAQS Program, all new and existing sources of air pollution are prohibited from emitting pollution that exceeds ambient air quality levels designated to protect public health and welfare. The program is implemented through source specific emissions limits detailed in SIPs. The program stipulates that newer pollutant sources suffer more stringent control technology and permit requirements. As part of CAA’s focus on particular pollution problems, such as inhibited visibility and hazardous conditions, the program concentrates all CAA requirements that apply to a given source of air pollution in a comprehensive operating permit program. See Cindy Johnson, *For Better Or Worse: Alternatives to Jail Time For Environmental Crimes*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, 265, 269 n.30 (2000) (citing THOMAS L. ADAMS ET. AL., ENVIRONMENTAL LAW HANDBOOK §2.1, at 72 (Thomas F.P. Sullivan ed., 14th ed. 1997)).

27. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1191 (1995) (discussing history of federal air pollution regulation before 1970).

28. See *e.g.*, 42 U.S.C. §§ 4321-47 (1994) (National Environmental Policy Act, 1969), 42 U.S.C. §§ 7401-7661f (Clean Air Act, 1970), 33 U.S.C. §§ 1251-1385 (1994) (Clean Water Act, 1972), 16 U.S.C. §§ 1531-44 (1994) (Endangered Species Act, 1973), 42 U.S.C. §§ 300f-300j (1994) (Safe Drinking Water Act), 1974, 7 U.S.C. §§ 136-136y (1994) (Federal Insecticide, Fungicide, and Rodenticide Act, 1975), 42 U.S.C. §§ 6901-92k (1994) (Resource Conservation and Recovery Act, 1976), 15 U.S.C. §§ 2601-71 (1994) (Toxic Substances Control Act, 1976).

29. See Dwyer, *supra* note 27, at 1192 (discussing how 1970 CAA amendments anchored regulatory power in federal authority at expense of states).

air pollution control.<sup>30</sup> In effect, Congress aimed to obtain states' assistance while molding their regulatory plans to execute federal policy.<sup>31</sup>

Current federal air pollution regulation strongly demonstrates that the states' ability to regulate autonomously is significantly diminished.<sup>32</sup> Yet recent Supreme Court federalism decisions are signaling a retreat to an emphasis on state sovereignty.<sup>33</sup> Congressman Staggers, the floor manager for the House version of the 1970 CAA amendments, emphasized the importance of state initiative: "[T]he federal government sets the standards, we tell the states what they must do and what standards they must meet. These standards must be put into effect by the . . . states, and we expect them to have the men to do the actual enforcing."<sup>34</sup> The Supreme Court, however, specifically held in *New York v. United States*<sup>35</sup> that "[S]tates are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government."<sup>36</sup> CAA escapes this federalist snare by limiting its mandate to states that fail to submit a SIP or which submit an inadequate plan; only then are states subject to a

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30. *See id.* (discussing increased stringency of 1970 CAA amendments as establishing dominant federal control).

31. *See id.* at 1193 (stating purpose of complex state roles in 1977 and 1990 CAA amendments was to bend states toward federal will).

32. *See id.* (concluding that current federal air pollution regulation strongly suggests reduced ability of states to regulate autonomously).

33. *See New York v. United States*, 505 U.S. 144, 188 (1992) (voiding portions of Low-Level Radioactive Waste Policy Amendments Act of 1985 that forced states to take liability for low-level radioactive waste generated within State for coercive nature); *see also Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down Brady Handgun Violence Prevention Act for commandeering state police officers for federal purposes); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating Violence Against Women Act because Commerce Clause did not provide Congress with authority to enact civil remedy provisions inasmuch as provision was not regulation of activity that substantially affected interstate commerce); *United States v. Lopez*, 514 U.S. 549, 568 (1995) (voiding Gun-Free Schools Act of 1990 because it neither regulated commercial activity nor contained requirement that possession be connected to interstate commerce).

34. 116 CONG. REC. 19, 204 (1970) (recording comments of Congressman Staggers in support of 1970 CAA amendments and indispensability of state roles in regulating air pollution).

35. 505 U.S. 144 (1992).

36. *New York*, 505 U.S. at 188 (holding that states are not federal administrative agencies or subdivisions).

Federal Implementation Plan (FIP).<sup>37</sup> Still, the SIP is subject to significant federal regulations, specifications, review, and approval.<sup>38</sup>

The 1990 Amendments to CAA increased the quantity and type of sources subject to federal regulation.<sup>39</sup> These amendments greatly expanded the non-attainment provisions with stringent requirements formulated to enforce the NAAQS in highly polluted areas.<sup>40</sup> Regarding the CO emissions problem, Congress enacted sections of CAA that prescribe federal minimums for the oxygen content of retail gasoline.<sup>41</sup> Federal courts recognize that oxygenating fuel reduces CO emissions by converting it into harmless carbon dioxide and water.<sup>42</sup>

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37. See 42 U.S.C. § 7410(c)(1)(A) (1994) (directing that states which fail to submit SIPs shall be subject to Federal Implementation Plans [hereinafter FIPs] of EPA Administrator's promulgation).

38. See Dwyer, *supra* note 27 at 1194 (discussing significant federal role in overseeing SIPs); see also Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation, Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, and Francis S. Blake, General Counsel, Office of General Counsel, to Addressees 2 (on file with author) [hereinafter memorandum] (stating that SIP regulations that deviate from EPA's policy of clearly worded and explicit rules are to be disapproved and promoting close scrutiny of SIP submissions). The memorandum was written to address problems in SIP submissions concerning "vague, poorly defined rules;" it asserted that rules should be "clear as to who must comply and by what date." *Id.* The memorandum also asserted that any provisions, which allow for alternate techniques or any other variations of the normal code must be completely and explicitly defined and must make clear whether specific EPA approval is required. See *id.*

39. See Arnold W. Reitze, *The Legislative History of U.S. Air Pollution Control*, 36 Hous. L. Rev. 679, 730 (Fall 1999) (discussing broadened scope of CAA due to 1990 CAA amendments regarding number and type of sources subject to regulation).

40. See Dwyer, *supra* note 27, at 1194 (stating that 1990 CAA amendments expanded restrictions applicable to non-attainment areas by providing specific requirements to ensure compliance).

41. See 42 U.S.C. § 7545(m)(2) (discussing federal minimums of oxygenated gasoline content for non-attainment areas for CO). The primary aim of the oxygenated fuel requirements in CAA is to reduce CO emissions by adding extra oxygen to the combustion mixture, which achieves a more complete combustion. See William M. Brown, Note, *The Renewable Oxygenate Requirement: A Boon For the Environment Or a Boondoggle For the Ethanol Industry?*, 41 N.Y.L. Sch. L. Rev. 1299, 1305-06 (1997) (discussing purpose of oxygenate fuel additive requirements in CAA). Extra oxygen in the combustion mixture mitigates combustion deficiencies often experienced in cold winter weather. See EPA RULES AND REGULATIONS: APPROVAL AND PROMULGATION OF AIR QUALITY IMPLEMENTATION PLANS; COMMONWEALTH OF VIRGINIA: OXYGENATED GASOLINE PROGRAM, 65 Fed. Reg. 8051, 8052 (2000) (explaining how addition of oxygen to combustion mixture enhances fuel combustion and how fuel combustion is often less efficient in cold weather).

42. See *Chrysler Corp. v. EPA*, 631 F.2d 865, 869 (D.C. Cir. 1980) (discussing ability of oxygen as fuel additive to reduce CO emissions by converting it to carbon dioxide and water).



Many states have enacted statutes that prevent their legislatures from enforcing environmental controls more stringent than federal prescriptions except in cases where the higher standard is necessary for public health or to meet the federal air quality standards.<sup>43</sup> Nevada's air pollution control statute empowers its State Environmental Commission to establish fuel standards for mobile sources of air contaminants that must achieve air quality standards that "protect the health of the residents of the State of Nevada."<sup>44</sup> There is no language that limits the Nevada Commission to the boundaries of the regulations set by the federal government.<sup>45</sup>

The 1990 Amendments also established a symbiotic approach to providing clean air; they maintain federal authority to set standards but assign primary responsibility for meeting those standards to the states.<sup>46</sup> CAA requires each state to adopt and submit to the EPA Administrator a plan that provides for the implementation, maintenance, and enforcement of air quality standards within three years of the promulgation of the NAAQS.<sup>47</sup> Each SIP must include enforceable emission limitations and control measures to meet these standards.<sup>48</sup>

More specific instructions are set forth in section 7545 of CAA for those locations dubbed "non-attainment" areas, because the higher concentrations of CO in these areas significantly threaten national air quality.<sup>49</sup> Section 7545 requires each state with a non-attainment area for CO to submit a plan revision that contains provisions regarding the usage of oxygenated gasoline.<sup>50</sup> Specifically,

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43. See OKLA. STAT. ANN. tit. 27A, § 2-5-114 (West 1994) (empowering Oklahoma to promulgate air pollution regulations more stringent than federal standards only upon determination by Council that more stringent standards are necessary to protect public health or environment); see also R.I. GEN. LAWS § 23-23-5(12) (1993) (prohibiting Rhode Island from adopting emission controls more stringent than federal standards unless it can be shown that they are needed to meet air quality standards).

44. See NEV. REV. STAT. § 445B.210(8) (1997).

45. See *id.*

46. See Reitze, *supra* note 39, at 725 (discussing dualism of 1990 CAA amendments in terms of dividing air pollution control between federal government and states).

47. See 42 U.S.C. § 7410(a)(1) (stating requirements imposed upon states regarding SIPs).

48. See 42 U.S.C. § 7410(a)(2)(A) (discussing elements of SIP, procedures for submission, and provisions for implementing SIP in each state region).

49. See 42 U.S.C. § 7545 (m)(1)(A). A "non-attainment area" describes any area that does not meet the national ambient air quality standard for a specific pollutant. See 42 U.S.C. § 7407(d)(1)(A)(i) (defining term "non-attainment" for the purposes of statute).

50. See 42 U.S.C. § 7545(m)(1)(A) (stating requirements of SIP revisions for CO non-attainment areas).

the plan revision must contain provisions that require essentially all commercial gasoline to contain not less than 2.7 percent oxygen by weight.<sup>51</sup>

### C. The Smog of the Surrounding Case Law

CAA is regarded as the most controversial environmental law ever enacted.<sup>52</sup> Its sheer complexity results in considerable state resistance and compels substantial expenditure in oversight resources and costly litigation.<sup>53</sup> Although the federal circuit courts have confronted several of the complex provisions of CAA, most circuits held, despite differing fact scenarios and case contexts, that states may promulgate stricter pollution control standards than federal law requires.<sup>54</sup>

The Supreme Court set forth standards of statutory interpretation with specific reference to EPA and CAA in *Chevron v. National Resources Defense Council*.<sup>55</sup> The Court constructed a two-part inquiry to determine if an agency's interpretation of a statute is permissible.<sup>56</sup> The threshold question is whether Congress unambiguously expressed its intent in the statute.<sup>57</sup> If the intent is clear, the inquiry ends, and the court must give the congressional intent effect.<sup>58</sup> If a statute is silent or ambiguous concerning a specific issue,

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51. See 42 U.S.C. § 7545(m)(2) (discussing minimum oxygenate fuel requirements for CO non-attainment areas).

52. See Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 617 (opining that CAA is most contentious environmental law ever enacted).

53. See Joshua D. Sarnoff, *The Continuing Imperative (But Only From a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 307 (1997) (discussing regulatory failures under CAA); see also David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1226 (1985) (noting that "[d]elegation can set in motion a protracted game that frustrates statutory goals. . . the [CAA] suggests that government is sometimes less able to cope with delegation than without it").

54. See *infra* notes 69-83 and accompanying text.

55. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-46 (1984) (setting forth standards for agency interpretations of statutory scheme that it administers).

56. See *id.* (directing judicial inquiry into agencies' statutory interpretation through question of congressional intent and reasonableness of agencies' interpretation).

57. See *id.* at 842 (describing preliminary question of clear congressional intent when interpreting agency's construction of statute).

58. See *id.* at 842-43 (holding that courts must give effect to congressional intent if it is clear and unambiguous).

courts must decide whether the agency's interpretation is a reasonable construction of the statute.<sup>59</sup>

Furthermore, the Court recognized that courts should afford agencies significant weight and deference regarding their interpretations of statutory schemes they are entrusted to administer.<sup>60</sup> In *Chevron*, the Court held that the Administrator's interpretation of the term "stationary source" under CAA was permissible because it was a reasonable construction of competing interests and is entitled to deference.<sup>61</sup> Specifically, the regulatory scheme is complex and EPA considered the matter in detail, and the decision involves reconciling conflicting policies.<sup>62</sup>

The Supreme Court's holdings in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*<sup>63</sup> and in *Medtronic, Inc. v. Lohr*<sup>64</sup> provide for further judicial deference in the realm of state police powers.<sup>65</sup> In *Travelers*, the Court held that in analyzing preemption claims, courts must begin with the assumption that Congress does not intend to supplant state law.<sup>66</sup> Furthermore, the

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59. *See id.* at 843 (holding that in cases of statutory ambiguity courts must decide whether agency's interpretation is permissible). Moreover, the *Chevron* Court held that if Congress explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to generate a specific provision via regulation, because the power of administering a congressionally created program necessarily requires rule and policy formulation to fill these gaps. *See id.* These regulations are to be given controlling weight unless they are arbitrary, capricious, or patently contrary to the statute. *See id.* at 844. The *Chevron* Court also held that if a legislative delegation to an agency appears implicit rather than explicit, a court may not supplant a reasonable construction of the statute with its own interpretation. *See id.*

60. *See Chevron*, 467 U.S. at 844 (affording executive agencies considerable weight and deference concerning their interpretations of statutes they were assigned to administer). The Court in particular noted that this type of deference is especially employed when the interpretation of the statute involves reconciling conflicting policies where extraordinary circumstantial knowledge of the matters involved is required. *See id.* These interpretations should not be overturned unless it appears from the statute or its legislative history that Congress would not have supported the interpretation. *See id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)); *see also United States v. Louisiana Pac. Corp.*, 908 F. Supp. 835, 843 (D. Colo. 1995) (upholding more stringent pollution monitoring standards adopted in Colorado's SIP because Administrator approved version of Colorado's SIP that included these measures).

61. *See Chevron*, 467 U.S. at 865 (upholding EPA Administrator construction of "stationary source" because it involved reconciliation of conflicting policies and competing interests in patently technical and complex context).

62. *See id.*

63. 514 U.S. 645 (1995).

64. 518 U.S. 470 (1996).

65. *See New York State Conf. of Blue Cross & Blue Shield v. Traveler's Ins. Co.*, 514 U.S. 645, 654-55 (1995); *Medtronic Inc., v. Lohr*, 518 U.S. 470, 475 (1996).

66. *See Travelers*, 514 U.S. at 654 (holding that preemption analysis begins with assumption that Congress did not intend to supplant state law).

*Travelers* Court held that in cases where federal law is alleged to bar state action in fields of traditional state regulation, the Court has assumed that the historic state police powers are not superseded by federal acts unless that was the “clear and manifest purpose of Congress.”<sup>67</sup> The *Medtronic* Court similarly held that “States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons,” because the health and safety of a state’s citizens are “primarily, and historically, . . . matter[s] of local concern.”<sup>68</sup>

Most of the federal circuits construe CAA’s provisions and the role of the Administrator to permit states to select higher minimum standards.<sup>69</sup> The Court of Appeals for the Sixth Circuit in *Her Majesty the Queen In Right of the Province of Ontario v. City of Detroit*<sup>70</sup> held that CAA preempts state law only to the extent that state law is not as strict as the emissions limitations established in the federal statute.<sup>71</sup> Specifically, the Sixth Circuit expressly stated that CAA adopts only minimum air quality levels, and that “states are free to adopt more stringent protections.”<sup>72</sup> The Sixth Circuit stated in

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67. See *id.* at 655 (holding that areas of traditional state regulation are not preempted by federal law unless congressional intent is manifest and clear).

68. *Medtronic*, 518 U.S. at 475.

69. See *infra* notes 70-83 and accompanying text.

70. 874 F.2d 332 (6th Cir. 1989).

71. See *id.* at 342 (holding that CAA preempts state law only if state emissions limitations are not as strict as federal regulations).

72. See *id.* at 343 (holding that CAA allows states to adopt more stringent environmental regulatory protections than those prescribed in CAA). The *Ontario* court relied on 42 U.S.C. § 7416, which provides:

Nothing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting control or abatement of air pollution; except that . . . such State . . . may not adopt or enforce any emission standard or limitation which is less stringent than the standard under [its SIP] or [Section 7411 or Section 7412].  
42 U.S.C. § 7416 (1989).

The current version of section 7416 excepts the provisions of sections 7543 and 7545(c)(4). See 42 U.S.C. § 7416. Section 7543 precludes states from adopting emissions standards relating to new motor vehicles and nonroad vehicles. See 42 U.S.C. § 7543. Section 7545(c)(4) precludes states from adopting fuel additive requirements if the Administrator finds that no such control is necessary or if the Administrator has already prescribed a control. Yet § 7545 also states at (c)(4)(C) that “[a] State may prescribe and enforce, for the purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle . . . if an applicable [SIP] so provides.” 42 U.S.C. § 7545(c)(4)(C). But see *United States v. Ford Motor Company*, 814 F.2d 1099, 1102 (6th Cir. 1987) (noting that standards for purification of ambient air supply cannot be set along state boundaries). The Sixth Circuit specifically noted that if state control of ambient air emissions were final, industries characteristically contributing heavily to air pollution would summarily relocate to states with the most lenient pure air standards, severely skewing inter-state industrial competition. See *id.*

*Southeastern Oakland County Resource Recovery Auth. v. City of Madison Heights*<sup>73</sup> that “nowhere does the CAA affirmatively grant local governments the independent power to regulate air pollution. Rather, a local legislature’s power to regulate in this area is subject . . . to the minimum standards of the CAA . . . .”<sup>74</sup> The Supreme Court concluded in *Union Electric Company v. EPA*<sup>75</sup> that states may submit implementation plans more stringent than federal requirements.<sup>76</sup> The *Union* Court also held that the Administrator must approve SIPs if they meet minimum CAA requirements.<sup>77</sup>

The Court of Appeals for the Third Circuit held in *St. Joe Minerals Corp. v. EPA*<sup>78</sup> that states may enforce stricter pollution controls than those in the EPA-approved SIP, so long as the standards are not less restrictive than an applicable federal implementation plan.<sup>79</sup> The Court of Appeals for the Seventh Circuit held in *Indiana & Michigan Electric Company v. EPA*<sup>80</sup> that the Administrator has an obligation to insure that SIPs meet federal minimums only; the fact that an SIP delineates requirements that are more stringent than federal mandates does not automatically warrant the plan’s disapproval.<sup>81</sup> The Seventh Circuit adopted the Court of Appeals for the Fourth Circuit’s holding in *Appalachian Power Co. v. EPA*,<sup>82</sup> which declared that “states . . . could be as tough on polluters as they wished, but that no state could allow industry to exceed federal standards . . . .”<sup>83</sup>

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73. 5 F.3d 166 (6th Cir. 1993).

74. *See id.* at 169 (holding that all state legislation regulating air pollution is subject to minimum standards of CAA). The Sixth Circuit also noted in *Ohio Envtl. Council v. United States District Court* that “[the CAA] clearly envisions the possibility of continuous adjustments to the basic plan by the State and the EPA.” *Ohio Envtl. Council v. United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977).

75. 427 U.S. 246 (1976).

76. *See id.* at 265 (concluding that states may submit SIPs with more stringent pollution requirements than federal mandates). The *Union* Court used this conclusion to hold that CAA provides no basis for an Administrator “ever to reject a [SIP] on the ground that it is economically or technologically infeasible.” *Id.*

77. *See id.* (concluding that EPA Administrator must approve SIPs that meet minimum requirements under CAA).

78. 508 F.2d 743 (3d Cir. 1975), *vacated* on other grounds, 425 U.S. 987 (1976).

79. *See id.* at 748 (holding that states may enforce stricter pollution controls than those included in their SIPs).

80. 509 F.2d 839 (7th Cir. 1975).

81. *See id.* at 844 (holding that Administrator cannot disapprove SIP because it provides for requirements exceeding federal minimums).

82. 477 F.2d 495 (4th Cir. 1973).

83. *See Indiana & Michigan Electric*, 509 F.2d at 844 n.2 (quoting *Appalachian Power Co.*, 477 F.2d at 498). The Fourth Circuit also held that states were expected to consider “local factors, such as ‘meteorological conditions, topographical con-

The Court of Appeals for the Second Circuit, however, explicitly guarded against varying emissions standards among the states in *American Automobile Manufacturers Ass'n. v. Cahill*.<sup>84</sup> In addressing the preemption issue raised by the plaintiffs, the Second Circuit clearly differentiated between the concepts of "emissions standards" and "enforcement mechanisms," holding that a percentage Zero Emissions Vehicle (ZEV) sales requirement was an emission standard.<sup>85</sup> The Second Circuit therefore concluded that a percentage ZEV sales requirement imposed on automobile manufacturers by the State of New York is preempted by CAA, because upholding it would risk the adoption of further mutations of the California emissions standard in other states.<sup>86</sup> For example, the Second Circuit notes that "[w]ere we to uphold New York's ZEV sales requirement . . . then a third state might adopt ZEV sales requirements . . . leading to at least four different regulatory schemes: federal, California, New York, and the third state."<sup>87</sup>

The Court of Appeals for the First Circuit, in *Association of International Automobile Manufacturers, Inc. v. Commissioner, Massachusetts*

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text, and economic and social demands." *Appalachian Power Co.*, 477 F.2d at 498-99 (discussing other state considerations in SIP formulation).

84. See *American Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 199 (2d Cir. 1998). In *Cahill*, the State of New York adopted the California emissions standards under the "opt-in" provision of CAA, with some differences. See *id.* at 199 (noting that New York's Low Emissions Vehicle program did not include medium-duty vehicles that were included in California's Zero Emissions Vehicle (ZEV) requirements). Section 7507 allows any state to adopt any emissions standards for new motor vehicles if the standards are identical to California's standards for which California has obtained a federal waiver and if both the state and California adopt the standards two years before the commencement of the vehicle model year. See 42 U.S.C. § 7507; see also H.R.REP. NO. 294, 310 (1977) (declaring that "States are not authorized to adopt or enforce standards other than the California standards").

85. See *Cahill*, 152 F.3d at 200 (discussing whether ZEVs sales requirement is state standard that may be preempted under CAA or enforcement provision that would not be preempted). In its view, an emissions standard is a regulatory measure intended to lower emissions levels, whereas an enforcement mechanism is a device intended to give effect to the regulatory standard. See *id.* (enumerating difference between emissions standards and enforcement mechanisms). The Second Circuit held in *Cahill* that a ZEV percentage sales requirement is an emissions standard, because it is a command having a direct effect on the level of emissions rather than a method of enforcing a command. See *id.*

86. See *id.* at 201 (explaining that upholding New York ZEV sales requirement would lead to unacceptable plurality of emissions standards).

87. *Cahill*, 152 F.3d at 201 (illustrating danger of multiple state regulatory schemes concerning emissions standards by example). The CAA California Emissions provision was inserted so that states wrestling with their own pollution problems could adopt California's more stringent emission controls. See H.R.REP. NO. 294, 309-10 (1977). The provision also prevents manufacturers from having to produce widely varying cars to meet disparate state emission standards. See *id.* at 309.

*Department of Environmental Protection*,<sup>88</sup> held that emissions “standards” refer to “regulations on quantitative levels of emissions.”<sup>89</sup> However, the First Circuit distinguishes between “simply monitoring or enforcing compliance with some distinct numerical emissions standard” and effecting a quantitative reduction in emissions.<sup>90</sup> In *Massachusetts Dep’t. of Env’tl. Protection*, the First Circuit held that Massachusetts’ ZEV mandates were standards because they attempted to achieve a quantitative reduction in emissions and were presumptively preempted.<sup>91</sup> In contrast, the Court of Appeals for the District of Columbia held in *Louisiana Environmental Action Network v. Browner*<sup>92</sup> that CAA mandates federal regulation of emissions of air pollutants but expressly does not preempt states from adopting or enforcing their own regulations, referring specifically to the submission of the SIP.<sup>93</sup>

The Second Circuit noted, however, in *Motor Vehicle Manufacturers Ass’n. of the United States, Inc. v. New York State Department of Environmental Conservation*<sup>94</sup> (MVMA I) that although state regulation of emissions other than California is directly linked to approved California actions, state fuel regulation plans will only avoid preemption by successful demonstration of necessity to the Administrator.<sup>95</sup> In MVMA I, the Second Circuit held that whether New York may regulate motor vehicle fuels and how it may do so depends upon its need to meet NAAQS.<sup>96</sup>

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88. 208 F.3d 1 (1st Cir. 2000).

89. *See id.* at 6 (quoting *Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1112-13 (D.C. Cir. 1979)). The First Circuit held further that numerical production requirements are standards relating to the control of emissions. *See id.* at 7.

90. *See Massachusetts Dep’t of Env’tl. Prot.*, 208 F.3d at 7 (distinguishing between enforcing abstract numerical standard and effecting quantitative reduction in emissions).

91. *See id.* (relying on 42 U.S.C. § 7543(a), which explicitly revokes states’ ability to adopt or enforce emissions standard for new vehicles or new engines).

92. 87 F.3d 1379 (D.C. Cir. 1996).

93. *See id.* at 1381 (holding that CAA expressly does not preempt states from adopting or enforcing their own regulations). The D.C. Circuit drew this conclusion from 42 U.S.C. § 7416. *See id.* For the text of § 7416, *see supra* note 72.

94. 810 F. Supp. 1331 (2d Cir. 1993), *rev’d on other grounds*, 17 F.3d 521 (2d Cir. 1994).

95. *See Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. New York State Dep’t of Env’tl. Conserv.*, 810 F. Supp. 1331, 1343 (N.D.N.Y. 1993), *rev’d on other grounds*, 17 F.3d 521 (2d Cir. 1994) (explaining different treatment of state emissions regulations and state fuel regulations under CAA).

96. *See id.* (holding that State of New York’s ability to regulate fuels turns on its need to meet NAAQS).

## IV. NARRATIVE ANALYSIS

The crux of Exxon's argument in *Exxon*, consisted of a narrow interpretation of CAA's section 7545.<sup>97</sup> Exxon claimed that the 1990 amendments to CAA preclude the states from implementing higher oxygen content minimums than the 2.7 percent figure specified in the statute.<sup>98</sup> To resolve this question, the Ninth Circuit first examined the 1990 amendments to decide whether the EPA Final Rule was a permissible reading of the statute.<sup>99</sup> After concluding that EPA's construction was permissible, the Ninth Circuit then sought to determine whether the higher minimum was preempted under section 211 of CAA.<sup>100</sup>

#### A. The EPA Final Rule Was a Permissible Construction of the Statute

The Ninth Circuit began with an analysis of the text of CAA, as amended in 1990, regarding the requirements for oxygenated gasoline in CO non-attainment areas.<sup>101</sup> In relevant part, the text of section 7545(m)(2) states, "Each plan revision under this subsection shall contain provisions to require that any gasoline sold, or dispensed, to the ultimate consumer in the CO non-attainment area . . . be blended . . . to contain *not less than 2.7 percent oxygen* by weight."<sup>102</sup> EPA claimed that this provision demands a minimum oxygenated gasoline content of 2.7 percent but allows states to mandate a higher oxygen standard, because the provision establishes a federal "floor" but no "ceiling."<sup>103</sup> To ascertain the congressional

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97. See *Exxon*, 217 F.3d at 1249 (discussing petitioner's primary argument).

98. See *id.* (interpreting 1990 amendments to CAA).

99. See *id.* The Ninth Circuit determined first that "in reviewing a final action by the EPA, [it] reverse[s] only if [the Rule] is arbitrary, capricious, or contrary to law or if it exceeds the statutory jurisdiction, authority, or limitations." *Id.* at 1248 (quoting *Abramowitz v. EPA*, 832 F.2d 1071, 1074-75 (9th Cir. 1987)). The Ninth Circuit next concluded that in reviewing EPA's reading of the statute, it must "ask whether the intent of Congress is clear and, if not, whether the agency's construction is permissible." *Id.*

100. See *Exxon*, 217 F.3d at 1253 (discussing Ninth Circuit's preemption analysis under § 211).

101. See *id.* at 1249 (discussing Ninth Circuit's basis for concluding that its analysis begins with CAA's oxygenated gasoline requirement). The Ninth Circuit held that "the starting point for interpreting a statute is the language of the statute itself." *Id.* (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

102. 42 U.S.C. § 7545(m)(2) (emphasis added) (describing oxygenated fuel requirements for CO non-attainment areas).

103. See *Exxon*, 217 F.3d at 1249 (discussing EPA's assertion that broad reading of § 7545(m)(2) controls).



intent of the statute, the Ninth Circuit's textual interpretation began with an analysis of the statute as a whole.<sup>104</sup>

The Ninth Circuit first noted that CAA allows for any minimum oxygen content as is necessary for the attainment of the NAAQS in section 7512a(b)(3)(A).<sup>105</sup> Section 7512(b)(3)(A), entitled "Serious Areas: Oxygenated Gasoline," in relevant part, provides:

Within two years after November 15, 1990,[each] State shall submit a revision to require that gasoline sold . . . in the Consolidated Metropolitan Statistical Area (as defined by the United States Office of Management and Budget) . . . be blended . . . with fuels containing such levels of oxygen as is necessary, to provide for the attainment of the CO national ambient air quality standard . . . and maintenance of the national ambient air quality standard thereafter in the area.<sup>106</sup>

The Ninth Circuit concluded that although this provision precisely defines the geographic scope of the regulation and promulgates a fixed deadline for attainment, it is flexible in its oxygen requirement and must be construed consistently with section 7545(m)(2).<sup>107</sup>

Next, after concluding that the statute was ambiguous regarding the 2.7 percent requirement, the Ninth Circuit applied the holding of *Chevron* to conclude that any reasonable interpretation of the statute is sufficient absent clear congressional intent.<sup>108</sup> Under *Chevron*, the Ninth Circuit reasoned that it was not required to "conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the Ninth Circuit would have reached if the question initially had arisen in a judicial proceeding."<sup>109</sup> The *Exxon* court also noted the *Chevron*

104. *See id.* (stating that Ninth Circuit's determination of congressional intent is derived from consideration of whole statute).

105. *See id.* at 1250 (noting that elsewhere CAA allows for oxygen minimum that meets NAAQS). The Ninth Circuit then stated that it must construe the two overlapping sections of the statute consistently. *See id.* (quoting *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 340-41, (1994)).

106. 42 U.S.C. § 7512a(b)(3)(A).

107. *See Exxon*, 217 F.3d at 1250 (discussing § 7512(a)'s flexible oxygen requirements); *see also Brown*, *supra* note 41 (discussing consistent reading of both provisions of statute).

108. *See Exxon*, 217 F.3d at 1250 (concluding that any reasonable agency interpretation is sufficient absent clear congressional intent).

109. *Id.* (discussing whether agency's construction was permissible).

court's holding that CAA assigns primary responsibility for assuring air quality to the states.<sup>110</sup> As a result, the Ninth Circuit held that EPA's reading of the statute is permissible so long as it is a reasonable interpretation absent clear congressional intent.<sup>111</sup>

The Ninth Circuit then applied these conclusions to resolving the ambiguity in section 7545. Section 7545 states "not less than 2.7 percent," as a result, the Ninth Circuit noted that it is not clear whether Congress intended to require that the minimum must be specifically 2.7 percent or that it merely has to be no less than 2.7 percent.<sup>112</sup> Armed with evidence of flexible minimums elsewhere in the statute and the *Chevron* reasonableness test, the Ninth Circuit concluded that states retain the authority to require a minimum oxygenate standard greater than 2.7 percent under CAA.<sup>113</sup> The Ninth Circuit determined that EPA's reading was permissible because it was reasonable in the context of the structure of CAA.<sup>114</sup> Since the environmental regulatory scheme of oxygenated gasoline under CAA essentially rests in state enforcement through SIPs, and because states must revise these plans to meet the requirements of the NAAQS, the Ninth Circuit reasoned that EPA's conclusion of state authority is reasonable in the context of the statute.<sup>115</sup>

To buttress this conclusion further, the Ninth Circuit then examined the statute's legislative history to glean the true congressional intent.<sup>116</sup> The Ninth Circuit noted in particular Senator Wirth's comment, which explained that he understood the 1990 amendment proposal to explicitly allow for the possibility of individual states to select higher oxygen content minimums.<sup>117</sup> Congressman Richardson's comment also guided the Ninth Circuit: "[T]he Richardson-Madigan provision [adopting the 2.7 percent

110. *See id.* (noting that CAA holds states primarily responsible for air quality under *Chevron*).

111. *See id.*; *see also* Brown, *supra* note 41.

112. *See Exxon*, 217 F.3d at 1251 (explaining ambiguity in § 7545 concerning required oxygenate content).

113. *See Exxon*, 217 F.3d at 1251 (concluding that states have authority to raise oxygenate minimums after considering statutory structure and context).

114. *See id.* (accepting EPA reasoning after regarding statute in its entirety).

115. *See id.* (explaining that responsibility of meeting NAAQS under statute remains with states through revision of SIPs). The Ninth Circuit also claimed that although this evidence does not summarily resolve the ambiguity in the statute, it is sufficiently persuasive evidence to support the reasonableness of EPA's construction and should be entitled to *Chevron* deference. *See id.*

116. *See id.* (stating necessity of examining legislative history if statute is unclear).

117. *See Exxon*, 217 F.3d at 1251-52 (noting Senator Wirth's understanding that 1990 amendments still allow states to select higher oxygen content minimums).

minimum] does not mandate a 'recipe' or so-called government gas . . . instead the amendment established minimum basic standards to reduce . . . toxic air pollutants in gasoline."<sup>118</sup> Senator Burdick explained that the amendments were not intended to affect existing states' rights.<sup>119</sup> The Ninth Circuit read this particular comment in conjunction with section 116 of CAA, which states that "nothing in this act shall preclude or deny the right of any State . . . to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants."<sup>120</sup>

In addition, the Ninth Circuit found the dialogue between Senator Kohl and Senator Baucus, one of the bill managers, most useful.<sup>121</sup> Senator Kohl stated that he understood the current law to allow states to select a more rigorous standard if they so desired and asked Senator Baucus if the amendments maintain this authority.<sup>122</sup> Senator Baucus replied that "[states] will be allowed to regulate fuels and fuel additives under the SIP. The Administrator of the [EPA] shall allow this State action if he or she finds the State control is necessary to meet national primary or secondary air quality standards."<sup>123</sup> The Ninth Circuit then concluded that although the legislative history does not resolve the statutory ambiguity completely, it supports the conclusion that EPA's construction was reasonable and is entitled to *Chevron* deference.<sup>124</sup>

#### B. Clark County's Oxygen Standard Is Not Preempted Under Section 7545(c)(4)(A) of CAA

CAA states at section 7545(c)(4)(A), in relevant part, that:

no State may prescribe or attempt to enforce . . . any control or prohibition respecting any characteristic or component of a fuel . . . (i) if the Administrator has found that no control is necessary . . . or (ii) if the Administrator has

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118. *Id.* (discussing Congressman Richardson's understanding of amended oxygen minimum).

119. *See id.* at 1253 (discussing Senator Burdick's comment that amendments do not abrogate any existing State rights).

120. *Id.* (discussing Senator Burdick's comment in conjunction with § 116).

121. *See id.* (discussing dialogue between Senators Kohl and Baucus).

122. *See Exxon*, 217 F.3d at 1253 (discussing Senator Kohl's understanding of state authority under 1990 amendments).

123. *See id.* at 1256 (quoting Senator Baucus' reply that states are permitted to regulate fuels under SIPs to meet NAAQS under EPA approval).

124. *See id.* (discussing Ninth Circuit's assertion that legislative history, though not conclusive, supports EPA's broad interpretation).

prescribed . . . a control or prohibition applicable to such characteristic . . . unless [the controls are identical].<sup>125</sup>

Exxon claimed that Clark County's 3.5 percent standard is preempted under this section because EPA already promulgated a different minimum oxygen requirement.<sup>126</sup> The Ninth Circuit found, however, that the text of CAA explicitly protects the authority of states to regulate air pollution.<sup>127</sup> Moreover, the Ninth Circuit also noted that the Supreme Court is highly deferential to state law in areas traditionally regulated by the states.<sup>128</sup> Finally, the Ninth Circuit reiterated that the overriding purpose of CAA is to force states to achieve the NAAQS by regulating pollution effectively.<sup>129</sup>

The Ninth Circuit conducted the first part of its textual analysis at the beginning of CAA in section 7401.<sup>130</sup> Section 7401, entitled "Congressional Findings," states, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of states and local governments."<sup>131</sup> Second, the Ninth Circuit looked to section 7407, which assigns responsibility to the states for assuring air quality within the entire area comprising the state through the use of the SIP to achieve the NAAQS.<sup>132</sup> Third, the Ninth Circuit examined section 7416, entitled, "Retention of State Authority."<sup>133</sup> Section 7416 specifically states that "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 (2) any requirement respecting control . . . of air pollution."<sup>134</sup>

Next, the Ninth Circuit applied Supreme Court precedent concerning deference to state law in areas traditionally regulated by

125. 42 U.S.C. § 7545(c)(4)(A) (limiting state authority to prescribe controls or prohibitions).

126. *See Exxon*, 217 F.3d at 1254 (discussing petitioner's claim for preemption under CAA).

127. *See id.* (discussing textual support in CAA for explicit protection of state authority to regulate air pollution).

128. *See id.* at 1255 (discussing Supreme Court precedential support for deference to state law in areas traditionally regulated by states).

129. *See id.* (discussing overriding purpose of CAA in favor of state authority to regulate air pollution).

130. *See id.* (beginning textual analysis of CAA by examining § 7401).

131. 42 U.S.C. § 7401.

132. *See* 42 U.S.C. § 7407(a) (assigning responsibility to states for realization of NAAQS through SIPs).

133. *See* 42 U.S.C. § 7416 (stating that broad authority of states to adopt any standard or requirement for air pollution control is not precluded in CAA).

134. *Id.*

states.<sup>135</sup> Primarily, the Ninth Circuit looked to *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, which held that the Supreme Court always addresses questions of preemption beginning with the presumption that Congress does not intend to supplant state law.<sup>136</sup> Specifically, the Supreme Court held that:

in cases like this one, where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.<sup>137</sup>

The Ninth Circuit concluded that air pollution falls within the ambit of state police powers under the more general category of "protecting the health of state citizens."<sup>138</sup> Furthermore, the Ninth Circuit noted that environmental regulation traditionally has been a state endeavor.<sup>139</sup> Upon this premise, the Ninth Circuit supported its conclusion of the preemption immunity presumption by applying the holding in *Medtronic, Inc. v. Lohr*, which clearly directed that preemption analysis, especially regarding state police powers, presumes at its inception that police powers are not preempted.<sup>140</sup> Tracking the Supreme Court's reasoning, the Ninth Circuit stated that since protecting the health and safety of citizens was primarily a matter of local concern, states have traditionally been afforded significant deference under the police power doctrine in legislating to protect these interests.<sup>141</sup> Finally, the Ninth Circuit referenced the Supreme Court's holding in *Union Electric Co.*, which stated that "the states may submit implementation plans more stringent than federal law requires and that the Administrator

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135. See *infra* note 136 and accompanying text.

136. See *Exxon*, 217 F.3d at 1255 (discussing Supreme Court's penchant for presuming that Congress does not intend to supplant state law in preemption clauses).

137. *Id.*

138. See *Exxon*, 217 F.3d at 1255 (discussing why air pollution regulation is state police power).

139. See *id.* (noting that environmental regulation has traditionally been responsibility of states).

140. See *id.* (holding that preemption analyses begin with presumption that police powers are not preempted).

141. See *id.* (discussing great latitude afforded states in legislating to protect health and safety of citizens under police powers).

must approve such plans if they meet the minimum requirements of [section] 110(a)(2)."<sup>142</sup>

The Ninth Circuit concluded that since regulating air pollution falls within the scope of state police powers, the authority of the states is not preempted without clear congressional intent.<sup>143</sup> Here, the preemption provisions of CAA focus on the regulation of fuel additives, not on oxygenate standards, so the Ninth Circuit held that they do not demonstrate such a clear and manifest purpose to preempt state regulation of oxygenate levels.<sup>144</sup> Furthermore, states with CO non-attainment areas must maintain standards that meet the national air quality minimums to fulfill the purpose of CAA.<sup>145</sup>

The Ninth Circuit also concluded that the overriding purpose of CAA is to force states to regulate air pollution so as to meet the NAAQS.<sup>146</sup> More specifically, local planning initiatives culminating in SIPs provide the appropriate mechanism for realizing this goal; failing to achieve it warrants penalties and the imposition of FIPs.<sup>147</sup> States, therefore, have the responsibility and the incentive to meet the national minimums.<sup>148</sup> Furthermore, the Ninth Circuit noted that the preemption provisions would violate the purpose of CAA if they were construed to prohibit states that need to raise the minimum oxygenate standard from exceeding the national minimum.<sup>149</sup> For these reasons the Ninth Circuit affirmed the EPA

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142. *Id.* (quoting *Union Electric Co. v. EPA*, 427 U.S. 246, 265 (1976)). In *Union* the Court held that states may submit SIPs with more stringent standards than federal law requires. See *Union*, 427 U.S. at 265. The *Union* Court, however, was concerned with the capacity of a producer of sulphur dioxide emissions to challenge an SIP on the grounds that it is technologically or economically infeasible to comply with the plan. See *id.* at 249 (framing issue to be decided). The Ninth Circuit held that it may not. See *id.* at 269 (stating that economic and technological infeasibility are considerations wholly foreign to Administrator's analysis of SIPs).

143. See *Exxon*, 217 F.3d at 1256 (concluding that air pollution regulation is within historic state police power doctrine).

144. See *id.* (holding that CAA preemption provisions do not preclude state regulation of oxygenate levels because provisions focus on regulation of fuel additives, not oxygenate standards).

145. See *id.* (defending conclusion that preemption provisions do not apply because states must maintain levels to meet NAAQS to fulfill CAA goals).

146. See *id.* at 1255 (holding that overriding purpose of CAA is to force states to achieve NAAQS).

147. See *id.* at 1255-56 (discussing SIPs as CAA mechanism of achieving NAAQS and structured penalties, including FIPs).

148. See *Exxon*, 217 F.3d at 1256 (noting that states have responsibility and incentive to meet NAAQS).

149. See *id.* (explaining that construing preemption provisions narrowly against states could potentially violate CAA goals of meeting NAAQS).

Final Rule approving the Clark County oxygenate standard, holding that it does not conflict with and is not preempted by any provision of CAA.<sup>150</sup>

## V. CRITICAL ANALYSIS

### A. CAA in Its Entirety Supports the Ninth Circuit's Holding of State Discretion to Raise Federal Minimums

The Ninth Circuit's decision in *Exxon* properly achieves a tenable, pragmatic balance of federal environmental regulatory mandates and states' local environmental concerns.<sup>151</sup> A reading of CAA as a whole supports the Ninth Circuit's conclusion that CAA allows states considerable latitude in implementing oxygenate requirements to achieve NAAQS.<sup>152</sup> First, the findings and purpose of CAA as outlined by Congress support this conclusion.<sup>153</sup> Second, the sanctions imposed on states for inadequate or non-extant SIPs strongly suggest state responsibility and flexibility.<sup>154</sup>

Congress explicitly found in CAA that "Federal financial assistance and leadership is essential for the development of cooperative Federal [and] State programs . . ." <sup>155</sup> Moreover, Congress concluded that air pollution prevention "at its source is the primary responsibility of states and local governments."<sup>156</sup> Congress also stated that its purpose under CAA was to provide technical and financial assistance to state and local governments to aid them in executing their pollution control programs.<sup>157</sup> Additionally, other federal environmental regulatory acts delineate congruent objectives and structure. For example, the Clean Water Act similarly assigns primary responsibility for water pollution control to the

150. See *id.* (affirming EPA Final Rule mandating 3.5% oxygenate standard in Clark County during winter months).

151. See John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons From Environmental Regulation*, 60 LAW & CONTEMP. PROBS. 203, 203 (1997) (noting that congressional need to customize environmental policy to local conditions and federal desire for state technical and personnel resources compels Congress to share its regulatory authority).

152. See *infra* notes 161-73 and accompanying text.

153. See *supra* notes 101-07 and 112-24 and accompanying text.

154. See *infra* notes 155-60 and accompanying text.

155. 42 U.S.C. § 7401(a)(4) (explaining congressional finding that federal financial assistance and leadership is necessary to develop cooperative connections between federal government and states).

156. 42 U.S.C. § 7401(a)(3) (assigning primary responsibility for pollution prevention to states and local governments).

157. See 42 U.S.C. § 7401(b)(3) (stating purpose of CAA is to provide assistance to states in execution of local pollution control programs).

states.<sup>158</sup> The Resource Conservation and Recovery Act also identifies solid waste management as a national concern but preserves state responsibility for its collection and disposal.<sup>159</sup> These findings and specific goals verify that Congress contemplates State initiative to develop and execute pollution control measures and that the federal government essentially serves to assist states in meeting federal standards.<sup>160</sup>

Although the *Exxon* court primarily reconciled sections 7512a(b)(3)(A) and 7545(m)(2), CAA also requires a state that has not achieved the national air quality standard for CO in a non-attainment area to submit a revised plan detailing an economic incentive program (EIP)<sup>161</sup> that may include any transportation control measure outlined in section 7408(f).<sup>162</sup> The transportation controls in section 7408(f) include programs to reduce motor vehicle emissions consistent with subchapter II of CAA.<sup>163</sup> These controls are supplemented by Administrative guidance, which provides that EIP submissions “[S]hall be sufficient, together with a transportation control program, to achieve the specific annual reductions in CO emissions set forth in the implementation plan by the attainment date.” This broad language supports the Ninth Circuit’s holding because it suggests that a state may impose requirements to

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158. See 33 U.S.C. § 1251(b) (explaining that “[I]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states to . . . eliminate pollution . . .”). *Id.* Congress further stated here its background role of supporting and aiding research and providing technical services and financial aid. See *id.*

159. See Ellen M. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 EMORY L.J. 373, 379 (2000) (discussing RCRA recognition of primary state responsibility to collect and dispose of solid waste).

160. See Dwyer, *supra* note 151, at 216. The role of the federal agency in shared regulatory programs such as the NAAQS program is threefold: first, the federal agency sets substantive standards for emissions, second, it reviews and approves flexible SIPs designed to enforce these standards, and third, it only re-assumes federal implementation and enforcement if the state efforts slip below a specific threshold. See *id.* (discussing states as “junior partners” to federal government regarding environmental regulatory schemes).

161. See *Exxon*, 217 F.3d at 1255 (stating that term “EIP” applies to “incentives and requirements to reduce fuel emissions and vehicle miles traveled . . .”).

162. See 42 U.S.C. § 7512a(g) (requiring submission of revised SIP containing economic incentives program for failure of serious area to attain national CO standard); see also 42 U.S.C. § 7511a(g)(4) (permitting any transportation control under § 7408(f) to be part of economic incentives program required in revised SIPs).

163. See 42 U.S.C. § 7408(f)(xii) (charging Administrator to publish information regarding formulation and emission reduction potential of transportation control measures).



reduce vehicle emissions that are merely adequate to achieve the states' goals under its SIP.<sup>164</sup>

Section 7512a(b)(3)(A) further states that the SIP revisions for CO emission controls must also include a program for implementation and enforcement of the control "consistent with guidance to be issued by the Administrator."<sup>165</sup> Recent EPA guidance suggests that EPA now seems to favor a more clement approach regarding SIP requirements and novel approaches to reducing mobile source emissions.<sup>166</sup>

CAA's sanction provisions, for failure to achieve the national CO standard, support the Ninth Circuit's conclusion that primary regulatory responsibility is assigned to the states.<sup>167</sup> CAA mandates that each SIP provide "enforceable emissions limitations" to meet CAA requirements.<sup>168</sup> Failure to submit or implement a plan allows the Administrator, with the Secretary of Transportation's approval, to prohibit any highway projects or the awarding of any grants to a non-attainment area.<sup>169</sup> If a state fails to achieve the national stan-

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164. See NATIONAL SCIENCE AND TECHNOLOGY COUNCIL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES: INTERAGENCY ASSESSMENT OF OXYGENATED FUELS (visited Oct. 10, 2000) <<http://www.epa.gov/oms/regsfuels/ostp-0.pdf>> (interpreting CAA oxygenate requirements for CO non-attainment areas as being at least 2.7 percent).

165. 42 U.S.C. § 7512a(b)(3)(A) (requiring SIP revisions to include program for implementation and enforcement of oxygenated gasoline requirement consistent with Administrator's guidance).

166. See Memorandum from Richard D. Wilson, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators 4 (Oct. 24, 1997) (on file with author) (announcing EPA plans to use its authority under CAA to allow SIP credit for new approaches to reducing mobile source emissions). *But see* Memorandum from Sheldon Meyers, Director's Office of Air Quality Planning and Standards, to Director, Air and Waste Management Division Regions II-IV, VI-VIII, X (Jul. 29, 1983) (on file with author) (recommending that EPA Regional Administrators determine whether SIP revisions are appropriate administrative mechanisms to handle state goals and that SIP revisions must be adequately supported with data and modeling demonstrations).

167. See 42 U.S.C. § 7509 (enumerating sanctions for failure regarding non-attainment areas).

168. See 42 U.S.C. § 7410(a)(2)(A) (requiring states to include enforceable emissions controls in SIPs).

169. See 42 U.S.C. § 7509(a)(1) (1994) (enumerating circumstances for failure to submit implementation plans); *see also* 42 U.S.C. § 7509(b)(1)(A) (allowing EPA Administrator to impose prohibitions on highway projects and grants to non-attainment areas that fail to submit plans or fail to implement requirement of plan upon approval of Secretary of Transportation). Congress may use the highway sanction under both its power to promote the general welfare and the Commerce Power, except as a means of outright coercion. *See Virginia v. EPA*, 80 F.3d 869, 881 (4th Cir. 1996). The Fourth Circuit held that these highway sanctions do not violate the Tenth Amendment or the spending power; the sanctions *induce* change without *coercing* it (emphasis added). *See id.* at 880. The Fourth Circuit held that because CAA sanctions only prohibit funds in non-attainment areas without inter-

dard in a non-attainment area, it must submit a revised plan within one year that may include any additional measures that the EPA Administrator may reasonably prescribe.<sup>170</sup> Therefore, although primary responsibility for attaining NAAQS resides with the states, the federal government has not completely abdicated its enforcement role; states have a significant incentive to submit plans with measures specifically designed to meet federal requirements.<sup>171</sup> The Ninth Circuit's holding allows states to avoid federal chastisement by customizing their SIPs with local requirements designed to meet NAAQS despite specific local obstacles, such as topography or weather conditions.<sup>172</sup> As a result, this type of disciplinary incentive supports the Ninth Circuit's broad reading of CAA oxygenate requirements.<sup>173</sup>

#### B. Fifty States With Fifty Individual Environmental Obstacles Suggests Upward Mobility of Federal CAA Minimums

Local officials complain that federal rigidity inhibits the ability of states to enact sensible environmental policies.<sup>174</sup> Commentators have questioned the rationality of federal standards applied uniformly on a national scale, noting the sheer diversity of the envi-

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fering with funds granted to attainment areas, and because federal monies may still be spent on highway projects that promote highway safety or a reduction in air pollution, the sanctions are not coercive. *See id.* at 881-82.

170. *See* 42 U.S.C. § 7509(d)(1)(2) (permitting Administrator to reasonably prescribe any means necessary in revised SIP in light of technological feasibility and costs to achieve NAAQS when states with non-attainment areas fail to achieve NAAQS). The Fourth Circuit held that the offset sanctions, which allow EPA Administrator to limit new construction of stationary sources of air pollution, are constitutional because they burden only private parties by regulating private pollution sources without burdening the state as a governmental unit. *See Virginia*, 80 F.3d at 882. Under CAA, failure to meet the CO milestone mandates a revised state plan that includes an economic incentive or transportation control designed specifically to achieve the required CO reductions. *See* 42 U.S.C. § 7512a(d)(3) (discussing states' incurred consequences for failure to meet CO milestone). The CO "milestone" is defined as the "reduction in emissions of CO equivalent to the total of the specific annual emission reductions required by December 31, 1995." 42 U.S.C. § 7512a(d)(1).

171. *See* Dwyer, *supra* note 151, at 216 (discussing EPA's generally background role after SIP approval but noting its ability to ensure that state enforcement agencies seek sufficiently strict sanctions).

172. *See id.*

173. *See id.*

174. *See* Adler, *supra* note 52, at 577 (noting that local authorities often complain that federal mandates hamper states' ability to enact sensible environmental policies). In the words of Michigan Governor John Engler, the EPA "has increasingly overstepped its bounds and usurped the lawmaking responsibilities of Congress and stepped on the state's ability to implement environmental reform." *See* Governor John Engler, Speech Before Warren T. Brookes Fellowship Memorial Dinner, November 19, 1996.

ronments in all fifty states.<sup>175</sup> For example, the United States Advisory Commission on Intergovernmental Relations stated that federal environmental regulations are often “complex, conflicting, difficult to apply, adversarial, costly, inflexible, and uncertain.”<sup>176</sup> Excessive costs of attaining national standards result in frequent violations of these requirements.<sup>177</sup> EPA has yet to develop a clear guideline for judging when its regulations are truly appropriate.<sup>178</sup>

Moreover, the D.C. Circuit recently re-instituted the doctrine of nondelegation and applied it to EPA under CAA.<sup>179</sup> Under this doctrine, open-ended statutory terms will be invalidated unless agencies are able to specify the governing legal criteria.<sup>180</sup> Although the D.C. Circuit ruled only against EPA regarding ozone regulations, the non-delegation doctrine invites further constitutional questions concerning other EPA regulations as well.<sup>181</sup> In terms of pollution regulation, EPA must produce “floors” and “ceilings” to limit its own discretion or face unconstitutionality invectives.<sup>182</sup> So long as ceilings and floors are in place and the space between them is not excessive, then agency discretion is sufficiently

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175. See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 308 (1999) (noting irrationality of national environmental regulations applied to fifty states of widely varying environmental dispositions).

176. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1165 (1995) (quoting U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *Intergovernmental Decisionmaking for Environmental Protection and Public Works* 1 (1992)).

177. See George Eads, *The Confusion of Goals and Instruments: The Explicit Consideration of Cost in Setting NAAQS*, in *TO BREATHE FREELY: RISK, CONSENT, AND AIR* 223, 228-35 (Mary Gibson ed., 1985) (noting that excessively high costs of attainment of national standards give rise to frequent violations of these standards).

178. See Sunstein, *supra* note 175, at 320 (noting that EPA has not developed consistent guidelines for defending appropriateness of its regulations).

179. See *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (holding that provisions under CAA that give EPA authority to issue national air quality standards represent unconstitutional delegation of legislative power). The D.C. Circuit held that since EPA failed to articulate intelligible principles channeling its application of factors used to determine the degree of public health concern associated with ozone, and since none are apparent in CAA, EPA has unfettered discretion to set NAAQS. See *id.* at 1034.

180. See Sunstein, *supra* note 175, at 309 (discussing tenets of nondelegation doctrine).

181. See *id.* at 310 (discussing possibility of significant constitutional ramifications if nondelegation doctrine is applied to other EPA regulations). This doctrine would also call into question the constitutional basis for several other federal regulatory schemes, such as the Federal Communications Commission or the Federal Aviation Administration. See *id.*

182. See Sunstein, *supra* note 175, at 348 (discussing nondelegation doctrine influence on EPA regulations in terms of narrow limits).

restricted to fend off constitutional attacks.<sup>183</sup> Yet, the D.C. Circuit also recognized that states have broad discretion under CAA in determining the manner in which they will achieve compliance with NAAQS, and EPA cannot reject a state's SIP based upon its view of "the wisdom of a state's choices of emission limitations."<sup>184</sup> This holding suggests that permitting state flexibility to raise federal minimums could alleviate constitutionality questions over federally generated standards, because each state's SIP revision proposal to EPA must contain adequate data, modeling demonstrations, and other findings justifying the state's needs.<sup>185</sup>

### C. The Holdings in *Chevron* and *Union Electric* Support the Ninth Circuit's Broad Reading of CAA Oxygenate Requirements

Other aspects of the *Chevron* holding, in addition to those the Ninth Circuit examined in detail, also support the Ninth Circuit's conclusion. For example, the Supreme Court in *Chevron* concluded that the Administrator's interpretation of CAA was reasonable because the regulatory scheme is patently complex, the decision involved reconciling conflicting policies, and the Administrator's accommodation was reasonable.<sup>186</sup> Similarly, CAA, like most other EPA regulations, has only grown more complex since the *Chevron* case.<sup>187</sup>

The Supreme Court in *Chevron* held that in cases where the legislative delegation to any agency on a particular question is implicit, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator

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183. See *id.* at 359 (stating that agency discretion is properly constrained if boundaries to its discretion exist).

184. See *American Trucking*, 175 F.3d at 1044 (holding that states have broad discretion in designing SIPs and that EPA Administrator cannot reject SIPs on basis of wisdom of state's choice of emissions limitations).

185. See Dwyer, *supra* note 151, at 216 (requiring scrutiny of SIP revisions with special attention to state findings as criterion for approval); see also 42 U.S.C. § 7511(a) (detailing plan submissions and requirements).

186. See *Chevron*, 467 U.S. at 865 (upholding EPA Administrator's construction of CAA as reasonable because of regulatory scheme's complexity, agency's detailed consideration, and because decision involved reconciling conflicting policies). The Court actually suggested that since Congress did not specifically destroy the ambiguity at issue, it may have deliberately desired the Administrator to balance the competing interests involved. See *id.* The Court also noted that while the agency itself is not directly accountable to the people, the Chief Executive most certainly is, and therefore it is entirely appropriate for the agency to make policy choices in interpreting CAA. See *id.*

187. See Adler, *supra* note 52, at 617.

of an agency.<sup>188</sup> The text of CAA regarding oxygenate minimums is relatively ambiguous, and the Administrator reasonably accommodates both federal and state interests, consequently the approval of the Clark County increase should be entitled to *Chevron* deference.

In *Union Electric Co. v. EPA*, the Supreme Court specifically held that CAA requires SIPs to contain controls “as may be necessary” to achieve air quality standards, meaning that the Administrator must assure the minimal requirements are met, not that he “detect and reject any state plan more demanding than federal law requires.”<sup>189</sup> The Court in *Union* also noted that if states could only adopt stricter standards outside of their SIPs, the Administrator would be forced to expend impractical time and energy poring over an SIP simply to ascertain whether it exactly meets federal regulatory standards, and it would require states desiring more stringent standards to enact a second, redundant set of standards.<sup>190</sup> In sum, the Supreme Court in *Union Electric* held that “State[s] ha[ve] virtually absolute power in allocating emission limitations so long as the national standards are met . . . .”<sup>191</sup> This decision stands in opposition to the Third Circuit’s decision one year earlier in *St. Joe Minerals Corp. v. EPA*, which held that states may enforce stricter regulations only by promulgating state laws, outside of the SIP.<sup>192</sup>

The Ninth Circuit was also justified in pursuing a different statutory analysis than the First and Second Circuits. Although the First and Second Circuits narrowly construed similar provisions of CAA, *Exxon* can be distinguished from the holdings in *Cahill* and *Massachusetts Dep’t. of Env’tl. Protection* because they concerned differ-

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188. See *Chevron*, 467 U.S. at 843-44 (holding that administrative agency’s power to administer congressionally created program necessarily requires policy to fill implicit gaps, and that agency administrator’s reasonable interpretation of statutory provision blocks any court from substituting its own construction).

189. *Union*, 427 U.S. at 263 (holding that text in CAA requiring SIPs to contain control devices “as may be necessary” to achieve federal standards does not preclude states from adopting higher standards). The Court went on to note that subsequent legislation supports this reading: the 1974 Energy Supply and Environmental Coordination Act [ESECA] allows the EPA Administrator to review SIPs and notify states if they can relax their controls without interfering with attainment of the national air quality standards. See *id.* at 263 n.10. Since the ultimate decision to relax the controls rests with the states, the Court concluded that the ESECA illustrates congressional approval of the instance where federally approved SIPs may be stricter than necessary for attainment of national standards. See *id.*

190. See *id.* at 264 (rejecting argument against states’ ability to adopt stricter standards than federal regulations because of impractical and burdensome results imposed on both states and EPA Administrator).

191. *Id.* at 267 (discussing state control over emission limitations as only limited by failure to meet national standards).

192. See *supra* note 78 and accompanying text.

ent provisions of CAA than the oxygenate requirement at issue in *Exxon*.<sup>193</sup> The First and Second Circuits noted that CAA explicitly provides that “[n]o state . . . shall adopt or attempt to enforce any standard relating to the control of emissions from *new motor vehicles or new motor vehicle engines* subject to this part . . . .”<sup>194</sup> The CAA provision for CO emissions in non-attainment areas, section 7545(c)(4)(A), denotes similar restrictions regarding fuel additives.<sup>195</sup> The First and Second Circuits, however, did not include an examination of state authority under CAA in their analyses in *Cahill* and *Massachusetts Dep’t. of Env’tl. Protection*.<sup>196</sup> Instead, both courts first found that the ZEV sales requirement was an “emissions standard” rather than an “enforcement” protocol and then concluded that the requirement was therefore preempted, because the applicable CAA provision preempts state standards.<sup>197</sup> The preemption language of section 7545(c)(4)(A) uses the words “control or prohibition respecting any . . . component of a fuel . . . .”<sup>198</sup> The Ninth Circuit distinguished the oxygenate standards at issue in *Exxon* from the fuel components regulated in CAA, and as a result, justified its approach by searching elsewhere under CAA.<sup>199</sup>

## VI. IMPACT

Despite CAA’s inherent nature as an environmental regulatory quagmire of federalist concerns, the Ninth Circuit seems to have elucidated a workable path to cooperative federalism. Commentators have noted that CAA truly aims to establish a “partnership” between the federal government and the states in its execution and implementation.<sup>200</sup>

193. See *supra* notes 81-88 and accompanying text.

194. 42 U.S.C. § 7543(a) (emphasis added) (prohibiting states from adopting or enforcing emissions standards for new motor vehicles or motor vehicle engines).

195. See 42 U.S.C. § 7545(c)(4)(A).

196. See *Cahill*, 152 F.3d at 199-201; see also *Massachusetts Dep’t. of Env’tl. Protection*, 163 F.3d at 82-87. Both courts conducted extremely fact-specific analyses; neither ventured too far away from CAA provisions dealing specifically with emissions standards for new cars and new engines. See *id.*

197. See *supra* notes 84-87 and accompanying text.

198. See *supra* note 112 and accompanying text.

199. See *supra* notes 97-103 and accompanying text.

200. See Walter G. Wright, Jr. and Mary Ellen Henry, *The Arkansas Air Pollution Control Program: Past, Present & Future*, 51 ARK. L. REV. 227, 233 (1998) (discussing role of federal government and states as partners in implementing CAA programs). For example, one commentator notes:

I believe such problems flow from an historically inaccurate EPA interpretation of the intent of Congress regarding the scope of federal jurisdiction. Until recently, the mode of behavior at EPA suggested that

First, in *Exxon*, the Ninth Circuit reiterates the 1990 CAA amendment balance of federal and state authority. On the one hand, truly centralized environmental regulatory control, enforcing preemptive federal law through local field offices, is likely to be politically and even constitutionally implausible.<sup>201</sup> Without political support, controversial environmental programs promulgated by a detached federal government that inevitably regulates local land use, economics, and lifestyle are likely to meet strong opposition.<sup>202</sup> On the other hand, truly decentralized control invites states to grant unacceptable concessions to industry by lowering regulatory standards to remedy revenue problems and fulfill economic interests.<sup>203</sup> The Ninth Circuit's decision in *Exxon* assuages federal fear of state acquiescence of federally mandated standards but maintains states' local flexibility to serve its specific environmental needs via the SIP.<sup>204</sup>

Secondly, the federal government's efforts to implement all of its environmental regulations without the help of the states would very likely prove futile.<sup>205</sup> The federal government is dependent upon local authorities to execute its regulatory will because of the nation's size and environmental diversity and because of the significant relationship between local environmental controls and local

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the agency was the supreme regulatory arbiter, and state and local governments were to act as minions subject to federal mandate. Yet, if one examines the jurisdiction established by each of the major federal environmental statutes, one will see that Congress did not preempt state authority regarding environmental regulation. This was quite deliberate. Congress chose to recognize *concurrent* state and federal jurisdiction instead of preempting states' authority. The state and federal governments were to be equal partners working *together*.

*Id.* at n.37.

201. See Robert A. Kagan, *Trying to Have It Both Ways: Local Discretion, Central Control, and Adversarial Legalism in American Environmental Regulation*, 25 *ECOLOGY L. Q.* 718, 731 (1999) (discussing political implausibility of truly centralized environmental regulatory power).

202. See Adler, *supra*, note 52, at 579 (discussing necessity of local political support for federal environmental programs whose dramatic effect on local land use and lifestyle is inevitably controversial).

203. See Kagan, *supra* note 201, at 732 (discussing fears generated by truly decentralized environmental regulation).

204. See Lauren MacLanahan, *Polychlorinated Biphenyls and the "Mega Rule" – Will It Have the Mega-Impact the EPA Desired?*, 24 *WM. & MARY ENVTL. L. & POL'Y REV.* 345, 366 (2000) (discussing that "command and control" model of environmental regulation, in which Congress establishes directive to reduce emissions, and EPA creates attainment standard halved amount of CO emissions in last twenty years). Command and control methods set performance standards that are based on the best available technologies. See *id.*

205. See Adler, *supra*, note 52, at 577 (stating that federal government could not hope to implement all of its environmental regulatory programs on its own).

land-use regulations.<sup>206</sup> To succeed in a given location, environmental policy must be customized for particular local conditions.<sup>207</sup> State and local officials have a degree of experience and expertise in handling local problems that is likely to be outside the grasp of federal agencies.<sup>208</sup>

Yet some say that commentators are preoccupied with the political division of environmental regulatory power between the government and the states.<sup>209</sup> Many radical critics advocate the wholesale transfer of environmental regulatory power back to the states.<sup>210</sup> Currently, EPA seems hesitant to weave overly tight controls into its regulatory policy.<sup>211</sup> Regarding fuel additives, EPA seems open to lowering or eliminating the minimum oxygen requirement to aid refiners in choosing which fuel additives to use and during which seasons to use them.<sup>212</sup> This flexibility of implementation affords the federal program a pricier long-term viability rather than an untenable uniformity.<sup>213</sup>

206. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1200 (1997) (detailing federal government's dependence upon state and local authorities to implement federal environmental regulatory policy).

207. See Adler, *supra* note 52, at 579 (stating that environmental regulation in any given location will only be successful if it is customized to satisfy local conditions).

208. See *id.* (stating that local experts have knowledge that is unobtainable by national agency experts).

209. See Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 353 (2000) (discussing why no recent analyses of devolution of regulatory authority to states considers impact on public health).

210. See *id.* at 354 (discussing radical position of critics that advocate total devolution of environmental regulatory power from federal government to states.)

211. See Dwyer, *supra* note 27, at 1207 (claiming that EPA is not willing to overburden states with controls). In the 1970s, Congress alienated the states by mandating transportation control programs in SIPs without giving states adequate time to fully address their ramifications. See *id.* (discussing congressional alienation of states through excessively ephemeral SIP submission schedules).

212. See Proposed Rules: Environmental Protection Agency: Regulation of Fuel and Fuel Additives: Reformulated Gasoline Adjustment, 65 Fed. Reg. 42920, 42922 (2000). EPA stated:

We seek comment on whether we should propose elimination of the per gallon oxygen minimum. We believe such action might provide additional flexibility to refiners in their choice of oxygenates. Elimination of the per gallon minimum may allow refiners to use little or no oxygenate during the summer ozone season, thus reducing the modest cost associated with summer ethanol use . . . We request comment on the alternative approach of lowering, rather than removing the oxygen minimum, which would retain the benefits of the requirement while reducing the small potential for any adverse impacts.

213. See Dwyer, *supra* note 151, at 220 (discussing practical impact of state environmental regulation).



EPA estimates that overall compliance with CAA will cost the private sector \$500 billion.<sup>214</sup> In terms of meeting the oxygenate requirements under CAA, fuel marketers must pay as much as an extra 10 cents per gallon of fuel because of the extra refining required.<sup>215</sup> Furthermore, EPA recently attempted to promulgate a new rule mandating that a minimum percentage of oxygenate fuel additives come from renewable sources.<sup>216</sup> The financial consequences of this ruling were estimated to exact \$50-\$300 million from consumers per year.<sup>217</sup> The principle argument in *Union Electric* asserted that compliance with CAA would cost the petitioner \$500 million for equipment installation and over \$120 million per year in maintenance and operating costs, which it argued was prohibitive.<sup>218</sup> Although it is possible that the federal standards are

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214. See Sunstein, *supra* note 175, at 307 (noting EPA's total cost estimate to private sector for complete compliance with CAA).

215. See Adler, *supra* note 52, at 577 (discussing increased costs of fuel due to incorporation of oxygenate requirements under CAA in refining process). The cost of complying with pollution control standards rarely inflicts significant damage to historically profitable companies. See William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, WM. & MARY ENVTL. L. & POL'Y REV., 1, 6 (1997) (discussing relatively innocuous effect of compliance costs on historically profitable companies). Companies operating at the margin of profitability, however, can be driven out of business by hefty compliance costs. See *id.* at 7 (discussing detrimental effects of compliance costs on marginally lucrative firms).

216. See 59 Fed. Reg. 39258, 39258 (1994) (requiring that 30% of oxygen required by CAA to be used in reformulated gasoline be derived from renewable feed stocks). EPA's stated policy is to reduce dependency on fossil fuels to meet the requirements of the reformulated gasoline program. See *id.* This Final Rule also required that "gasoline sold in certain areas be reformulated to achieve the greatest possible reductions in vehicle emissions of toxic and ozone-forming compounds." *Id.* The D.C. Circuit invalidated this Rule, holding that EPA was not statutorily authorized to adopt renewable oxygenate regulations because they are not directed toward the reduction of Volatile Organic Compounds [VOCs]. See *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

217. See Jonathan H. Adler, *EPA in Need of Adult Supervision* (visited Oct. 12, 2000) <<http://www.cei.org/UpdateReader.asp?ID=933>> (discussing increased consumer costs resulting from compliance EPA ruling that 30% of oxygenates come from renewable sources).

218. See *Union*, 427 U.S. at 272 n.2 (Powell, J., concurring) (reviewing petitioner's argument that compulsory compliance with CAA will incur prohibitive installation and maintenance costs). It is, however, important to note that even Justice Powell recognized the danger of inflexible federal environmental regulations. See *id.* at 272. He realized that forced compliance with CAA could likely drive an urban area's principal power supplier out of business and result in substantially greater risk to public health and welfare. See *id.*

Moreover, according to Professor Kirsten Engel's game theory model of state environmental regulatory behavior, although states compete intensely for new industrial facilities, environmental costs are a relatively small part of a firm's decision to locate within a particular state. See Dwyer, *supra* note 27, at 225 (noting in Engel's model that labor market structure, infrastructure quality, taxes, schools, and market access weigh more heavily than environmental cost concerns). Engel also

excessively stringent in terms of general state preference, under a flexible compromise of authority, states will maintain the ability to prioritize their development projects and, within limits, decide how to enforce their regulations to best serve local interests.<sup>219</sup>

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notes that “a significant number of state officials mistakenly believe that concerns about the cost of complying with environmental standards make a significant difference in a firm’s decision. *See id.*

219. *See Dwyer, supra* note 151, at 217 (discussing significant state role in hybrid system of national environmental standards coupled with state implementation and enforcement).

