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The Automobile Emissions Control Inspection and Maintenance Program: Making It More Palatable to "Coerced" Participants

*Ora Fred Harris, Jr.**

I. INTRODUCTION

Clean air is vital to the continued existence of humankind. To further this significant interest, Congress enacted the Clean Air Act (hereinafter the Act) which, through the concept of cooperative federalism, seeks to attain compliance with National Ambient Air Quality Standards promulgated for each critical or criteria air pollutant.¹ To be sure, this goal has not been fully achieved. In fact, a number of air quality control regions remain mired in nonattainment status and have experienced

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1. The Clean Air Act is currently codified at 42 U.S.C. §§ 7401-7642 (1982 & Supp. 1986). The effort to bring about clean air in this country is longstanding and reflects some federal involvement as early as 1953. But the Clean Air Amendments of 1970 ushered in a significant federal presence in the field of air pollution control. These amendments were designed "to assure that the air throughout the country 'is wholesome once again.'" See Note, *State Implementation Plans Under the Clean Air Act: Continued Enforceability As Federal Law After State Court Invalidation on State Grounds*, 19 Val. U.L. Rev. 877, 881 (1985).

The statutory framework underlying the concept of cooperative federalism is embodied in § 108(a)(1) of the Act, 42 U.S.C. § 7408(b) & (a) (1982 & Supp. 1986), which calls for the Federal Environmental Protection Agency [hereinafter EPA] to establish National Ambient Air Quality Standards [hereinafter NAAQS] for critical air pollutants to maintain the public health (primary standards) § 109(b)(1) of the Act, 42 U.S.C. § 7409(b)(1) (1982 & Supp. 1986) and to maintain the public welfare (secondary standards) § 109(b)(2) of the Act, 42 U.S.C. § 7409(b)(2) (1982 & Supp. 1986). Once such standards are promulgated, states assume the primary responsibility of attaining such standards. The crucial process used to achieve this end is the State Implementation Plan [hereinafter SIP] which is promulgated by a state agency subject to approval by EPA. Section 110(a)(1) of the Act, 42 U.S.C. § 7410(a)(1) (1982 & Supp. 1986).

Although the concept of cooperative federalism reflects an increase in the federal government's authority, it remains the generally understood rule that "pollution control is the 'primary responsibility of States and local governments.'" *New England Legal Foundation v. Costle*, 475 F. Supp. 425, 432 (D. Conn. 1979), citing 42 U.S.C. § 7401(a)(3), § 101(a)(3) of the Act.

varying difficulty in meeting the primary and secondary national standards.²

Automobile emissions control plays an integral role in the attainment of the National Ambient Air Quality Standards. The rationale for this phenomenon is fairly simple: automobile emissions implicate several critical air pollutants. They are: nitrogen oxides, hydrocarbons, carbon monoxide and ozone.³ Two of these pollutants—carbon monoxide and ozone—are principal culprits in thwarting the goals of the Clean Air Act, especially in urban areas with heavy concentrations of automobiles.⁴ In fact, this particular problem was addressed by Congress in the 1977 amendments to the Act.⁵

In these Amendments, Congress provided that states, through their State Implementation Plans (SIPs), could provide for the inspection and maintenance of automobile emission control systems.⁶ By so doing, states could delay their attainment of the National Ambient Air Quality Standards until 1982.⁷ Furthermore, regarding carbon monoxide and ozone, an extension was granted until December 31, 1987, provided several conditions were met, including the implementation of an inspection and

2. See, e.g., EPA: Pollution May Be on Rise, *USA Today*, April 23, 1986, at 3A (lists those cities with the greatest number of violations of the Clean Air Act) and Cone, L.A. To E.P.A.: Don't Hold Your Breath: Despite the Clean Air Act's Year-End Deadline, Los Angeles, and Many Other American Cities Still Suffer from Polluted Air, 72 *Sierra* 27 (1987).

3. See *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869, 873 n.2 (E.D. Pa. 1982) ("Three air pollutants—carbon monoxide, hydrocarbons [sic], and photo-chemical oxidants—are largely attributable to motor vehicle emissions"). Ozone, a type of photo-chemical oxidant, is "a pollutant created when hydrocarbons mix with nitrogen oxide, sunlight and heat." C-U Untouched by Chicago's Record Ozone, *Champaign-Urbana News Gazette*, August 8, 1988, at A-3 [hereinafter C-U Untouched]. See also Battle, *Transportation Controls Under the Clean Air Act—An Experience in (Un)Cooperative Federalism*, 15 *Land & Water L. Rev.* 1, 9 (1980).

4. See Kocheisen, *Reynolds Alerts Cities to Ozone, Carbon Monoxide Deadline*, 10 *Nation's Cities Weekly* 14 (1987).

5. See 42 U.S.C. § 7502(a)(2) (1982 & Supp. 1986), which provides for the attainment of NAAQS for the critical air pollutants no later than December 31, 1982, except for ozone and carbon monoxide in which compliance was extended until December 31, 1987. However, when it became readily apparent that state and local governments would not meet these standards at the prescribed time, Congress extended the compliance deadline until August 31, 1988. See C-U Untouched, *supra* note 3, at A-3 ("[t]he Deadline for states to meet federal air quality standards expires at the end of the month"). Stanfield, *Punching at the Smog*, *National Journal*, March 5, 1988, at 602 ("ozone remains a major problem").

6. 42 U.S.C. § 7410(a)(2)(G) (1982 & Supp. 1986). But there was no specific mandate in the Act for such I/M programs in nonattainment plans. Yet, such programs were implicitly authorized by § 172(b)(2) of the Act which directs that a state's revised SIP shall "provide for the implementation of all reasonably available control measures as expeditiously as practicable." 42 U.S.C. § 7502(b)(2) (1982 & Supp. 1986).

7. 42 U.S.C. § 7502(a)(1) (1982 & Supp. 1986).

maintenance (I/M) program.⁸ Thus, I/M programs are firmly entrenched requirements of the Clean Air Act.

The longstanding existence of such I/M programs does not necessarily reflect their successful implementation and enforcement. In fact, a significant amount of resistance to this programmatic requirement has surfaced over the years and has adversely affected its utility.⁹ There are several underlying reasons for the seemingly widespread aversion to the I/M program. They are: 1) an antipathy to federal intrusion in matters considered to be of "state or local" concern; 2) a concern about the costs attending such programs; and 3) a belief in the existing technological effectiveness and efficiency of most American and foreign made automobiles.¹⁰ As a consequence, political, economic, and social considerations are closely connected in this area, which is symptomatic of environmental issues generally.¹¹

The conjunction of these political, economic, and social factors in opposition to I/M programs has been the impetus for frequent extensions to and forgiveness of noncompliance with the deadlines delineated in the Act. The most recent extension, for example, was from December 31, 1987 to August 31, 1988.¹² It was fostered by congressional concern about the societal effects that sanctions authorized by the Act would have upon nonattainment air quality control regions. Those sanctions creating the most consternation call for a loss of federal highway and/or sewage treatment plant funds and/or a ban on construction of major stationary sources.¹³ These administrative sanctions or "sticks," if you will, are designed to compel compliance with the Act, including the I/M program requirements. Notwithstanding these ominous sanctions, non-

8. 42 U.S.C. § 7502(b)(11)(B) (1982 & Supp. 1986). See also D. Currie, *Air Pollution: Federal Law and Analysis*, 6-26 (1981) ("[R]equirement of a vehicle-inspection program is absolute . . .").

9. See Reitze, *Controlling Automotive Air Pollution Through Inspection and Maintenance Programs*, 47 *Geo. Wash. L. Rev.* 705, 720 (1979) and Illinois Institute of Continuing Legal Education (IICLE), *Environmental Law 2-22* (1983) (with 1988 supplement) ("I/M program" has been and continues to be particularly unpopular with the states and the public and is the subject of some debate).

10. See Reitze, *supra* note 9, at 720, 721, 724, and 734.

11. See Gates, *Environmental Law's Second Decade: How Are We Doing? 1987 Ark. Law.* 40, 41 ("most problems, and most solutions, are inextricably intertwined with a variety of economic, social and political factors").

12. Pub. L. No. 100-202, 101 Stat. 1329-199 (1987).

13. See, e.g., *Sunny Day for L.A. Called Step Closer with EPA Accord*, *L.A. Daily Journal*, Sept. 26, 1985, at 19 ("the Los Angeles basin does not stand a ghost of a chance of cleaning its air by the federally-mandated deadline of 1987 and . . . no one wants the sort of punitive economic sanctions the EPA can impose on California for failure to reach the deadline").

attainment areas are still with us,¹⁴ and I/M programs continue to attract the wrath of much of the American public.¹⁵ Because of this untenable situation, some genuine thought must be given to developing a new approach to environmental regulation in this area.

This Article explores those forms of regulatory policy that may provide greater incentives for state and local governments to implement and enforce I/M programs so as to make reasonable further progress toward attainment and maintenance of National Ambient Air Quality Standards. Typically, the federal regulatory focus underlying many environmental statutes has been on "command," "hammer," or so-called "stick" methods of enforcement.¹⁶ Certainly, the enforcement provisions of the I/M program mirror this approach. Very little consideration, however, seems to have been given to a broad "carrot" or positive incentive approach as an alternative method of implementation and enforcement.¹⁷ In this Article, this alternative will be closely examined and analyzed to determine its efficacy as an automobile emissions control mechanism.

II. THE CURRENT STATUS OF INSPECTION AND MAINTENANCE PROGRAMS

A. *General Discussion*

If one were in the midwestern United States during the oppressive heat and drought conditions of the summer of 1988, the ominous nature of ozone pollution would have been evident. For a few days during the first week of July, an ozone yellow alert was in effect in Chicago because of the interaction of factory and automobile emissions with the unusually hot temperatures.¹⁸ At particularly high risk were individuals

14. See EPA Proposed Delay in Sanctions for Air Pollution, L.A. Daily Journal, Nov. 18, 1987, at 1.

15. See Ostrov, Inspection and Maintenance of Automotive Pollution Controls: A Decade-Long Struggle Among Congress, EPA and the States, 8 Harv. Envtl L. Rev. 139, 141 (1984) (Recalcitrance is apparent, although commentator casts best possible light on public's acceptance of I/M programs.).

16. *Train v. Nat'l Resources Defense Council*, 421 U.S. 60, 64, 95 S. Ct. 1470, 1474 (1975) ("Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 . . .").

17. The unfortunate aspect of Congress' shortsightedness in adopting a "stick" approach as the dominant implementation method is the negative overtone that has been created, particularly in connection with I/M programs. See, e.g., Ostrov, Inspection and Maintenance of Automotive Pollution Controls: A Decade-Long Struggle Among Congress, EPA and the States, *supra* note 15, at 141 ("Rather than changing the state governments' attitudes toward I/M, the statutory revisions in some cases seemed to galvanize opposition to such programs.").

18. See C-U Untouched, *supra* note 3, at A-3.

with preexisting respiratory and cardiac problems. Moreover, each resident of the city was jeopardized to some degree by the risks posed by such unhealthy air quality.¹⁹

Perhaps those who were in Chicago and actually experienced the trauma of trying to breathe "dirty" air could best appreciate the importance of effective automobile emissions control as a means of attaining clean air.²⁰ Some may have even finally thought that the heretofore dreaded inspection and maintenance program had some redeeming value after all. Nevertheless, many persons probably remained unalterably opposed to such programs as unwarranted intrusions on their lifestyles with an inadequate corresponding return in enhanced air quality.²¹ To be sure, the causal relationship between the attainment of the National Ambient Air Quality Standards and the implementation of a rigorous I/M program is far from clear. Scientific evidence is not that illuminating in this regard; this reflects that, once again, science has not been as certain as we would like.²²

B. *Public Opposition to I/M Programs*

Quite frankly, the average American probably does not think about I/M programs in terms of scientific uncertainty. Instead, the underpinnings of the apparently intense political and public disdain for such programs are far removed from this consideration. For example, the concept of federalism has been frequently adduced as a prime reason for demurring to I/M programs. The average citizen tends to characterize such programs as unwarranted intrusions into traditionally state or local matters, namely the safety, inspection, and maintenance of automobiles.²³

19. *Id.* ("EPA has issued 12 ozone advisories so far this year, urging people to limit outdoor activity and physical exertion, especially individuals with heart and lung problems").

20. It is generally accepted that people better appreciate and respond to the risks of pollution when these risks are specifically brought home to them. See Harris, *Communicating the Hazards of Toxic Substance Exposure*, 39 *J. Legal Educ.* 97, 102 (1989) ("Students learn (as do people in general) when the risk is specifically brought home to them . . ."). This would certainly be the case for those trying to cope personally with the ozone alert. See Stanfield, *supra* note 5, at 601 ("Environmentalists have been able to transform the air pollution debate into a public health issue.").

21. Reitze, *supra* note 9, at 736 ("I & M will add more costs in both dollars and time. In light of these added costs, I & M makes little sense.").

22. See, e.g., Newcomb, *The Seattle Automobile Inspection and Maintenance Program: Multiple Analyses of Program Impact*, 10 *Evaluation Rev.* 217, 227 (1986) (Although tentative research findings reflected "that the I/M program has had a negligible impact on levels of CO at the two monitoring stations studied . . ." more conclusive findings necessitated additional research at other monitoring stations.).

23. The resistance by the states and their residents is political in nature and is one of the primary reasons for the lethargic development of I/M programs. Reitze, *supra* note 9, at 720.

Beyond this level of rationality, the federalism argument has been articulated in more sophisticated, legalistic terms whenever the federal government has threatened to impose sanctions upon a state for failing to implement an I/M program.²⁴ What seems to have eluded the attention of the proponents of such arguments is that both the language and legislative history of the Act seem to unequivocally support the federal government's action in this regard.²⁵ Moreover, the concept of "cooperative federalism" which undergirds the Act is invariably placed in jeopardy whenever a state refuses to cooperate.²⁶ Thus, sanctions of the kind clearly delineated in the Act must be available to further its overall objectives.²⁷

Another remonstrance centers on the issue of the costs associated with I/M programs. In this regard, both financial and time costs are implicated. Concerning financial costs, the usual argument is that the expenses attendant to inspection of the automobile coupled with the added repair costs in the event one fails an inspection are unduly severe.²⁸

24. For a thorough discussion of the multifaceted issues surrounding the implementation of I/M programs within our system of federalism, see Ostrov, *supra* note 15.

25. See Note, *supra* note 1, at 882. In support of the argument justifying expansive federal power under the Clean Air Act, the commentator notes:

First, over the past three decades, federal authority in the field of air pollution control has increased dramatically which the discretion of the States has been cut back rather severely.

Second, the ultimate congressional purpose in passing the 1970 Amendments was, and still is, to protect the public health and welfare by achieving specified federal air quality standards.

26. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *Yale L.J.* 1196 (1977) ("[S]uccess of federal programs has been gravely compromised by this dependence upon state and local governments, whose generally poor record in controlling environmental deterioration triggered the initial resort to federal legislation, and whose subsequent performance in the context of federal programs has in many instances remained inadequate.").

27. Because cooperative federalism will sink of its own weight if one of the parties to the compact refuses to cooperate, some enforcement mechanism is necessary to insure that the cooperative federal-state regime remains viable. The sanctions found in the Act (termination of federal highway funds, sewage treatment funds, and a ban on construction of major stationary sources) work, in theory, toward this objective and, therefore, are essential devices to "achieve acceptable air quality." Ostrov, *supra* note 15, at 139. See also Battle, *supra* note 3, at 3 ("The task of the federal government, therefore, becomes one of enticing or coercing the states to perform duties toward which they are themselves disinclined—without running afoul of constitutional restrictions or a legislative backlash.").

28. But see Clean Air Act Amendments of 1977, Report by the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 294, 95th Cong., 1st Sess., at 286 (1977), 1977 U.S. Code Cong. & Admin. News (91 Stat. 685) 1077 ("Consumer costs for inspection and maintenance are offset in substantial measure by consumer savings associated with fuel economy improvements resulting from maintenance."). Thus, a difference of opinion exists as to whether the unavoidable costs associated with such I/M programs are unreasonably high in view of the benefits.

Moreover, the time or inconvenience factor associated with such activities, it is contended, is excessively burdensome.²⁹ These costs, when weighed in a cost-benefit ratio, have prompted some individuals to conclude that I/M programs are not economically efficient.³⁰

A final protest to such programs has been couched in terms of their inutility in view of the technological efficiency of the current fleet of new automobiles. In fact, the argument has been made that such programs are unnecessary because of the state of the art emission control systems prevalent in today's models.³¹ The technological effectiveness of existing emission control systems, the reasoning goes, is capable of insuring adequate air quality.³² But this argument tends to overlook the fact that many of these systems can be compromised by unauthorized tampering.³³ Certainly, an I/M program could detect such improper action and insure that this advanced technology is actually operative.

The foregoing arguments against I/M programs reflect the intense political fallout associated with the implementation and enforcement of such programs. Is it politically palatable to force such programs upon the public? It is perhaps fair to say that Congress and, to a lesser degree, the federal Environmental Protection Agency (hereinafter EPA) have not exhibited the requisite political courage to take stringent actions against those who have adopted a cavalier attitude regarding compliance with I/M requirements.³⁴ In other words, it may be extremely painful

29. Reitze, *supra* note 9, at 734 ("Additional costs that an I & M program can entail include time lost in having an inspection and difficulties related to quality control of automotive repairs.").

30. *Id.* at 706 (Government should "forego" the expense of another expansion of the federal bureaucracy by rejecting the implementation of I & M programs.).

31. *Id.* at 796 ("The diminishing need for the I & M program is a result of technological advances in emissions control systems required by other provisions of the Clean Air Act.").

32. *Id.* at 706. The commentator suggests that more meaningful automobile emission control is achievable via "technological developments in engine design" instead of I/M programs.

33. Though there are anti-tampering provisions contained in both the Clean Air Act (42 U.S.C. § 7522(a)(3) (1982 & Supp. 1986)) and in a few state laws, see, e.g., Cal. Health & Safety Code, § 44017 (West 1986) and Md. Transp. Code Ann. § 23-202(c)(2) (Supp. 1988), effective enforcement is dubious because violations are simply difficult to detect. Perhaps an inspection and maintenance program could remedy this deficiency. Reitze, *supra* note 9, at 713.

34. As one member of the California Assembly has observed concerning the efficacy of sanctions available under the Clean Air Act: "I think you've got the threat but the threat is not exercised. So I am not sure people regard it as a real threat. I think it's important to keep that threat in place because without it you don't have the will." Richardson, *The Politics of Smog*, California Journal 289 (June 1987), at 289. See also *Cleaner Air Will Require Courage*, The Atlanta Constitution, Sept. 1, 1988, at 18A [hereinafter *Cleaner Air*] ("Congress must summon its courage and tell the utilities, coal companies, auto makers, petroleum refiners and others that the nation *will* clean up its air."). (Emphasis in the original).

from a political perspective to terminate federal highway or sewage treatment funds and perhaps be even more difficult to order a ban on construction of major stationary sources because of noncompliance with a program that is perceived as not being highly regarded by a sizable portion of the American people.³⁵

From an environmental perspective, this procrastination is of dubious, but admittedly uncertain, value. To be sure, the number of cities and counties whose air quality fails to meet the national standards with respect to carbon monoxide and ozone have escalated.³⁶ A common denominator for many of these areas is the high concentration of automobiles.³⁷ Although uncertainty surrounds this issue, there is cogent evidence that the internal combustion engine found in most automobiles is a principal culprit of ambient air pollution in terms of nitrogen oxides, hydrocarbons, carbon monoxide, and ozone.³⁸ Thus, it is no leap in logic to conclude that excessive automobile emissions play a substantial role in the diminution of the ambient air quality.

I/M programs are simply a recognized method of controlling these harmful automobile-related pollutants. Congress acknowledged the program's utility by providing for it in the Act.³⁹ The EPA has in theory accepted the notion that I/M programs can effectively achieve attainment by at least threatening to impose sanctions against those communities who refuse to implement such programs.⁴⁰ Of course, such programs can never be the sole control mechanism; but it seems foolhardy not

35. Richardson, *supra* note 34, at 288. For example, this California official has recently hypothesized "that imposing sanctions could have an opposite political effect than intended—it could erode support for air pollution programs." But see Ostrov, *supra* note 15, at 190 ("public . . . support[s] the I/M" program; resistance is characterized as being more directed towards the "federal directives" pertaining to the program instead of their substance).

36. Arrandale, *Air Pollution Countdown*, 2 Congressional Quarterly's Editorial Research Reports 618 (1987) ("Millions of Americans still are breathing polluted air. More than 60 of this country's metropolitan areas, including most of its big cities, will miss a Dec. 31 deadline . . . on ozone and carbon monoxide.").

37. *Id.* ("Further progress may require drivers to use cleaner-burning fuels such as gasohol—a blend of petroleum with ethanol, which is derived from corn—or abandon their cars for commuter buses and trains in populous urban areas.").

38. Battle, *supra* note 3, at 9 ("Carbon Monoxide (CO), hydrocarbons (HC), and nitrogen oxides (NO_x) are the major pollutants emitted from vehicle tailpipes; and HC and NO_x combine with atmospheric oxygen in sunlight in complex chemical reactions to form photochemical oxidants, or 'brown smog.'").

39. See 42 U.S.C. § 7502(b)(11)(B) (1982 & Supp. 1986).

40. See, e.g., *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869 (E.D. Pa. 1982) (EPA remained dormant for several years before taking any action to assure compliance with I/M program via consent decree), and Richardson, *supra* note 34, at 289 (a general feeling of skepticism exists as to whether EPA sanctions will ever be enforced given their discretionary nature and the political climate in which the threats of such sanctions are made).

to acknowledge their utility in the overall scheme of automobile emissions controls. To the extent, therefore, that public recalcitrance continues to stifle the utilization of I/M programs, the prospect of deleterious environmental effects becomes more ominous. Thus, a method to assuage this resistance to I/M programs will certainly have significant environmental consequences.

III. A SOLUTION OR SUGGESTED AVENUE TO RAPPROCHEMENT

A. *General Discussion*

An effective strategy must be developed to make the inspection and maintenance program under the Act more palatable to the American population. Astonishingly, such creative approaches are not currently embodied within the Act.⁴¹ This has certainly prevented clean air from becoming a reality.

As previously noted, the major enforcement mechanism under the Act consists of sanctions designed to encourage compliance through fear or intimidation.⁴² But the Act does provide for the awarding of federal grants to state agencies to promote research in developing methods to control air pollution in order to attain and maintain National Ambient Air Quality Standards.⁴³ It is transparent that the former approach operates on the "stick" principle while the latter approximates the "carrot" principle to behavioral modification. Which is more efficacious?

The answer to the foregoing question involves qualitative judgments concerning the effectiveness of the use or threatened use of coercive measures as compared to the prudent utilization of incentives to bring about reasonable further progress toward attainment, particularly with respect to fostering a more cooperative climate with regard to I/M programs. To be sure, one thing is clear: the stick approach has not worked very well in bringing about compliance with the Act, including promoting the use of I/M programs to achieve that end.⁴⁴ In fact, this

41. The only creative program within the Act to spur development of an I/M program is found at § 210 of the Act, 42 U.S.C. § 7544 (1982 & Supp. 1986), which provides, in pertinent part, "The Administrator is authorized to make grants to appropriate State agencies in an amount up to two-thirds of the cost of developing and maintaining effective vehicle emission devices and systems inspection and control programs . . ."

42. See 42 U.S.C. §§ 7410(a)(2)(I) and 7503(4) (1982 & Supp. 1986) (ban on construction of major stationary sources of pollution) and 42 U.S.C. § 7506(a) (1982 & Supp. 1986) (withhold federal highway and sewage treatment funds).

43. 42 U.S.C. § 7544 (1982 & Supp. 1986).

44. See, e.g., Stanfield, *supra* note 5, at 602. The commentator underlined the fact that the American Lung Association has conducted studies reflecting "that without the additional pollution controls on autos and trucks, as provided by the pending clean air

approach may have actually produced the opposite effect within the populace. Some contend, for example, that a threatened termination of highway funds or a ban on construction is fairly certain to instill an element of defiance that greatly cripples the implementation of I/M programs as well as any other form of automobile emissions control.⁴⁵ Much can be said of the notion that one possible way of riling an American is for the federal government to threaten him or her about something which is thought—rightly or wrongly—to come within his or her personal domain.⁴⁶ This appears to be exactly the case with regards to implementing I/M programs in nonattainment areas through the “stick” method.

In the affected community, as well as in state and city legislative halls, cries of defiance have frequently been loud and clear. From this has sprung indifference and, much too often, litigation regarding the implementation of such programs.⁴⁷ Not only has this hindered the fulfillment of the goals of the Act, but it has fostered economic inefficiency because of the huge transaction costs involved. Thus, one must seriously question whether the threat of “beating someone over the head” has been an effective regulatory approach.

In view of the palpable shortcoming of the “stick” approach to inspire compliance with the Act, it appears essential that there be some shift to an incentive approach to engender an appropriate level of environmentally conscious behavior. In other words, an alternative “Game Plan” must be devised. Of course, if an acceptable game plan is developed, the effective execution of such a plan must be carefully considered.

The question of whether Congress should more generously use economic incentives—market and otherwise—has arisen frequently in the

bills, ozone nonattainment areas will fail to meet the standard ‘for the foreseeable future’ because of the growth of industry and the increased number of cars.” The foregoing conclusion is certainly not a ringing endorsement of the efficacy of the “stick” method of enforcement.

45. See Ostrov, *supra* note 15, at 141 (“[S]tatutory revisions in some cases seemed to galvanize opposition to such programs.”).

46. A prime example of this phenomenon is the white resistance to court-ordered school desegregation in the South primarily from the late 1950’s through the 1970’s and subsequently in the North during the 1970’s and 1980’s. The Little Rock Central High School Desegregation Crisis of 1957 is a classic illustration of such federally-inspired defiance. See E. Huckaby, *Crisis at Central High* 39 (1980) (“[I]t was now Little Rock, Arkansas, versus the United States of America.”).

47. The most vivid illustration of the type of marathon litigation that has occasionally surrounded the I/M implementation issue is Delaware Valley Citizens’ Council for Clean Air v. Pennsylvania, 533 F. Supp. 869 (E.D. Pa. 1982), in which the initial litigation was commenced in 1982 and, after several different actions, was concluded in 1985.

context of environmental regulation.⁴⁸ Although the Act does utilize a few incentives, this effort is far too feeble. And, as discussed previously, these incentives are much too sparse to effectively eliminate nonattainment air quality control regions.⁴⁹ But the basic thesis of this Article is that perhaps a meaningful package of incentives could serve as a catalyst to a more tolerant, understanding attitude toward I/M programs. Now then, what should be the precise contours of such a program? This thorny question is the focus of the remaining sections of this Article.

B. *The Game Plan*

The existing incentive within the Act to extinguish nonattainment conditions within air quality control regions, namely research grants, can promote important environmental objectives with respect to improving air quality. Increasing environmental controls through scientific research simply enhances available methods of effective pollution control.⁵⁰ But because of the constant difficulty posed by the scientific uncertainty surrounding many of these issues, any scientific research spawned by research grants cannot be viewed in a vacuum as the

48. See, e.g., Note, Legal Incentives for Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Management, 95 Yale L.J. 810, 812 (1986) (bemoans the fact that neither Resource Conservation and Recovery Act of 1976 (RCRA) nor Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (now Superfund Amendments and Reauthorization Act of 1986 (SARA)) contain sufficient economic incentives to encourage waste reduction). See also *Chevron, USA, Inc. v. Nat'l Resource Defense Council*, 467 U.S. 837, 863 n.37, 104 S. Ct. 2778, 2792 n.37 (1984) ("Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework."), quoting Lave and Omenn, *Cleaning the Air: Reforming the Clean Air Act* 28 (1981).

49. The ineffectiveness of the incentives currently within the Act is graphically illustrated by the current state of nonattainment in this country which is periodically renewed by the extension of the compliance deadlines. The most recent extension for carbon monoxide and ozone expired on August 31, 1988, "the day when Congress must deal with ozone pollution." Stanfield, *supra* note 5, at 600. But, since the moratorium deadline, EPA has been compelled to resort "to its own devices" because of Congress' unwillingness to deal with the air pollution problem. *Cleaner Air*, *supra* note 34, at 18A.

50. It is undeniable that scientific research can broaden the galaxy of effective environmental control devices. Striking examples are: (1) the development of the catalytic converter which significantly reduces carbon monoxide (CO) emissions, converting them into harmless carbon dioxide (CO₂) and water (H₂O); and (2) the development of gasohol which, if mass produced and distributed, could significantly reduce automobile emissions. See, e.g., Farmers Say, "Hurrah for Ethanol!", *Successful Farming*, Aug. 1988, at 23 (successfully used in the Denver area to improve air quality). But is there a limit to what science can do?

panacea.⁵¹ Thus, an incentive package must transcend the one currently in the Act.

The difficulty rests, therefore, with carving out a transcendent incentive program in the face of scant judicial, legislative, and administrative guidance. In fact, there is virtually nothing concerning the use of incentives to galvanize people into complying with the I/M program.⁵² Thus, it appears that little, if any, meaningful thought has been given to the complete utilization of incentives, as opposed to command and control regulations, to enhance air quality in nonattainment areas.⁵³

Regarding implementation of the I/M program, the absence of an incentive-based regulatory approach may be a crucial deficiency in the nonattainment process and may partially explain why this program has been frequently viewed as an anathema.⁵⁴ Dispelling this generally negative perception of I/M programs requires a novel marketing strategy to emphasize their strengths to the general population. A package of economic incentives—market and non-market—seems to be at least one answer to this problem.

What should these incentives be? How should they be configured? Market incentives first come to mind.⁵⁵ Of these, tax incentives are considered most often.⁵⁶ In the waste management area, for example,

51. Congress seemed to be cognizant of the limits of science by placing greater emphasis on other "incentives," for better or for worse, like cutting off federal funds or imposing bans on the construction of certain pollution sources.

52. See *supra* note 41 and accompanying text.

53. The term "incentives," for purposes of this Article, means those devices that induce one into doing something because of the prospect of reward and, therefore, engender a positive feeling within the actor. An example of incentives in this sense would be tax incentives like credits and/or deductions. But it appears that Congress, some courts and a few commentators have taken a broader view of incentives and have categorized items such as extensions to compliance deadlines and, most notably, sanctions in the Act—denials of federal grants and bans on construction in the event of noncompliance—as incentives to compliance. To be sure, these latter items may induce compliance but surely not because of the extension of a "carrot." Instead, they epitomize the "stick" or "disincentive" approach to behavioral modification.

54. Battle, *supra* note 3, at 2. In analyzing the myriad reasons why states refuse to cooperate under the cooperative federalism concept, the commentator hypothesizes that "[t]here may be insufficient incentives to entice the states to participate, as can occur when the state is left with too few discretionary choices." Certainly, this is true of the Clean Air Act generally and in connection with the I/M program specifically. That is, there are just too few incentives (in the true sense of the word) to galvanize compliance. Thus, recalcitrance becomes an ineluctable consequence.

55. "Market" incentives are those positive incentives arising within the marketplace that, if doled out judiciously, can foster certain desired behavior.

56. The Internal Revenue Code has been often used as a tool for social or behavioral change. A striking example are the tax breaks once extended to homeowners for engaging in energy conservation practices. The ostensible objective of these tax incentives was to reduce the wasteful use of energy. See Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (1978).

Congress has been criticized for not looking to market incentives as inducements for more effective waste management controls under the Resource Conservation and Recovery Act (RCRA).⁵⁷ The argument has been advanced that such incentives would hasten the shift from waste management to waste reduction, reuse, and recycling.⁵⁸ In other words, the avowed objective of RCRA—waste reduction—would become more than mere idle words if market or economic incentives were extended to generators, transporters, and disposers of solid and hazardous wastes to reduce the volume of waste instead of simply trying to manage it after generation.⁵⁹

This thesis is probably relevant to the nonattainment aspect of the Act, particularly in connection with automobile emissions control mechanisms like an I/M program. Is it not conceivable that providing incentives, pursuant to the Internal Revenue Code, to automobile owners complying with directives under the I/M program would spur a more successful program? For example, a tax credit or, at the very least, a tax deduction for those whose automobiles successfully undergo inspection and testing will probably transform a defiant attitude into a compliant one among such owners. In looking at this solution in terms of the predictability or rationality of human behavior, the tax incentive (“a carrot”) would provide a ready inducement for bringing the automobile emissions control program to its desired level of effectiveness.⁶⁰ It seems that this approach would be markedly better than the prevailing “stick” method.

When tax incentives are proposed to foster behavioral modification concerning environmental matters, two issues arise: 1) will such action place an undue strain on the United States Treasury and 2) will it open the door to a myriad of other interest groups claiming a similar right to such preferential tax treatment.⁶¹

57. Note, *supra* note 48, at 814.

58. *Id.* at 813 (To the contrary, EPA “has created disincentives for waste reduction.”).

59. *Id.* at 831.

60. The transparent advantage of a “carrot” approach involving tax incentives is that recipients will likely respond with alacrity to its availability. This will surely militate in favor of the successful utilization of I/M programs. The only legitimate question concerning a tax incentive program is whether it should be worked out under the auspices of and in conjunction with the states or whether it should be handled directly with individual citizens. The former approach approximates more closely the notions of federalism embodied within the Act. Because I/M programs are a part of the SIP and thus state law, the state should enact the enabling legislation for such an incentive program. The latter approach does not make any sense unless the federal government would actually run the I/M program, a proposition which is of uncertain validity both constitutionally and practically.

61. These are certainly legitimate subjects of concern given that the nation is currently in the throes of a massive budget deficit with no meaningful abatement currently on the horizon.

Regarding the first concern, problems are presented in weighing the economic costs of an activity against the correlative environmental benefits. The difficulty rests not so much in determining the economic costs, but in quantifying the corresponding environmental benefits.⁶² More precisely, how does one reduce such benefits to dollars and cents? The only plausible method of accomplishing this end is to identify those harms attributable to "dirty" air and then to determine the resulting societal costs. In this connection, it should be noted that chronic and acute health problems may result from air with unhealthy levels of hydrocarbons, carbon monoxide, and nitrogen oxides.⁶³ The costs to society of coping with these health problems are staggering. For example, in the Los Angeles area alone, the costs have been placed at \$13 billion.⁶⁴ When one assesses the environmental benefits of I/M programs in terms of reducing these pollution costs, the cost/benefit ratio militates in favor of such programs. To be sure, a plausible argument can be made that the economic costs of I/M programs (even with tax incentives) may be overshadowed by the ensuing environmental benefits. Because of this favorable cost-benefit ratio, the addition of a tax incentive package should not undermine efficiency and, more significantly, should not unduly burden the federal government's coffers.⁶⁵

As to the second concern, the tax incentive program underlying the I/M proposal will serve a distinctive function, namely to promote the provision of a public good: clean air.⁶⁶ Without clean air, society faces significant health risks which threaten humankind's continued existence. This preeminent interest, therefore, deserves such preferred tax treatment.

62. In the regulatory context, EPA has occasionally experienced some difficulty in assessing the environmental benefits associated with a given regulation pursuant to its statutory responsibility of determining the regulation's cost-effectiveness. See, e.g., *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978) (establishing industry-wide effluent limitations under the Clean Water Act, codified at 33 U.S.C. § 1251 (Supp. 1987)).

63. Regarding hydrocarbons and nitrogen oxides, they can interact with atmospheric oxygen and, in the presence of sunlight, form ozone. "Medical researchers have found that ozone in the lower atmosphere can cause serious upper respiratory problems." *Los Angeles Faces Imminent Ban on Building New Tainting Plants*, *New York Times*, Aug. 30, 1988, at 7A. "Carbon monoxide, which comes largely from vehicle exhaust, reduces the ability of the body to absorb oxygen and can cause heart problems." *Id.*

64. See *Patrol Is Welcome Sight Amid Smog*, *Los Angeles Journal*, Aug. 31, 1988, at 8.

65. In essence, a net savings should redound to the benefit of the federal treasury in view of the sizable reduction in pollution-related health costs resulting from the enhanced implementation of I/M programs arising from available tax incentives.

66. The provision of public goods is one of those desired goals, along with the elimination of externalities, whose attainment will bring about an efficient level of pollution control. Governmental intervention greatly facilitates the achievement of this objective. R. Findley and D. Farber, *Environmental Law: Cases and Materials* 346 (2d ed. 1985) [hereinafter R. Findley and D. Farber, *Cases and Materials*].

When couched in such terms, restricting the proposed economic tax incentives to an I/M program is defensible.⁶⁷

It seems unwise to mortgage the environmental future of the nation simply to save a few dollars today. This position has special appeal because of the numerous quantifiable environmental benefits now associated with I/M programs. Using tax incentives to revitalize the I/M program, therefore, makes eminently good sense from an environmental policy perspective.

Alternatively, because the costs of inspection and, if necessary, of repair to an automobile's emission control system have often been cited as reasons underlying some of the widespread public discontent for I/M programs, reimbursement for such compliance costs would probably allay much of the opposition to the program.⁶⁸ Congruent with the behavioral rationale underlying the tax incentive proposals, such a program of direct economic assistance would also have the positive effect of leading one to conclude that he or she is being rewarded for assuming the added responsibility of having an automobile tested and inspected to determine if emission control standards are being met. In other words, these incentives tend to make the citizen feel good about what he or she is doing and, consequently, make it easier for such individual to adhere to the environmental creed that he or she may openly espouse, namely, in this instance, clean air.⁶⁹ To be sure, this is far different from feeling that you have been hit over the head with a stick.

In addition to individual incentives, perhaps some group or governmental incentive packages should be considered as an alternative to the "stick" approach. For example, if state and local governments were offered some federal "carrots" to hasten their efforts to make I/M programs a reality, then much of the legislative and litigative resistance could possibly be eliminated. What form should these incentives take?

67. It is exceedingly difficult to imagine a more important social goal than to clean up the nation's air. For this reason, privileged treatment under the Internal Revenue Code is eminently reasonable.

68. To maintain the concept of federalism already embodied in the Act, states should be conduits for those federal reimbursements for compliance with the I/M program. There is precedence for this arrangement in the myriad of social programs funded by the federal government through the states. A notable example is the Federal Food Stamp Program. See 7 U.S.C. §§ 2011-30 (1988).

69. See, e.g., Portney, *Reforming Environmental Regulation: Three Modest Proposals*, *Issues in Science and Technology* 74 (Winter, 1988) ("public concern about the environment is still very high"). In view of this environmental attitude, a principal goal is to align this positive belief with similar behavior. See Snyder, *When Believing Means Doing: Creating Links Between Attitudes and Behavior*, from Zanna, Higgins, and Herman, *Consistency in Social Behavior*, *Ontario Symposium on Personality and Social Psychology* 105 (2d ed. 1979).

One possible answer to the incentive problem in this context is to simply convert the existing disincentives into incentives.⁷⁰ That is, where the federal government currently holds the threat of termination of highway and sewage treatment funds over states as a Damoclean sword, what if this threat were turned into an incentive package to foster compliance. That is, if a supplemental level of federal funding for highways and waste treatment plants were offered to those states that were compliant with regard to I/M programs, then perhaps less recalcitrance would be shown. Here again, allowing state and local government officials to perceive the prospect of reward for their obedience may instill the cooperative spirit so much needed under the concept of federalism embodied in the Act.⁷¹

Although the foregoing incentives may insure that I/M programs will be more faithfully accepted, there is always the prospect that such proposals may not succeed completely. It cannot be denied, for example, that sometimes human behavior is unpredictable.⁷² Much of the underpinning for the incentive proposals is predicated on it being predictable that positive environmental action will result from offering favorable

70. Again, a definitional problem exists in distinguishing "disincentives" from "incentives." What this author would describe as disincentives to compliance—a threatened loss of highway or sewage treatment funds and/or a ban on the construction of major stationary sources—have been frequently referred to by courts as "incentives" or "carrots" to induce performance. See, e.g., *Ostrov*, supra note 15, at 149 ("While providing states with a 'carrot' in the form of more time to achieve acceptable air quality . . ."); *Connecticut Fund for the Env't. v. EPA*, 672 F.2d 998, 1008 (2d Cir.), cert. denied sub. nom. 459 U.S. 1035, 103 S. Ct. 445 (1982), (paraphrasing S. Rep. No. 95-127, 95th Cong., 1st Sess. 25 (1977) ("[C]onstruction ban thus not only provides incentives for states to adopt the route Congress believed would lead to success . . .")); *Pacific Legal Found. v. Costle*, 627 F.2d 917, 918 (9th Cir. 1980), cert. denied, 450 U.S. 914, 101 S. Ct. 1354 (1981); *United States v. Ohio Dept. of Highway Safety*, 635 F.2d 1195, 1203 (6th Cir. 1980), cert. denied, 451 U.S. 929, 101 S. Ct. 2031 (1981) ("should be noted that the various mechanisms provided to induce voluntary State implementation of approved or promulgated measures, such as cut-offs of highway funds for failure to implement such measures."); and *New England Legal Found. v. Costle*, 475 F. Supp. at 437 (Incorporates "the traditional 'carrot and stick' philosophy by creating incentives for effective state and local planning to protect public health while still permitting industrial and commercial growth."). But, according to this writer's common understanding, these are disincentives rather than incentives or positive inducements for compliance with the I/M provisions of the Act. Stated differently, such provisions are simply "sticks" aimed at bringing about compliance and lack any of the essential attributes of positive incentives.

71. In this proposed turnaround, the distinguishing feature is that states receive an additional reward for engaging in favorable behavior. This is commonly referred to as a positive incentive to perform and is probably more palatable to states and their residents.

72. For example, it may be rational for an individual to behave in a certain manner and yet, for whatever reasons, that individual may elect to pursue a different course of action. This phenomenon undermines the notion of many microeconomists, for example, that the conduct of human beings is rational and thus predictable. See, e.g., *Posner, A Theory of Negligence*, 1 *J. Legal Stud.* 29, 32 (1972).

incentives; but it is conceivable that some individuals or entities may be offered a "carrot" and still decide that an I/M program is not palatable. If this happens, what then?

If all else fails, the federal government might seriously consider operating the I/M program.⁷³ Of course, this suggestion raises a host of potential issues. Questions of federalism and practical politics are likely to accompany such a bold federal initiative.⁷⁴

Regarding the federalism issue, the apposite question is whether the federal government's assumption of control over an I/M program would be an intrusion into matters of traditional state sovereignty in violation of the Tenth Amendment.⁷⁵ To be sure, such analysis must involve a discussion of the landmark case in the area, *Garcia v. San Antonio Metropolitan Transit Authority*,⁷⁶ in conjunction with the cooperative federalism principle underlying the Act.

To appreciate *Garcia*, one must understand the case that it overturned, *National League of Cities v. Usery*.⁷⁷ In *National League of Cities*, a 1974 amendment to the Fair Labor Standards Act, which removed all previous exemptions for state and local government employees pertaining to overtime and minimum wage, was challenged.⁷⁸ The majority opinion of the Supreme Court stated that the wage and hour regulations impermissibly interfered with integral functions of state and local governments.⁷⁹ Moreover, according to the Court, states stand on a different footing than an individual or corporation when challenging Congress' power to regulate commerce.⁸⁰ The generally consistent reaction to *National League of Cities* was that the Court had breathed new life

73. To support this contention, an analogy can be drawn to § 110 of the Act which authorizes EPA to promulgate an SIP whenever a state fails to do one that will attain the National Ambient Air Quality Standards (NAAQS) for a criteria air pollutant. This procedure typifies that the ultimate responsibility for insuring compliance with the Act rests with the federal government. See, e.g., Note, *supra* note 1, at 896 ("Congress has placed the responsibility for enforcing the Act on the EPA.") and *Train v. Nat'l Resources Defense Council*, 421 U.S. 60, 87, 95 S. Ct. 1470, 1485 (1975) ("[T]he Agency is charged with administration of the Act.").

74. For a discussion of these two salient issues, see *infra* notes 75-89.

75. The question of the extent, if any, that the Tenth Amendment of the Constitution limits federal power has been an abiding source of interest for years. See, J. Nowak, R. Rotunda and J. Young, *Constitutional Law* § 4.10 (3d ed. 1986), for a thorough discussion of the evolution of this issue. See also R. Rotunda, J. Nowak and J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 4.10 (1986).

76. 469 U.S. 528, 105 S. Ct. 1005 (1985).

77. 426 U.S. 833, 96 S. Ct. 2465 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005 (1985).

78. *Id.*

79. *Id.*

80. *Id.*

into the Tenth Amendment which, until this point, was not considered to pose any significant constitutional limitation on federal power.⁸¹

Almost a decade later, *Garcia* was decided by the Court, and it involved issues strikingly similar to *National League of Cities*. The City of San Antonio owned and operated a mass transit system; the federal district court found that this was a traditional governmental function. Therefore, according to *National League of Cities*, the city was exempt from the requirements of the Fair Labor Standards Act.⁸² The Supreme Court granted certiorari and subsequently overruled *National League of Cities*, holding that their decision in that case was unworkable and inconsistent with the principles on which the case was supposedly based. The primary rationale of the Court was that interests of state sovereignty are more properly protected by the political process than by judicially created limitations on federal power.⁸³ Thus, one reading of *Garcia* is that the Court virtually eliminated the Tenth Amendment as a restriction on federal power.⁸⁴ If this is a reasonable interpretation of *Garcia*, it would seem permissible for the federal government to take control of and operate the I/M programs in response to uncooperative behavior by state and local governments.

The argument for such federal action is perhaps bolstered by the federalism concept embodied within the Act. Under the concept of cooperative federalism contained within the Act, both the federal government and the states play vital roles in making clean air a reality within the United States.⁸⁵ The federal government, through the EPA, establishes primary and secondary National Ambient Air Quality Standards to protect the public health and welfare.⁸⁶ The states, through State Implementation Plans (SIPs), formulate the strategy to attain such standards subject to the ultimate approval of the EPA in view of the requirements of the Act.⁸⁷ Thus, the ultimate responsibility for insuring attainment of national pollution standards falls on the federal govern-

81. See, e.g., Heldt, *The Tenth Amendment Iceberg*, 30 *Hastings L.J.* 1763 (1979); Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 *Fordham L. Rev.* 1115 (1978); Percy, *National League of Cities v. Usery: The Tenth Amendment Is Alive and Doing Well*, 51 *Tul. L. Rev.* 95 (1976).

82. 469 U.S. 528, 532, 105 S. Ct. 1005, 1007 (1985).

83. *Id.* at 551, 105 S. Ct. at 1017.

84. See La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 *Nw. U.L. Rev.* 577 (1985) (“[P]ower of judicial review to limit national incursions on state autonomy should be exercised only in rare circumstances.”) and Comment, *State Autonomy After Garcia: Will the Political Process Protect States’ Interests?*, 71 *Iowa L. Rev.* 1527 (1986) (Commentator argues political process is insufficient restraint on commerce power.).

85. See 42 U.S.C. §§ 7409-10 (1982 & Supp. 1986).

86. 42 U.S.C. § 7409 (1982 & Supp. 1986).

87. 42 U.S.C. § 7410 (1982 & Supp. 1986).

ment. As such, the federal governmental should have the power to manage a pollution control device—an I/M program—if it is necessary to make reasonable progress toward attainment of National Ambient Air Quality Standards for critical pollutants like carbon monoxide and ozone.⁸⁸ This would surely seem to be the case when state and/or local authorities refuse to implement such programs.⁸⁹

Although no constitutional limitations on federal power necessarily preclude the foregoing action, the political ramifications attending it may be undesirable. One must consider the political damage that might occur were the federal government not only to mandate I/M programs but actually to implement them, a function traditionally within the bailiwick of states.⁹⁰ The political fallout of such an action may actually be counterproductive to the goals of the Act. Thus, it may be impolitic to consider seriously this alternative enforcement mechanism; at the very least, the “informal” political process would probably thwart this kind of federal intrusion to promote I/M programs.⁹¹ Moreover, such action seems to belie the “carrot” approach, which goes to the heart of the proposal advanced in this Article. As a matter of fact, this type of intrusive activity may constitute the quintessential heavy-handed assertion of federal power. Consequently, this “stick” would probably be ineffective in making I/M programs useful tools to attain national standards for clean air.

88. Although this fundamental federal power may exist, the question of the propriety of exercising it remains a thorny issue. (For a more detailed discussion of this latter question, see *infra* notes 90-91.)

89. See Note, *supra* note 1, at 880 (“[S]uggested that federal legislation prior to 1970 failed because of both an inability and an unwillingness on the part of the states to deal with air pollution.”). To be sure, this noncooperative attitude has stymied the I/M program. Hence, federal power should be available to avoid the inertia produced by such recalcitrance. See *United States v. Ohio Dept. of Highway Safety*, 635 F.2d 1195, 1202 (6th Cir. 1980), cert. denied, 451 U.S. 929, 101 S. Ct. 2031 (1981) (“Most preferably, the State may agree voluntarily to implement and enforce the I/M program. Other options include . . . if feasible, providing for Federal implementation and enforcement of the program (including Federal licensing of private I/M centers, or turnkey operations, and imposing Federal inspection fees).”).

90. It is conceivable that such action would constitute the ultimate federal intrusion upon state sovereignty. As such, the specter of massive resentment from state legislators and residents would loom higher than ever before. Certainly, this has been the transcendent issue in those school desegregation cases where federal military officials have been interposed to facilitate the desegregation process. See, e.g., *U.S. Takes Over Arkansas Guard*, *St. Louis Post-Dispatch*, Sept. 24, 1957, at 1.

91. Because environmental law is intensely political, the likelihood of such a bold federal initiative successfully surviving in this climate is slim. See Futrell, *Hazardous Wastes and Toxic Substances: Lessons from Superfund, RCRA; and Other Environmental Laws*, 24 *Hous. L. Rev.* 125, 128 (1987) and Sive, *Forward: Roles and Rules in Environmental Decisionmaking*, 62 *Iowa L. Rev.* 637, 640 (1977) (both commentators alluding to the highly political nature of environmental law).

Another possible federal action which would facilitate this process would be to approach directly the local governmental unit, if such is amenable to constructive action. This solution would work particularly well in those instances in which the state legislature has enacted legislation prohibiting the implementation of I/M programs.⁹² Query: Can the federal government negotiate a settlement with the local governmental unit despite a state statutory prohibition?

Although there is very little jurisprudence on this issue, *Lawrence County v. Lead-Deadwood School District*,⁹³ a seldom cited Supreme Court decision, may shed some light on the matter. *Lawrence County* dealt with the conflict between federal and state law over distribution of federal payments in lieu of taxes: state law required that funds be distributed in the same manner as general tax revenues while federal law allowed the local unit to use the funds "for any legitimate governmental purpose."⁹⁴ In resolving the issue, the Court concluded that the federal law preempted state law, and the local governmental unit was obligated to comply with that law notwithstanding the state mandate to the contrary.⁹⁵

In the context of this Article, what significance might *Lawrence County* have? Perhaps it illustrates that the federal government (most likely the EPA) can work out an agreement with a compliant local governmental unit to effectuate an I/M program in defiance of a state statute or directive.⁹⁶ But, because *Lawrence County* has been infrequently cited and may be limited to its peculiar facts, the question of whether Congress may require or directly fund a local program which has been prohibited by state statute admittedly remains unanswered.⁹⁷

Assuming Congress can permissibly engage in such activity, here again, the political consequences may be too ominous to risk it.⁹⁸ Is it conceivable, for example, that a local government would hazard adverse

92. A variety of issues arise from this proposed action, including profound federalism questions.

93. 469 U.S. 256, 105 S. Ct. 695 (1985).

94. *Id.* at 260, 105 S. Ct. at 697.

95. *Id.* at 258, 105 S. Ct. at 696.

96. The obvious advantage of such an arrangement is that it allows the federal government to engage in meaningful efforts to further the I/M problem at the local government level notwithstanding resistance arising at the state level. Again, a distinct disadvantage, from a practical sense, is the political upheaval that could be spawned by such actions.

97. Cf. Note, *supra* note 1, at 891 (Maintaining that SIP approved by EPA but later "invalidated" by state courts "on state grounds remains enforceable" as "federal law.>"). By analogy, federal action in requiring or funding a local program should take precedence over a contrary state statute.

98. Again, political considerations remain an important factor because of the nature of environmental decisionmaking. See *supra* note 91.

political repercussions for conducting an I/M program contrary to the wishes of the state? What about the numerous instances in which a local government with such maverick leanings might be later subjected to retaliation by the state?⁹⁹ Considering these possibilities, a local governmental unit may be loath to enter into such a compact with the federal government.

Even if the local governmental unit were willing to enter into such an agreement, the concomitant political costs would still have to be considered. For example, a tremendous outpouring of indignation could be generated at the state and various local governmental levels because of some perceived "breach of faith;" this could entail mammoth political problems that would hinder, rather than further, the I/M program.¹⁰⁰ Quite frankly, it is almost unimaginable that such a "divide and conquer" policy would have a realistic chance of succeeding on such a volatile issue.

The political risks, to be sure, would probably be even greater if the federal government attempted to order a local governmental unit to implement an I/M program, assuming, once again, that such action falls within the pale of permissible federal power.¹⁰¹ Nothing may epitomize the "stick" approach more than this type of federal action. It is the stuff of which resistance is born. As a result, there is very little to commend this approach as a means of galvanizing compliance with I/M requirements. Here again, an incentive approach seems preferable to any approach grounded on compulsion.

C. *The Execution of the Game Plan*

Although it is important to formulate a concept or plan for a palatable I/M program, its execution is perhaps just as vital. For example, it is at this point in the process that ideas are crystallized to give substance and form to an otherwise theoretical model. Thus, execution assumes an aura of importance because, without it, inertia is a distinct possibility regardless of the quality of the abstract ideas.¹⁰² But,

99. For example, a reduction or termination of state funds to support vital local services such as public schools, sanitation facilities, and the like, may be distinct possibilities.

100. Because a local governmental unit does not operate within a vacuum, it is certainly dependent upon, to some degree, the existence of a cooperative relationship with the state governmental unit and perhaps, to a lesser extent, with other local governmental counterparts.

101. This quintessential powerplay is likely to engender nothing short of a political revolt.

102. A satisfactory execution scheme is particularly vital in an I/M program because of the disfavor such programs frequently encounter. An agreeable plan of execution can at least assuage this public discontent.

as luck would have it, implementation is exceedingly difficult to achieve in a meaningful way.

The implementation of the game plan should further the following objectives: 1) that the federal government and the states should essentially retain the cooperative federalism relationship originally created in the Act; and 2) that the process of implementation should, congruent with the plan, make state and local officials and citizens feel good about complying with the I/M program.¹⁰³ Again, this is consistent with the theme that positive behavioral responses are evoked when incentives are used to stimulate performance, as opposed to the utilization of negative stimuli which tend to engender reactions that run counter to the goals of the Act.¹⁰⁴

The concept of cooperative federalism is an extremely attractive implementation tool. To the extent that both the federal government and the states share in the responsibility of attaining and maintaining national ambient standards, success is more probable.¹⁰⁵ A qualification to this principle may arise, however, when one or both of the parties fails to cooperate. Regarding I/M programs, for instance, a major problem in the implementation phase has been the lack of cooperation by states.¹⁰⁶ Thus, an implementation plan that obviates this problem has some realistic chance of success.

Implementing the notion of shared responsibility can certainly be facilitated by a package of economic incentives.¹⁰⁷ This proposal calls for Congress to make better use of market and non-market incentives in the implementation of I/M provisions. Moreover, any disincentives currently included in the Act should be restructured so as to constitute performance incentives.¹⁰⁸ Again, any governmental official or entity

103. The "feel good" concept is inherent in the overall behavioral goal of inspiring people to do as they believe. At a time, therefore, when a majority of the public is espousing the view that economic growth should be subordinated to environmental protection, it is exceedingly important to make it easier for "people to put their money where their mouths are." Portney, *supra* note 69, at 74.

104. A graphic illustration of this principle is the less than satisfactory results involving I/M programs accomplished through the "stick" method of inducing compliance. See 42 U.S.C. § 7401 et seq. (1982 & Supp. 1986).

105. To Congress' credit, the Act does reflect the heartfelt belief that a federal-state cooperative effort is necessary to attain the primary and secondary National Ambient Air Quality Standards. This recognizes that air pollution must be effectively addressed at both the national and local level. History supports this in view of the deficiencies extant when air pollution control was the sole responsibility of the states. See Stewart, *supra* note 26, at 1196.

106. As previously noted, the cooperative federalism concept does not function well when one partner (most commonly the state) fails to cooperate. *Id.*

107. Economic incentives are integral components of the shared responsibility concept because of the role they can play in enticing cooperative behavior.

108. For a discussion of this issue, see *supra* notes 70-71 and accompanying text.

espousing the sanctity of clean air will have little justifiable reason to resist complying with an I/M program in the face of a possible reward for such compliance. As noted, "oftentimes people's words are better than their deeds."¹⁰⁹ An incentive program of this nature can foster the necessary linkage between lofty words and actual deeds and thus make it easier for people to actually do what they profess to believe. This nexus between attitude and behavior, although difficult to correlate, can serve a face-saving function for some individuals because, as pointed out in an ancient saying, "[a] superior man is ashamed if his words are better than his deeds."¹¹⁰

The theory that incentives make it palatable for one to act in uniformity with his or her beliefs probably holds particularly true in regards to those individuals residing in nonattainment areas. In such areas, one may readily champion clean air in the abstract, but find it difficult to bring his or her behavior in line with these words because of the perceived negative costs associated with environmental requirements of I/M programs.¹¹¹ The inability to establish some consistency between the actor's beliefs and his or her behavior concerning clean air is exacerbated when his or her attitude is adversely affected by the "stick" method of enforcement. In such cases, an individual's actions may simply be a product of his or her current situation and not reflect any enduring attitudes.¹¹²

The principal objective of the incentives package proposed in this Article is to create a setting that increases the likelihood that a durable, environmentally cognizant attitude will be transformed into comparable deeds. That is, placing an individual in supportive surroundings should greatly enhance the probability that he or she will actually act in harmony with his or her beliefs. Certainly, the affected individual should feel better about complying with I/M requirements when there is an incentive for doing so. Given this, the notion of "doing what one believes" should assume a greater degree of validity.¹¹³

To illustrate graphically why the foregoing regulatory method is probably superior to the one currently embodied in the Act, *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*,¹¹⁴ a case epit-

109. Snyder, *supra* note 69, at 105.

110. *Id.* (statement attributed to Confucius (circa 500 B.C.)).

111. In such nonattainment areas, residents have to be actually willing to sacrifice economic benefits for environmental improvement; thus, it becomes more difficult "to support environmental positions." Portney, *supra* note 69, at 74.

112. Snyder, *supra* note 69, at 110-11.

113. One would seemingly be predisposed to bringing his or her conduct in line with espoused beliefs when a reward or incentive makes such behavior easier to engage in. But see *supra* note 72 and accompanying text.

114. 533 F. Supp. 869 (E.D. Pa. 1982). This is the citation for the seminal case in this tortuous litigation. There are fourteen other related actions.

omizing the untoward consequences of such existing regulations, has been singled out for analysis. This case represents litigation spanning a number of years with concomitantly huge transaction costs.¹¹⁵ During this period, very little was actually accomplished toward advancing the principal objective of the I/M program, namely a reduction in harmful emissions from in-use vehicles.¹¹⁶ A step-by-step examination of this tortuous litigation reveals what perhaps should never be done with respect to the I/M program.

The *Delaware Valley Citizens' Council for Clean Air* saga began as early as 1982. In a proceeding in a federal district court in Pennsylvania, the state of Pennsylvania moved for a stay and modification of a consent decree which had been entered into by the state and two of its administrative agencies with the United States and the Delaware Valley Citizens' Council in 1978.¹¹⁷ The purpose of this consent decree was to establish an I/M program. In 1981, however, the Pennsylvania General Assembly had passed a statute (HB 456) prohibiting expenditure of public funds for the I/M program.¹¹⁸

The federal district court held that Pennsylvania was not entitled to a modification of the consent decree because the changed circumstance that would otherwise give rise to a modification was of Pennsylvania's own doing, namely prohibiting spending for the I/M program by statutory mandate.¹¹⁹ Moreover, in ancillary rulings, the court held: 1) that it need not defer to EPA for administrative remedies before deciding issues of contempt and unconstitutionality raised by the Pennsylvania General Assembly's action prohibiting spending on the I/M program; 2) that, on the facts presented to it, it lacked the authority under the federalist system to countermand the decision of a state legislature not to expend state funds on the establishment of an I/M program; 3) that the Tenth Amendment to the United States Constitution restricted the reach of the Commerce Clause and acted as a bar to declaring HB 456 unconstitutional; 4) that state agencies were in contempt for failing to

115. The magnitude of the transaction costs, especially those pertaining to attorney's fees, is demonstrated by the attorney's fees requests stemming from the litany of actions under the style of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 106 S. Ct. 3088 (1986), rev'd, 483 U.S. 711, 107 S. Ct. 3078 (1987) ("\$30,000 for attorney's fees and costs incurred prior to the entry of the consent decree" and a total fee for Phases I-IX of \$205,433).

116. As a result of the defiant behavior of the Pennsylvania General Assembly, very little, if anything, was done regarding reducing automobile emissions via I/M programs. Nonattainment in the Philadelphia and Pittsburgh areas remained intact, for example, during this protracted litigation.

117. See *Delaware Valley Citizens' Council For Clean Air v. Pennsylvania*, 533 F. Supp. 869, 872 (E.D. Pa. 1982).

118. *Id.* at 875.

119. *Id.* at 884.

comply with the consent decree; and 5) that the Commonwealth of Pennsylvania and the Secretaries of Transportation and Environmental Resources were also in civil contempt and thus the United States Department of Transportation was enjoined from awarding certain transportation grants, unless specified conditions were met.¹²⁰

In a subsequent decision (slightly less than a month later), the federal district court again entertained a Pennsylvania motion for a stay of sanctions pending appeal of the previously rendered decision; this motion was denied.¹²¹

The seminal action in the Court of Appeals for the Third Circuit was brought by several Pennsylvania legislators. These legislators sought to intervene in the original case nearly four years after the actions were originally filed and twenty months after entry of the consent decree. Intervention was sought as of right, or with the court's permission, on the ground that the decree deprived the intervenors of their right as legislators to debate and vote on whether Pennsylvania should establish an I/M program.¹²² The district court had earlier denied the motion to intervene as untimely.¹²³

On appeal, the Third Circuit held: 1) that, although the citizen suit provision of the Clean Air Act confers a right to intervene to enforce the law, it does not give a right to intervene on behalf of an alleged violator or to intervene to seek to prevent enforcement; and 2) that the interests of the legislators were adequately represented by the state.¹²⁴

The litigation continued when the Third Circuit rendered its first substantive decision concerning the consent decree.¹²⁵ In this phase of the litigation, Pennsylvania challenged three orders entered by the federal district court in relation to the consent decree: 1) denial of a request by Pennsylvania for a 20 month extension of the deadline for the implementation of the I/M program; 2) modification of the consent decree to require monthly state audits of emissions inspection stations, the establishment of two "referee" stations to handle consumer complaints, and the certification by Pennsylvania of at least 3,000 inspection stations by May 1, 1982; and 3) refusal of the Pennsylvania request for the reconsideration of order number two.¹²⁶ The Court of Appeals for

120. *Id.*

121. *Id.* at 885.

122. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970 (3d Cir. 1982).

123. *Id.* at 972, citing *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, No. 76-2068 (E.D. Pa. March 25, 1981).

124. *Id.* at 973.

125. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 976 (3d Cir.), cert. denied, 459 U.S. 905, 103 S. Ct. 206 (1982).

126. *Id.* at 977.

the Third Circuit concluded that the federal district court had properly exercised its discretion in all three of the orders and affirmed the challenged portions of the consent decree.¹²⁷

The long and costly path of litigation then returned to the federal district court. At this point, Pennsylvania sought federal dollars under the safety and air quality exceptions to the federal sanctions imposed for noncompliance with the I/M program.¹²⁸ The district court, carefully applying the law to the facts, ruled that those projects which were primarily for safety purposes—new markings to replace faded paint markings, the only purpose of which was to provide guidance for drivers—would receive funding under the exceptions listed in the sanction order.¹²⁹ Those projects, however, which were not primarily for safety (bridge repair, modernization, new construction) would not receive funding.¹³⁰

The focus of the litigation then shifted to the Pennsylvania state courts. In *Burd v. Commonwealth Department of Transportation*,¹³¹ some members of the Pennsylvania General Assembly brought actions for a declaratory judgment and injunctive relief to prevent the Pennsylvania Department of Transportation from implementing an I/M program. A curious twist to this action was that legislators were asking the court to prohibit the Pennsylvania Department of Transportation from implementing an I/M program when the Department was then under a federal district court contempt order for failure to implement that same program.

Realizing the countervailing positions involved, the state court arrived at a common sense resolution of the issue and held that, notwithstanding the Pennsylvania statute prohibiting the operation of an I/M program, there were indeed other provisions of the Pennsylvania Code that did authorize the Department of Transportation to operate an I/M program.¹³² Thus, the motion for summary judgment was denied.

The members of the Pennsylvania General Assembly appealed the state court finding that the Pennsylvania Department of Transportation had authority to operate the I/M program. Interestingly, while the appeal was pending, the legislature passed legislation that would allow an I/M program, if failure to have a program would result in loss of federal funds.¹³³

127. *Id.* at 987.

128. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 551 F. Supp. 827 (E.D. Pa. 1982). The pertinent provision of the Act giving rise to this exception is 42 U.S.C. § 7506(a) (1982 & Supp. 1986).

129. *Id.* at 831.

130. *Id.* at 831.

131. 66 Pa. Commw. 129, 443 A.2d 1197 (1982).

132. *Id.* at 132, 443 A.2d at 1200.

133. 75 Pa. Cons. Stat. Ann. § 4706(b) (Purdon Supp. 1988), as amended, 1983 Pa. Laws 4, No. 3 § 1.

In view of this significant change in circumstances, the Supreme Court of Pennsylvania ruled that the Pennsylvania Department of Transportation had no statutory authority to implement an I/M program at the time it entered into the consent decree, so that the purported decree was void.¹³⁴ Moreover, the court concluded that the subsequently enacted legislation permitting the I/M program in Pennsylvania did not retroactively validate the Department of Transportation's consent to the agreement.¹³⁵ Thus, an injunction was issued precluding Pennsylvania from performing the terms and conditions of the consent decree.

In the face of a scathing dissent, a question arises concerning the effect of the Pennsylvania Supreme Court's decision upon the very core of this long and drawn out litigation—the consent decree. To be sure, the dissent's contention that the federal district court's actions were not against Pennsylvania governmental departments as separate entities, but as arms of the state, makes eminently good sense.¹³⁶ Thus, in the opinion of one dissenting judge, the state of Pennsylvania (as a whole) always had the authority to implement the I/M program.¹³⁷

The litigation spiral then shifted from the substantive arena to the thorny issue of attorney's fees. It is easy to imagine the tremendous level of court costs, including attorney's fees, attending such protracted litigation. As could be expected, the citizens group involved in the litigation, Delaware Valley Citizens' Council for Clean Air, sued for attorney's fees and costs under the Clean Air Act, for all activity after the consent decree was issued on August 29, 1978.

In the first of many different adjudications of the issue, the federal district court awarded the group compensation based on the degree of skill required for a particular task. The court first arrived at the "lode-star" figure, which was then capable of being adjusted, based on the contingent nature of the case, the quality of the work performed, and the results obtained.¹³⁸

On appeal to the Third Circuit, the attorney's fees litigation resulted in an affirmance in part and a reversal in part. The court of appeals affirmed that portion of the district decision holding that attorney's fees may be awarded for time spent by counsel participating in regulatory

134. *Scanlon v. Commonwealth Dept. of Transp.*, 502 Pa. 577, 590, 467 A.2d 1108, 1114 (1983).

135. *Id.* at 590, 467 A.2d at 1114.

136. *Id.* at 595, 467 A.2d at 1117.

137. *Id.* The *Scanlon* decision was eviscerated in *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 755 F.2d 38, 42 (3d Cir. 1985), cert. denied, 474 U.S. 819, 106 S. Ct. 67 (1985) ("[F]inal federal court judgment based on federal law cannot be collaterally attacked by a state court . . .").

138. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 581 F. Supp. 1412, 1431 (E.D. Pa. 1984) (Subsequent case treatment *infra* note 139.).

proceedings. However, it held that the lower court erred by increasing the fee award on the basis of the superior quality of counsel's performance. In addition, the Third Circuit deferred decision, pending reargument, on the question of the propriety of a multiplier to the lodestar amount based on the risk of loss incurred by counsel in undertaking the litigation.¹³⁹

The attorney's fees question finally worked its way to the United States Supreme Court. The Court made a significant contribution to the body of law in this area by holding that generally the lodestar amount need not be adjusted upward for superior performance except in truly extraordinary circumstances.¹⁴⁰ As to normal superior performance, the Court felt that such an adjustment would be a windfall for the prevailing attorney because the prevailing attorney's success is primarily attributable to skill, experience, and hard work. Coincidentally, these are the same factors normally considered by a court in determining the reasonable number of hours and reasonable hourly rate for the lodestar.¹⁴¹ Pursuant to reargument, the Court later held that the lodestar amount could not be routinely adjusted to account for risk of loss. The apparent explanation for this limitation is that risk of loss is always inherent in litigation.¹⁴² The upshot of this decision, although difficult to determine accurately in either a theoretical or practical sense, is that normally a prevailing party will be limited to the lodestar amount. The possible policy argument militating against this holding is that lawyers may be dissuaded from undertaking such complex, tedious, and costly litigation because of the absence of any prospect of recovery beyond the lodestar.¹⁴³

The difficulty in applying the Supreme Court decision concerning the computation of attorney's fees of a prevailing party has been evident

139. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272 (3d Cir.), aff'd in part and reversed in part, 478 U.S. 546, 106 S. Ct. 3088 (1986), rev'd on reh'g sub. nom. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S. Ct. 3078 (1987).

140. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 475 U.S. 546, 106 S. Ct. 3088 (1986) and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S. Ct. 3078 (1987).

141. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 546, 106 S. Ct. at 3089 ("[T]he lodestar figure includes most, if not all, of the relevant factors comprising a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance.").

142. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S. Ct. 3078 (1987) ("Before adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk-enhancement, plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market.").

143. As a corollary, counsel may find it difficult to expend the requisite time and effort in such cases because of the prospect of limited recompense.

when lower courts have subsequently tried to act consistently with the dictates of the Court's opinion. For instance, *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania* is still languishing in the lower federal courts because of the attorney's fees issue.¹⁴⁴

The foregoing concatenation of litigative events has nothing to commend it. It was cumbersome, costly, tedious, and, most importantly, counterproductive in terms of bringing about desired environmental objectives. In these cognate cases, the continuous recalcitrance of the Pennsylvania General Assembly over a number of years reflects the tremendous potential for disruptive behavior inherent in the "stick" method.¹⁴⁵ To be sure, during this protracted litigation in both federal and state courts, very little was done to reduce nitrogen oxides, hydrocarbons, and carbon monoxide emissions from in-use vehicles. Instead, a confusing collection of legal decisions was generated by this maze of judicial holdings, which provides little comfort for the environmental concerns justifying I/M programs.¹⁴⁶

In summary, the Pennsylvania experience reflects the most unimaginably defiant attitude toward I/M programs; the threat of sanctions embodied in the Act probably did more to foster this behavior than to eliminate it.¹⁴⁷ More importantly, the Pennsylvania experience signals that a new approach to behavior modification within the American populace is essential if I/M is to play an important role in achieving air quality that meets the National Ambient Air Quality Standards. An approach which engenders greater cooperation among federal and state authorities must, therefore, receive serious consideration if clean air is to become a reality.

D. Policy Objectives Advanced by the Plan

If a system of economic incentives concerning the I/M program had been operational during the lengthy Pennsylvania litigation, what would

144. See, e.g., *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 826 F.2d 289 (3d Cir. 1987).

145. Who is to say that members of the Pennsylvania General Assembly would not have been more responsive to the dictates of the consent decree had a "carrot" been extended to them. At the very least, a favorable reward would have been available upon compliance, the prospect of which may have been the impetus for favorable action.

146. The environmental concerns associated with the I/M program are primarily the reduction of harmful emissions from in-service vehicles which will lead to reasonable further progress toward attainment of national primary and secondary standards. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869, 873 n.2 (E.D. Pa. 1982).

147. To hit someone over the head with a stick can lead to a more defiant attitude because of the natural tendency that such conduct will rile someone. As it has been noted, "Even a dog distinguishes between being stumbled over and being kicked." O. Holmes, *The Common Law* 3 (1881).

have been the likely result? What would have been the reaction of the Pennsylvania General Assembly if members of the general public as well as the state had been offered economic inducements to implement an I/M program? Would their attitudes about clean air have been transformed into parallel deeds, namely the volitional acts of getting their automobiles inspected and tested and perhaps repaired to insure the proper functioning of the emissions control systems?

Of course, it is difficult, if not impossible, to forecast accurately the answers to the foregoing questions. But one can surmise that an altogether different situation might have ensued. For instance, a package of incentives to either the state of Pennsylvania or its residents would probably have quelled any significant resistance to such a program.¹⁴⁸ As a result, the Pennsylvania General Assembly would have probably felt the popular political pulse and, in all likelihood, would have presented considerably less, and perhaps no, resistance to the I/M program.¹⁴⁹ Just think of the time and resources that could have been saved and thus allocated to other purposes in the absence of such defiance. More significantly, environmental benefits with regard to automobile emissions pollution could have been realized instead of the environmental costs suffered during the hiatus created by the litigation.¹⁵⁰

In terms of the overall environmental policy objectives that may be realized from the establishment of such friendly, political relations among these key players, some significant movement toward the attainment and maintenance of National Ambient Air Quality Standards with regard to carbon monoxide and ozone is the most noteworthy. To be sure, this could assuage the air quality problems that plague a number of air quality control regions today.¹⁵¹ Moreover, the political shell game that surrounds the current clean air policy regarding extensions for compliance could be avoided.¹⁵²

148. When one feels good about what he or she is doing, there is less likelihood that there will be any meaningful resistance to doing it. Cf. Youngs, *Pattern of Threat and Punishment Reciprocity in a Conflict Setting*, 51 *J. of Personality and Soc. Psychology* 541 (1986) ("Numerous studies suggest that the use of threats and punishments in a conflict setting can trigger the development of conflict spirals . . .").

149. State legislatures are notoriously political bodies whose ability to respond to political impulses with alacrity is well-documented. See, e.g., the Illinois General Assembly's rapid approval of funding for a new ballpark for the Chicago White Sox during the 1988 session. 1988 Ill. Laws 85-1034, 1988 Ill. Legis. Serv. 204 (West).

150. See *supra* notes 114-147 and accompanying text.

151. See *Some Building Banned in Los Angeles Area to fight Air Pollution*, *The Louisville Courier-Journal*, Aug. 30, 1988, at 1.

152. A pivotal question now is what happens after the arrival of August 31, 1988, the current moratorium date for compliance with the National Ambient Air Quality Standards for carbon monoxide and ozone. But see *EPA Plans to Resume Clean Air Crackdown in Atlanta, Elsewhere*, *The Atlanta Journal and Constitution*, Aug. 30, 1988, at A3, where the possible post-moratorium activities of EPA are discussed.

An ancillary benefit of this rapprochement is that a positive environmental ethic may be instilled within the population, thus facilitating the phenomenon of matching up attitudinal declarations with behavior. It will certainly ease the administrative burden of implementing and enforcing I/M requirements if people are willing to behave as they believe.¹⁵³ The venerable concept of individual autonomy will be furthered while environmental objectives will be advanced, which is the best of both worlds.

Another added advantage of establishing good relations between the federal government and the states from an incentive-focused I/M program relates to economics. Pundits of I/M programs have often been critical of the unnecessary costs associated with them.¹⁵⁴ This criticism has intensified with the advent of more sophisticated technology in recent automobile models where it is argued that the warranty provisions associated with such state of the art emission control devices provide ample protection against the malfunction of such devices, thus obviating the need for I/M programs.¹⁵⁵ From an economics perspective, a cogent argument is that the consumer already pays once for environmental control when he or she purchases the automobile along with the emission control system warranty and, therefore, should not have to pay again via the cost of an I/M program.¹⁵⁶

But does existing emission control technology, coupled with the apposite warranty provisions, provide sufficient environmental protection from emissions of nitrogen oxides, hydrocarbons, and carbon monoxide by in-service vehicles? Probably not, absent an effective monitoring process to determine whether there is an actual malfunction in the automobile emission control system. How would anyone know if the warranty provisions pertaining to the emission control devices had been breached without some detection mechanism? At this point, the practical utility of I/M programs becomes apparent. They can serve a monitoring or detection function, and this should justify their additional costs. In other words, the environmental benefits associated with detecting and correcting automobile emissions which violate the national standards with regard to critical air pollutants appear to outweigh the economic costs attending an I/M program. Thus, under traditional microeconomic analysis, such programs appear to be economically efficient.¹⁵⁷

153. For example, the costs associated with enforcement actions and litigation could be greatly reduced if the states and citizens were more obsequious in their behavior regarding I/M programs.

154. See, e.g., Reitze, *supra* note 9, at 705.

155. *Id.* at 710.

156. *Id.* But this argument fails to consider the fact that I/M programs may be necessary to ensure emission control system is conforming to the applicable warranty.

157. See *Kaldor-Hicks Theorem*, where efficiency is defined in terms of the aggregative

Political, economic, and social policy considerations are always intertwined with environmental decision making.¹⁵⁸ The issues surrounding the propriety of I/M programs are consistent with this general theme. Politically, an I/M program driven by a "carrot" or incentive approach in contrast to the existing "stick" approach would be more palatable to the legislators and residents of the various states. In this instance, it is less likely that affected persons will perceive that they are being subjected to unwarranted intimidation to promote compliance; instead, the rewards or incentives encouraging performance make it politically palatable to submit freely to the program.¹⁵⁹

Economically, an I/M program is a boon because it can eliminate to some degree the problem of externalities which is commonly referred to as pollution in environmental law.¹⁶⁰ To the extent that air pollution stemming from nitrogen oxides, hydrocarbons, carbon monoxide, and ozone is curtailed, a more efficient result is likely to ensue because we eliminate the problem of externalities to some degree and also stimulate the provision of a public good, namely clean air.¹⁶¹ Moreover, under the Kaldor-Hicks standard of efficiency, the aggregative benefits of I/M programs appear to outweigh the aggregative costs, thus suggesting the efficiency of such programs in this sense as well.¹⁶²

Socially, the incentive-based I/M program offers the prospect of changing the entire manner in which the federal government implements and enforces statutory and regulatory environmental requirements.¹⁶³ Changing the social phenomenon in which the majority of people espouse things which they do not really subscribe to presents a significant challenge. If people actually adopt the ethic of doing as they believe, environmental values in general will be enhanced; more importantly, a far greater acceptance of the I/M program will probably occur and will naturally increase the likelihood of reaching and maintaining national ambient standards in a far greater number of air quality control regions.

The incentive-based regulatory proposal advanced in this Article is designed to enhance ambient air quality in a politically, economically,

benefits of an activity outweighing the aggregative costs. See generally, Hicks, *The Economics of John Hicks* 12 (1984).

158. Gates, *supra* note 11, at 40, 41.

159. Overcoming political resistance to the I/M program enhances the likelihood of more ready acceptance. See Reitze, *supra* note 9, at 720.

160. See R. Findley and D. Farber, *Environmental Law In a Nutshell* 117 (2d ed. 1988) ("Pollution is a common form of external cost . . .").

161. R. Findley and D. Farber, *Cases and Materials*, *supra* note 66, at 346.

162. It is unclear whether Pareto efficiency (the "80/20 rule" is attributed to Italian economist Vifredo Pareto, 1848-1923) applies here. But perhaps it does because no one is made worse off and someone will actually benefit from the I/M program.

163. This would signal a change from the command and control method to a more palatable positive incentive approach.

and socially acceptable fashion.¹⁶⁴ Accomplishing these varied objectives is no small task. But this novel approach to environmental regulation is a vast improvement over existing regulatory initiatives. Therefore, the short-term and long-term goals of such a proposal must be considered.

1. *Short-Term Objectives*

The use of economic incentives to stimulate popular support for the I/M program should have immediate short-term benefits. The realization of such gains is vital because any dramatic change in direction needs some quick victories to establish its legitimacy.¹⁶⁵

In the case of an I/M program, there must be some readily available evidence that such a revitalized program will make a difference in enhancing air quality in those air quality control regions heretofore plagued by carbon monoxide and ozone pollution.¹⁶⁶ Such evidence is essential to counteract the frequent criticism that no causal connection between an I/M program and improved air quality has been demonstrated scientifically.¹⁶⁷ Moreover, if this causal nexus is not shown rather early in the new inspection and maintenance process, vociferous protests about the undue costs attendant to such programs can be expected.

The preeminent short-term goal is, therefore, to acquire data reflecting that a marked improvement in air quality is indeed traceable to enhanced public participation in the I/M program.¹⁶⁸ If such data are available, the I/M process stands to gain politically, economically, socially, and environmentally. The prompt success of this program and its processes are essential to obtain the imprimatur of the American people. And this popular approval will probably avert the recrudescence

164. Here again, satisfaction of the political, economic and social considerations make the proposal coterminous with policy perspectives governing environmental decisionmaking generally. See Gates, *supra* note 11, at 40, 41, and F. Anderson, D. Mandelker, and A. Tarlock, *Envtl. Protection: Law and Policy XXVI* (1984).

165. Because people are generally skeptical of change, immediate evidence of the success of a dramatically different program may mollify the skeptics. To the contrary, the failure to realize some environmental gains rather quickly could add fuel to the argument that this additional strain on the United States treasury created by economic incentives is not worth the meager benefits.

166. For example, dramatic improvements in the air quality of "dirty air" cities like Los Angeles, Chicago, Dallas, Atlanta and Denver, to name a few, would graphically demonstrate the efficacy of the economic incentive program.

167. See, e.g., Ostrov, *supra* note 15, at 152 ("Because I/M is only one means of achieving the goal of acceptable air quality, states needed a standardized method to demonstrate emission reductions and consequent air quality improvement.") ("difficult to develop a correlation between I/M-induced HC reductions and ozone air quality"). *Id.* at 190.

168. *Id.* at 187 ("The question remains, however, whether I/M will be effective for post-1980 automobiles designed to meet tougher new car standards.").

of the wasteful litigation exemplified by the litany of cases arising from *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*.¹⁶⁹

2. Long-Term Objectives

Once an incentive-based I/M program is embraced by the vast majority of the American people, attention shifts to the long range objectives of such programs. The ultimate long-term goal is to reach that point where there is no longer any need for such programs. This will only be achieved, of course, upon the universal attainment and maintenance of National Ambient Air Quality Standards coupled with the development of state of the art emission control systems that are virtually foolproof. Of course, as a practical matter this Elysium may not be attainable.¹⁷⁰

Because the foregoing goal may be well-nigh unachievable, some less ambitious, but essential, objective should be explored. A more modest goal consists of three principal objectives: 1) to stimulate the virtually universal acceptance of the I/M program; 2) to sensitize Americans to the fact that bringing their behavior concerning the environment in line with their favorable attitudes will probably make I/M programs more agreeable to them; and 3) to phase out eventually the need for an incentives package to promote compliance with an I/M program. To be sure, these are formidable, yet potentially achievable, objectives.¹⁷¹ But the truly promising aspect of the proposal presented in this Article is that clean air can be attained and maintained during the period in which I/M programs are actually used; and yet such programs can be easily phased out when it becomes apparent that, for whatever reasons, they are no longer needed to maintain the requisite ambient air quality.¹⁷²

IV. CONCLUSION

Congress has been loath to use economic incentives to insure compliance with environmental statutes and regulations. Although the question of whether this is generally an ill-advised policy perhaps transcends this Article, it is transparent that such policy is imprudent in connection

169. See supra notes 114-147 and accompanying text for a discussion of this protracted, perhaps economically inefficient, utilization of judicial resources.

170. "Clean air" may not be a universally attainable objective because the political will may be lacking in view of the countervailing economic and social policy considerations. In a *Deluge of Problems, Where Are the Worst Threats?*, Conservation Foundation Letter, December 1983.

171. See supra notes 148-164 and accompanying text.

172. Whenever I/M programs should become superfluous because of favorable air quality, it would be a much deserved boon for the American people to dispense with this requirement.

with the I/M program under the Clean Air Act. To be sure, the "stick" policy has demonstrated its inutility as a regulatory tool for stimulating prompt, effective compliance. On the other hand, the "carrot" approach has virtually unlimited potential as a means of fostering a desirable response to I/M programs within the general population. Hence, this suggested approach could make such programs more palatable to the apparently numerous coerced participants within our society.

