



1-1-1996

# Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level

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# Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level

Thomas O. McGarity\*

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You know, everybody is against pollution. But most have an Achilles' heel when antipollution efforts hit them personally.

—William D. Ruckelshaus, Administrator, EPA\*\*

Unfortunately, everything in this country, everything operates with politicians. If you don't get the politicians on your side, you're doomed to lose.

—M.S. Safadi, owner of the now-defunct Pasadena, Texas Inspection and Maintenance Facility\*\*\*

## I. INTRODUCTION

For the twenty years preceding the enactment of the Clean Air Act Amendments of 1970, the history of pollution control in the United States was one of increasing federal assumption of power and responsibility.<sup>1</sup> The next twenty years witnessed huge battles over attempts by the federal government to compel, cajole, or otherwise induce state and local governments to deal seriously with urban pollution. For most of the nation's polluted cities, this was a period of standoff in which state and local governments did little to bring about any serious changes in urban lifestyles and the federal government took only modest action to force auto manufacturers, petroleum producers and marketers to implement technologies aimed at reducing pollution at the source. As a consequence, polluted urban areas saw very few of the promised improvements. The 1990 Amendments to the Clean Air Act, which represented the culmination of years of intense legislative deliberation, took a longer view toward attaining air quality goals in the most severely polluted cities, but required stringent technological controls and sought to induce state and local governments to begin seriously to address necessary reductions in commuter traffic. Unfortunately, the familiar process of reaction and retrenchment began to set in almost as soon as the 1990 Amendments became law, and the complicated state/federal implementation scheme is coming unraveled once again.

From the outset, the modern Clean Air Act has contained the hortatory congressional finding that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."<sup>2</sup> The history of the implementation of the Clean Air Act in urban areas, however, demonstrates that the relevant state and local governments have failed to meet

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\*\* *Coming Government Moves in War Against Pollution: Interview with William D. Ruckelshaus, Administrator, Environmental Protection Agency*, U.S. NEWS & WORLD REP., Mar. 29, 1971, at 72.

\*\*\* Leigh Hopper, *Auto Emissions Flap Worries Contractors; Repeal Would Leave Operators in Limbo*, HOUSTON POST, Dec. 24, 1994, at A20.

1. J. CLARENCE DAVIES, III, *THE POLITICS OF POLLUTION* 49-58 (1970).  
2. Clean Air Act § 101(a)(3), 42 U.S.C.A. § 7401(a)(3) (West 1995).

their responsibilities. Although the federal government in the early 1970s attempted to force the state and local governments to meet their responsibilities, concerns for federalism in the courts and Congress blunted that initial effort. Since the mid-1970s, the history of the implementation of the Clean Air Act has been one of federal nudging, cajoling, and sometimes threatening to administer sanctions or to take over state programs, all of which resulted in very little serious effort at the state and local levels. To be sure, air quality in most urban areas is much healthier than it was twenty-five years ago, and the nation can take pride in this progress, most of which has taken place in the last five years. This Article will maintain, however, that nearly all of that progress is attributable to source control requirements directly or effectively imposed at the federal level and by lawsuits filed by affected citizens and environmental groups aimed at forcing federal, state, and local agencies to fulfill their statutory responsibilities.<sup>3</sup> As a corollary, this Article will conclude that current efforts to accelerate the "devolution" of federal power to the states, if directed to urban pollution control, could very easily reverse the encouraging trend of the last five years and ensure that millions of American citizens never breathe clean air.

## II. THE PROBLEM OF AUTOMOBILE EMISSIONS IN URBAN AREAS

### A. *Health and Environmental Effects of Photochemical Oxidants*

The health and environmental effects of exposure to ozone in the ambient air, like the health and environmental effects of many pollutants, is a subject of much debate. Studies convincingly demonstrate that ozone causes "immediate, short-term changes in lung function and increased respiratory [problems] among healthy adults and children who exercise moderately or heavily during periods of elevated ozone concentrations."<sup>4</sup> Exposure to ozone for one or two hours at levels encountered in cities like Los Angeles, New York, and Houston can cause decreases in lung function and pronounced symptoms like coughing and pain when breathing deeply, but these effects appear to be reversible.<sup>5</sup> It is becoming increasingly clear that the acute adverse effects of exposure to a particular concentration of ozone in the atmosphere depend upon both the duration of exposure

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3. I am excluding from this assessment and from the discussion that follows the extraordinary progress that the nation has made with respect to ambient concentrations of lead in urban air. Ambient levels of lead are down more than 90% from those that routinely occurred in the 1970s. U.S. EPA, NATIONAL AIR QUALITY AND EMISSIONS TRENDS REPORT 1991 1-6 (1992) [hereinafter 1991 EMISSIONS TRENDS REPORT]. This progress is attributable almost exclusively to a single federal regulation requiring that lead be phased out as an additive to gasoline. THOMAS O. MCGARITY, REINVENTING RATIONALITY 29-44 (1991). Thus, the experience with lead is entirely consistent with this Article's conclusion that most important progress toward achieving the National Ambient Air Quality Standards in urban areas is attributable to federal source-control programs.

4. UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, CATCHING OUR BREATH: STEPS FOR REDUCING URBAN OZONE 39 (1989) [hereinafter OTA OZONE REPORT].

5. *Id.* at 39-40, 54.

and the intensity of the individual's physical activities during the time of exposure.<sup>6</sup> Children engaged in moderate to heavy exercise for up to two hours at exposure levels equal to the current primary ambient air quality standard of 0.12 parts per million (ppm) (which is supposed to include an adequate margin of safety) suffer temporary loss of some lung function. Persons engaged in moderate exercise levels have suffered acute effects at concentrations as low as the former standard (promulgated in 1971, but amended in 1978) of 0.08 ppm.

Many individuals suffer from pre-existing lung diseases that make them susceptible to extreme reactions to moderate concentrations of ozone in the air. For example, exposure to relatively modest levels of photochemical oxidants can precipitate asthma attacks in some individuals, although it is not clear that asthma sufferers are generally more sensitive to ozone.<sup>7</sup> It is also possible that exposure to ozone may cause additional reductions in lung function in persons suffering from chronic obstructive pulmonary disease like bronchitis and emphysema, but existing studies have not established such a link.<sup>8</sup>

Many scientists believe that prolonged exposure to high levels of ozone results in permanent lung impairment in some individuals who do not suffer from pre-existing diseases.<sup>9</sup> Thus, chronic exposure to ozone may cause accelerated aging of the lung, retardation of lung development in children, and pulmonary fibrosis.<sup>10</sup> Some scientists and economists, however, are not convinced that ozone has been shown to cause any incapacitating or irreversible effects in humans.<sup>11</sup> More studies must be undertaken before it will be possible to draw any supportable conclusions about the connection between ozone exposure and chronic lung disease.<sup>12</sup>

According to a study undertaken by the U.S. Congress Office of Technology Assessment (OTA), in the late 1980s, sixty-eight million people were exposed to ozone levels of more than 0.12 ppm for periods ranging from four to nearly nineteen hours per year. Of these, approximately thirteen million engaged in heavy outdoor exercise.<sup>13</sup> OTA predicted that attaining the 0.12 standard in all areas of the United States would prevent several hundred million incidents of reversible respiratory symptoms, such as coughing or pain upon deep breathing.<sup>14</sup>

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6. *Id.* at 40-41.

7. *See id.* at 43.

8. *Id.* at 50.

9. *Id.* at 40.

10. *Id.*

11. Brad Knickerbocker, *Cleaner Air But No Clarity on Next Steps*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, at 3 (reporting the results of a study for the Washington University Center for the Study of American Business by economists Kenneth Chilton and Christopher Boerner).

12. OTA OZONE REPORT, *supra* note 4, at 48-49.

13. *Id.* at 59.

14. *Id.* at 64. According to OTA, this works out to about one to three fewer cough episodes per person per year for those living in nonattainment areas. But it would reduce coughing incidents by about four to 14 incidents per person per year for those living in the worst polluted cities. *Id.* at 66-67.

It would also eliminate eight to fifty million "restricted activity" days on which the victim feels ill enough to restrict activities, but not too ill to get up.<sup>15</sup>

Another recent study by the American Lung Association found that about 12.1 million children under the age of thirteen and nearly 900,000 asthmatic children under age eighteen live in areas in which ozone levels exceed 0.12 ppm. The study also found that although a substantial percentage of all children in the United States live in urban areas that have unhealthy levels of ozone pollution, the burden falls disproportionately upon minority (African-American, Hispanic, and Asian) children.<sup>16</sup>

Finally, damage to plants and animals can result if they are exposed to the levels of ozone typically occurring in seriously polluted areas. The OTA report estimated that photochemical oxidant pollution currently reduces crop yields in exposed areas by from 1% to 20%.<sup>17</sup> Meeting the National Ambient Air Quality Standards (NAAQS) for ozone would, by OTA estimates, produce economic benefits in the range of \$0.5 to \$1 billion per year.<sup>18</sup>

### B. *The Contribution of Automobile Emissions*

Photochemical oxidants are formed when certain hydrocarbon compounds, sometimes called volatile organic compounds (VOCs), combine with oxides of nitrogen (NO<sub>x</sub>).<sup>19</sup> As a measure of the concentration of photochemical oxidants in the atmosphere, regulatory agencies rely upon the more easily measured concentration of ozone. In hot summer months, there is probably a natural background concentration of ozone of about 0.04 ppm (one-third of the 0.12 ppm national primary ambient air quality standard) attributable largely to vegetative emissions of hydrocarbons. Automobiles are major contributors to both VOC emissions and NO<sub>x</sub> emissions in urban areas. The relative contributions of automobiles and other mobile sources to VOC emissions *vis-à-vis* stationary sources

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15. *Id.* at 64. OTA's admittedly highly speculative attempt to place a dollar value on these benefits of attaining the primary NAAQS for ozone arrived at a range of \$0.5 to \$4 billion per year, with some estimates ranging from less than \$0.1 billion to more than \$10 billion annually. *Id.*

16. See AMERICAN LUNG ASSOCIATION, DANGER ZONES: OZONE AIR POLLUTION AND OUR CHILDREN (1995); see also *Report Finds 12 Million Children Live in Areas Where Ozone Tops Federal Standard*, 26 *Env't Rep.* (BNA) No. 1, at 22 (May 5, 1995).

17. OTA OZONE REPORT, *supra* note 4, at 79.

18. *Id.*

19. *Id.* at 97. Oxides of nitrogen are pollutants in their own right, and EPA promulgated primary and secondary NAAQS for one of the oxides of nitrogen—nitrogen dioxide. 40 C.F.R. § 50.11 (1995). Currently only one area, Los Angeles, has not attained the NO<sub>x</sub> standards, and it may soon be redesignated. 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at 1-8. Exposure to nitrogen dioxide in high enough levels can irritate the lungs and lower resistance to respiratory illness, especially in children and in persons already suffering from respiratory diseases. EPA has recently decided not to revise either of the standards for nitrogen dioxide. See *Standard for Nitrogen Dioxide Adequate to Protect Health, Environment*, EPA Says, 26 *Env't Rep.* (BNA) No. 13, at 1035 (Oct. 13, 1995).

is a question to which there is no clear answer, because existing VOC emissions inventories are quite poor and emissions models are highly uncertain.<sup>20</sup> Since the formation of photochemical oxidants depends upon sunlight and temperature and because stagnant air tends to limit pollutant dispersal, ozone concentrations tend to be highest on hot sunny days when the wind is not blowing.<sup>21</sup>

One of the most perplexing aspects of arriving at regulatory solutions to the problem of photochemical oxidants is the phenomenon of "ozone transport." Because photochemical oxidants remain in the air for a considerable period of time, prevailing winds can transport ozone that is initially formed over a city to surrounding rural areas.<sup>22</sup> Ozone plumes can spread over large distances that include both urban and rural areas. For example, photochemical oxidants that originate in New York sometimes pollute the air over Boston.<sup>23</sup> This phenomenon can greatly complicate efforts to reduce ozone in particular areas. It may often be the case, especially on the East Coast, that a 100% reduction of VOC emissions in one area will not be sufficient to meet air quality standards in that area because of ozone transported from other areas.<sup>24</sup>

According to one recent, but nevertheless highly uncertain modeling exercise, automobiles account for between 40% and 45% of all VOC emissions and about 35% of all NO<sub>x</sub> emissions nationwide.<sup>25</sup> In addition, automobiles are responsible for at least 70% of carbon monoxide emissions nationwide.<sup>26</sup> Although emissions of both VOCs and carbon monoxide from individual automobiles have declined over the last two decades as a result of EPA's emissions standards for automobiles, the increase in the size of the automobile fleet has to some extent offset those declines.<sup>27</sup> The number of miles traveled in automobiles has more than doubled in the last twenty years to more than two trillion miles per year.<sup>28</sup> Further declines in individual emissions are possible (though by no means assured) as a result of a gradual shift away from gasoline to cleaner burning fuels mandated by the 1990 Amendments to the Clean Air Act.

The balance between VOC emissions and NO<sub>x</sub> emissions varies from city to city, depending upon the degree to which stationary sources emit those pollutants. In urban areas with high NO<sub>x</sub> emissions, reducing VOC emissions is the preferred strategy, and reducing NO<sub>x</sub> emissions in such situations may even be counter-

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20. OTA OZONE REPORT, *supra* note 4, at 26.

21. *Id.* at 97.

22. *Id.* at 23.

23. *Id.*

24. *Id.* at 23-24.

25. *Id.* at 12, 98. EPA's estimates, based on the year 1985, are 34% and 45% contribution of motor vehicles for VOC and NO<sub>x</sub>, respectively. Inspection/Maintenance Program Requirements, 57 Fed. Reg. 52,950, 52,981 (1992).

26. Inspection/Maintenance Program Requirements, 57 Fed. Reg. at 52,981.

27. *Id.* at 52,950.

28. *Id.*



productive.<sup>29</sup> As the polluted air mass moves out of urban areas and into rural areas with few NO<sub>x</sub> emissions, strategies aimed at reducing NO<sub>x</sub> emissions are increasingly attractive.<sup>30</sup> This may in part be attributable to the fact that most VOC emissions in rural areas are due to summertime emissions from vegetation.<sup>31</sup>

Highway vehicles, including automobiles and trucks, produce about one-third of overall NO<sub>x</sub> emissions nationally, but in highly polluted cities like Los Angeles, they account for almost two-thirds of the total.<sup>32</sup> In most cities highway vehicles account for 30% to 45% of NO<sub>x</sub> emissions.<sup>33</sup> The other primary source of NO<sub>x</sub> emissions is electric utility boilers, which account for another 35%.<sup>34</sup> Because NO<sub>x</sub> emissions from automobiles and trucks have historically been subject to less stringent tailpipe emissions standards than VOCs, fleet turnover has not brought about a reduction in overall emissions, and, in fact, they are rapidly increasing as the rate of new vehicle production exceeds the rate at which old vehicles are scrapped.<sup>35</sup> Nevertheless, EPA has historically concentrated almost exclusively upon reducing VOC emissions in its strategies for reducing levels of photochemical oxidants in the ambient air.<sup>36</sup> This approach has changed somewhat in recent years.<sup>37</sup>

### III. INSPECTION AND MAINTENANCE AS A TOOL FOR FIGHTING URBAN SMOG

Although vehicle tailpipe and running emissions have declined dramatically through design changes in new model automobiles, even the best designed systems wear out and break down.<sup>38</sup> Automobiles that have been on the road for several years emit between two to seventeen times the amount of pollutants that they emitted when brand new.<sup>39</sup> Sadly, in the early years, some people disabled

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29. OTA OZONE REPORT, *supra* note 4, at 17-18.

30. *Id.* at 18. NO<sub>x</sub> concentrations also diminish more rapidly as a polluted air mass moves from urban to rural areas. *Id.* at 98.

31. *Id.* In suburbs, vegetative emissions may account for one-half of all VOC emissions in the summer. *Id.*

32. *Id.* at 18.

33. *Id.*

34. *Id.* at 98.

35. *Id.* at 18.

36. *Id.* at 98.

37. *Id.*

38. See generally *Clean Air Act Amendments: Hearings on Inspection and Maintenance Programs Before the Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety of the Senate Comm. on Environment and Public Works*, 104th Cong. 178 (1995) (statement of Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA) [hereinafter *Hearings on Inspection and Maintenance: Statement of Mary D. Nichols*]; Arnold W. Reitze, *Controlling Automotive Air Pollution Through Inspection and Maintenance Programs*, 47 GEO. WASH. L. REV. 705 (1979); Arnold W. Reitze & Barry Needleman, *Control of Air Pollution from Mobile Sources Through Inspection and Maintenance Programs*, 30 HARV. J. ON LEGIS. 409 (1993).

39. *Hearings on Inspection and Maintenance: Statement of Mary D. Nichols, supra* note 38, at 178.

the pollution control devices on their automobiles out of a desire to increase performance.<sup>40</sup> Even those who do not deliberately disable pollution controls have little incentive to repair them when they break or wear out.<sup>41</sup> EPA estimates that 20% to 40% of the vehicles on the road are emitting more pollutants than they are supposed to emit.<sup>42</sup> Obviously, even the best designed automobiles burning the cleanest fuels will emit too many pollutants if the emissions control systems are in need of repair or replacement. Minor malfunctions in control devices can result in large increases in emissions, and major malfunctions can cause emissions to “skyrocket.” EPA estimates that only 10% to 30% of all vehicles cause a majority of vehicle-related emissions.<sup>43</sup> Yet not all “clunkers” are gross emitters. For example, on a single day in April 1993, a roadside testing facility in Fresno, California, flunked two well-maintained 1985 vehicles and passed a “1974 Cadillac Coupe de Ville with torn upholstery, missing chrome, [and] dust thick enough to write in.”<sup>44</sup>

The problem of identifying those vehicles that need additional maintenance can be solved through the implementation of an effective vehicle inspection and maintenance (I/M) program. Relatively inexpensive equipment exists for measuring tailpipe emissions from idling automobiles, and somewhat more expensive equipment can accurately measure emissions from automobiles operating under road-like conditions. Onboard diagnostic devices on many newer autos can detect poorly functioning emissions controls that could result in a failure to attain the tailpipe emissions standards, and inspection and maintenance of these new diagnostic systems can help ensure that drivers are on notice of the need to repair pollution control devices.<sup>45</sup> At the cutting edge of I/M technology, remote sensing devices use lasers to detect gross emitters as they travel down the road.<sup>46</sup> Vehicle

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40. Reitze, *supra* note 38, at 724; see *Hearings on Compliance with Title II (Auto Emissions Standards) of the Clean Air Act Before the Senate Comm. on Public Works*, 93d Cong. 396 (1973) (statement of Clarence M. Ditlow III, Public Interest Research Group). The incidence of tampering has declined steadily with the phase out of cheaper leaded gasoline and the advent of sophisticated computerized emission control devices. Vehicle Inspection and Maintenance Requirements for State Implementation Plans, 57 Fed. Reg. 27,771 (1992).

41. Reitze, *supra* note 38, at 727-28.

42. *Hearings on Inspection and Maintenance*: Statement of Mary D. Nichols, *supra* note 38, at 178.

43. Inspection/Maintenance Program Requirements, 57 Fed. Reg. at 52,950-52.

44. Maria L. LaGanga, *Anti-Smog Program Offers Hazy Idea of Dirty Cars*, L.A. TIMES, May 2, 1993, at A3.

45. EPA was supposed to have promulgated regulations requiring auto manufacturers to install onboard diagnostic devices covering at least catalytic converters and oxygen sensors within 18 months of the 1990 amendments. Clean Air Act § 202(m)(1), 42 U.S.C.A. § 7521(m)(1) (West 1995). Once EPA promulgates standards requiring onboard diagnostic devices, state implementation plans must provide for inspection and maintenance of these devices in areas in which inspection and maintenance programs are in effect. Clean Air Act § 202(m)(3), 42 U.S.C.A. § 7521(m)(3) (West 1995).

46. *Hearings on the Implementation of the Motor Vehicle Emissions Inspection and Maintenance Program of the EPA Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 232 (1995) (statement of Douglas R. Lawson, Reno, Nevada) [hereinafter *Hearings on Inspection and Maintenance*: Statement of Douglas R. Lawson].

I/M programs can bring about rapid reductions in emissions at a relatively small cost.<sup>47</sup>

“Basic” I/M consists of visual examinations by trained personnel of pollution control equipment, like catalytic converters and purge canisters, and machine measurement of exhaust emissions when the engine is running at high and low speeds in idle mode. The equipment for administering basic I/M is relatively inexpensive and can easily be afforded by a medium sized service station. Basic I/M also requires only a modest amount of training for the operators. Programs using basic I/M typically allow the service station that does the testing to make any necessary repairs.<sup>48</sup>

“Enhanced I/M,” which is required by the 1990 Clean Air Act Amendments for serious, severe, and extreme nonattainment areas, means different things to different people. EPA initially took the position that enhanced I/M required a “loaded mode” test that measured tailpipe emissions as the engine accelerated and decelerated against resistance. The agency developed a “high-tech” procedure, called IM-240, in which the vehicle is placed on a treadmill or dynamometer and operated for up to 240 seconds (four minutes) over a predetermined driving cycle that simulates actual driving conditions.<sup>49</sup> This test more accurately measures emissions under actual driving conditions and is more likely to detect maladjustments and malfunctions in modern computerized ignition systems. It is also able to measure NO<sub>x</sub> emissions, which do not occur in sufficient amounts in idle mode to be accurately measured. EPA’s preferred loaded mode inspection technology, costs about \$140,000 per lane versus \$15,000 to \$40,000 for basic I/M equipment. Since centralized facilities were envisioned to be large multi-lane affairs, EPA expected that any repairs would be undertaken at separate facilities with follow up tests at a centralized testing facility.<sup>50</sup>

Huge battles have been waged in recent years over whether enhanced I/M should require “centralized test-only” programs or allow “decentralized test-and-repair” regimes employing equipment somewhat more sophisticated than basic I/M. Proponents of centralized test-only systems, a group that includes EPA, argue that such regimes are much more effective than decentralized test-and-repair programs because they are more accurate and more reliable.<sup>51</sup> They are

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47. Vehicle Inspection and Maintenance Program Requirements, 57 Fed. Reg. at 52,971. EPA estimates that sophisticated I/M programs can bring about a 28% reduction in automobile emissions in heavily polluted urban areas at a cost of about \$12.50 per vehicle per year. *Id.*

48. *Id.*; Reitze & Needleman, *supra* note 38, at 424-25.

49. *Hearings on Inspection and Maintenance*: Statement of Mary D. Nichols, *supra* note 38, at 179.

50. Vehicle Inspection and Maintenance Requirements for State Implementation Plans, 57 Fed. Reg. at 52,954; U.S. EPA, I/M BRIEFING BOOK § 4, at 3-4 (1995); Reitze & Needleman, *supra* note 38, at 424-25.

51. See *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight & Investigations of the House Comm. on Commerce*, 104th Cong. 316-17 (1995) (statement of Joseph Belanger, Director of Planning and Standards, Bureau of Air Management, Connecticut Department of Environmental Protection); see also *Hearings on Inspection and Maintenance*: Statement of Mary D. Nichols, *supra* note 38, at 178 (“[T]he inescapable conclusion [is] that test-and-repair programs are much less effective than test-only programs.”).

more accurate because they rely upon sophisticated loaded mode inspection technologies that can only be implemented on a centralized basis.<sup>52</sup> For example, the OTA study concluded that while basic inspection and maintenance can reduce auto emissions by 12%, enhanced inspection and maintenance with centralized test-only facilities can reduce emissions by an additional 17%.<sup>53</sup>

Centralized test-only programs are more reliable because the test-only feature eliminates the conflict of interest inherent in the test-and-repair regime. Numerous covert audits have demonstrated that small test-and-repair facilities lack either the training or the desire to detect malfunctioning or even nonexistent pollution control devices.<sup>54</sup> The results of more than 10,000 covert audits of test-and-repair facilities conducted by EPA and states during the 1980s revealed improper testing more than 80% of the time.<sup>55</sup> In thirty-eight covert audits that EPA undertook in St. Louis, 84% of the stations falsely passed vehicles that EPA had deliberately modified to fail the test. Almost 75% of the stations passed vehicles for which EPA had removed the catalytic converters altogether.<sup>56</sup> It is a sad fact of life that some test-and-repair operators are willing to forego expensive repairs to maintain consumer goodwill or to secure bribes. A 1992 California sting operation, for example, netted thirty-two service mechanics and station owners who had fraudulently issued almost 100,000 bogus smog certificates.<sup>57</sup> The potential for fraud diminishes when the repairs have to be undertaken at a separate facility. Moreover, it is inherently easier to police a limited number of centralized test facilities (50-100 for a large city) than a large number of decentralized facilities (4000 or more for a large city).<sup>58</sup> The bottom line is that test and repair facilities pass "a very large number of automobiles which should fail."<sup>59</sup>

The proponents of decentralized test-and-repair systems stress their convenience to auto owners, lower cost, and ease of operation. In a large city, the ratio of decentralized inspection facilities to vehicles is typically around 1 to

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52. *Hearings on Vehicle Inspection and Maintenance Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Energy and Environment*, 104th Cong., available at 1995 WL 408044, \*3 (1995) (statement of Michael P. Walsh, Former Director, Motor Vehicles Pollution Control Program, EPA) (copy on file with the *Pacific Law Journal*) [hereinafter *Hearings on Vehicle Inspection and Maintenance: Statement of Michael P. Walsh*] (describing an extensive audit of a centralized test-only program in British Columbia).

53. OTA OZONE REPORT, *supra* note 4, at 133.

54. *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 179 (1995) (statement of Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA) [hereinafter *Hearings on Clean Air Act Oversight: Statement of Mary D. Nichols*].

55. *Id.*

56. Inspection/Maintenance Program Requirements, 57 Fed. Reg. at 52,972.

57. Maria L. LaGanga, 32 *Arrested in Sting Aimed at Fraudulent Smog Checks*, L.A. TIMES, Dec. 18, 1992, at A1.

58. *Hearings on Vehicle Inspection and Maintenance: Statement of Michael P. Walsh, supra* note 52, at \*6.

59. *Most Car Owners Favor Emissions Checks, Improved Accuracy in Testing, Survey Shows*, 24 Env't Rep. (BNA) No. 19, at 855 (Sept. 10, 1993) [hereinafter *Most Car Owners Favor Emissions Checks*].

1000. In a centralized system, the ratio is on the order of 1 to 35,000.<sup>60</sup> This means that in a centralized regime more vehicles must be tested at a single facility, and the average drive to get to a facility is greater. Centralized testing, therefore, raises the specter of driving five or more miles to a facility for the privilege of joining a long line of waiting vehicles.<sup>61</sup>

Advocates of decentralized regimes also point out that decentralized tests are less expensive to the consumer because they require less costly equipment. In addition, by allowing the mechanic who tested the vehicle to repair it, a test-and-repair regime can avoid the "ping-pong" effect that can occur when a driver whose automobile fails the inspection takes it to a separate service station for repairs and returns to the testing facility to see if the repairs worked, possibly repeating the process if the vehicle fails a second time.<sup>62</sup> Proponents of decentralized test-and-repair facilities, many of whom are service station owners who stand to lose income from both testing and repairs if states adopt centralized test-only regimes, resent the implication that a high proportion of small service station mechanics are gross incompetents or outright frauds. Taking issue with the conclusions of EPA's secret audits, they maintain that the superiority of centralized testing has not been conclusively established.<sup>63</sup> Finally, they predict that a move away from decentralized testing will result in the loss of jobs with a resulting negative impact on local economies.<sup>64</sup>

Proponents of centralized test-only facilities respond that they are not necessarily less convenient than decentralized testing programs. First, unlike local garages, centralized facilities operate multiple lanes, and they devote full attention to emissions testing. Second, since each test at a fully automated centralized facility only lasts about seven minutes and since consumer "hot lines" can provide up-to-the-minute information on lane availability, the potential for long waits is normally not very high. Third, most programs provide for levying fines against operators when wait times exceed fifteen minutes. Fourth, centralized testing

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60. Inspection/Maintenance Requirements, 57 Fed. Reg. at 52,959.

61. See *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 73 (1995) (statement of George Allen, Governor, Commonwealth of Virginia).

62. *Most Car Owners Favor Emissions Checks*, *supra* note 59, at 855.

63. See, e.g., *Hearings on Inspection and Maintenance*: Statement of Douglas R. Lawson, *supra* note 46, at 232; *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 230 (1995) (statement of Lynn Scarlett, Chairperson, California Inspection and Maintenance Review Committee) [hereinafter *Hearings on Clean Air Act Oversight*: Statement of Lynn Scarlett]; *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 64 (1995) (statement of Joel Schwartz, Staff Member, California Inspection and Maintenance Review Committee) [hereinafter *Hearings on Clean Air Act Oversight*: Statement of Joel Schwartz].

64. Greg Lucas, *EPA Plan for Cleaner Air*, S.F. CHRON., May 24, 1993, at A1. On the other hand a high-tech test-only regime could actually increase small service station business by detecting more violations. *Id.*

using high-tech testing equipment need only be undertaken biennially, thus effectively cutting in half the number of trips. Fifth, allowing the same facility to perform the repairs adds to customer convenience only if the customer can leave the vehicle at the facility for a period of time for both testing and repairs.<sup>65</sup> Sixth, the ping-pong effect can be reduced by requiring testing facilities to share the testing data with repair shops. Finally, polling evidence suggests that urban drivers are willing to tolerate any additional inconvenience caused by a centralized test-only regime. For example, in an August 1993 national Gallup poll, 82% of auto owners said that they favored annual inspections of pollution controls on automobiles, 87% said that existing programs should be improved, and 81% said that ten dollars was a reasonable price to pay for the inspection. In addition, 72% believed that separating the testing function from the repair function would ensure proper repairs.<sup>66</sup>

It would be nice if only those vehicles that needed maintenance could be easily identified without requiring every vehicle to undergo periodic inspection. Engineers are in fact developing laser-based techniques for measuring tailpipe emissions from stations situated on the side of the road.<sup>67</sup> These "remote sensing" technologies offer a relatively inexpensive mechanism for identifying "gross emitters."<sup>68</sup> The possibility of being caught by a remote sensing device should also deter those who are inclined to tamper with their emission control systems.<sup>69</sup> Current versions of remote sensing technologies, however, are incapable of detecting heavy emitters of NO<sub>x</sub>, and they cannot detect evaporative emissions.<sup>70</sup> They also require that automobiles proceed in single file past the remote sensing device, an arrangement that is impractical at most road locations.<sup>71</sup> Single file remote testing might, for example, be feasible at entrance and exit ramps to major freeways, but a high enough proportion of the driving population of a large city may not proceed through a small enough number of entrance or exit ramps to ensure that most vehicles are subjected to remote testing.<sup>72</sup>

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65. See generally *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 315 (1995) (statement of Joseph Belanger, Director of Planning and Standards, Bureau of Air Management, Connecticut Department of Environmental Protection).

66. *Most Car Owners Favor Emissions Checks*, *supra* note 59, at 855.

67. *Hearings on Clean Air Act Oversight*: Statement of Joel Schwartz, *supra* note 63, at 71; *Hearings on Inspection and Maintenance*: Statement of Douglas R. Lawson, *supra* note 46, at 234.

68. See *Clean Air Act and Nuclear Regulation: Hearings on Vehicle Inspection and Maintenance Before the Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety of the Senate Comm. on Environment and Public Works*, 104th Cong. 59-60 (1995) (statement of Lynn Scarlett, Chairperson, California Inspection and Maintenance Review Committee) [hereinafter *Hearings on Vehicle Inspection and Maintenance*: Statement of Lynn Scarlett].

69. *Hearings on Vehicle Inspection and Maintenance*: Statement of Michael P. Walsh, *supra* note 52, at \*8.

70. *Id.*

71. *Id.*

72. *Id.*

EPA has sponsored or participated in several field tests of remote sensing devices, none of which has produced definitive results. In the most comprehensive attempt to compare vehicles tested in the IM-240 regime with vehicles identified through remote sensing, the remote sensors missed many autos that failed the IM-240 test while flunking many that passed the IM-240 test. EPA's engineers, in peer-reviewed publications, have concluded that remote sensing showed some promise as a supplement to, but not a substitute for, centralized testing using the IM-240 technology.<sup>73</sup> Although the debate over remote sensing technologies is heavily influenced by the politics of centralized versus decentralized testing, the most balanced analyses appear to support this conclusion.<sup>74</sup>

Once an inspection reveals that a vehicle is not performing up to par, repairs will usually be necessary. Those states that implemented I/M during the 1970s and 1980s attempted to ease the economic burden of such repairs on people with modest incomes by setting a ceiling (often in the \$300-\$400 range) above which repairs would not be required. Recent studies in states that employ high-tech centralized I/M technologies found that most repairs cost between \$150 and \$300,<sup>75</sup> suggesting that the ceiling should be somewhat higher than \$300.

The OTA report on urban ozone predicted that enhanced inspection and maintenance would reduce total nationwide VOC emissions by about 2%.<sup>76</sup> OTA estimated that the cost of implementing enhanced inspection and maintenance is relatively high, in the range of \$3500 per ton.<sup>77</sup> EPA, on the other hand, found the cost of enhanced I/M to be only about \$500 per ton,<sup>78</sup> which is very low compared to the cost of "reasonably available control technology" for many existing stationary sources and the cost of "best adequately demonstrated control tech-

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73. *Hearings on Clean Air Act Oversight*: Statement of Mary D. Nichols, *supra* note 54, at 180. In 1995, EPA entered into an agreement with the State of California to conduct a much more comprehensive study of remote sensing technologies in Sacramento, and it was hoped that the results of that experiment would help resolve questions about the efficacy of existing remote sensing technologies. The initial results, however, have proved susceptible to varying interpretations. See *Hearings on Vehicle Inspection and Maintenance*: Statement of Lynn Scarlett, *supra* note 68, at 59-60 (criticizing one interpretation of the Sacramento study and offering an alternative interpretation); *Hearings on Vehicle Inspection and Maintenance*: Statement of Michael P. Walsh, *supra* note 52, at \*8-\*9.

74. *Hearings on Vehicle Inspection and Maintenance*: Statement of Michael P. Walsh, *supra* note 52, at \*9 ("Remote sensing is not, however, an appropriate substitute for periodic I/M at the present time because practical difficulties regarding the comprehensiveness of testing have not been resolved and it is currently limited in its ability to sense high NO<sub>x</sub> and evaporative hydrocarbon emissions.").

75. *Hearings on Clean Air Act Oversight*: Statement of Mary D. Nichols, *supra* note 54, at 180.

76. OTA OZONE REPORT, *supra* note 4, at 13, 133.

77. *Id.* at 17, fig.1-8.

78. Vehicle Inspection and Maintenance Requirements for State Implementation Plans, 57 Fed. Reg. at 52,952. The OTA apparently assumed that enhanced I/M would be conducted annually. EPA's figure is based upon biennial inspections. EPA's figure also fails to quantify "inconvenience costs" to owners for the time consumed by undergoing the tests. This is a difficult calculation, given the widely differing values that people assign to their time. EPA concluded that even at \$20 per hour (and assuming 45 minutes for driving to and from the testing facility and undergoing the tests), the cost per ton would still be under \$1600 per ton. *Id.*

nology” for new stationary sources.<sup>79</sup> According to EPA, enhanced I/M is “seven times more cost effective than more stringent new car tailpipe standards and at least ten times more cost effective than additional controls beyond reasonably available control technology (RACT) on small and large industrial sources.”<sup>80</sup>

#### IV. HISTORY OF INSPECTION AND MAINTENANCE UNDER THE CLEAN AIR ACT

##### A. *State of Regulation Prior to 1970*

Middle class America’s love affair with the automobile perfectly complemented its flight to the suburbs. The automobile provided the means to escape from the noise and dirt of the city to the clean air and green, open spaces of the suburbs. If you were paid well enough and did not mind the time spent in commuter traffic, the automobile offered freedom to travel to and from work unconstrained by bus or train schedules. Whereas the cities of the Northeast were built around a single downtown in which rich and poor alike traveled by foot, rail, or bus, the automobile commute to the suburbs was the assumption around which urban planners and real estate developers built the sunbelt cities of the fifties.

During the boom years following World War II, the suburbs flourished and urban automobile traffic increased dramatically. Commuting times correspondingly increased as freeways and feeder roads became clogged with traffic during the rush hours. As people adjusted their schedules to avoid peak traffic times, the rush hours also grew in length. Later, during the sixties and seventies, the entry of women into the work force in large numbers often meant two automobile commuters per household, each bound for a different destination.

It soon became apparent that congestion was not the only downside of America’s greatly expanded mobility. In 1950, Dr. A. J. Haagen-Smit, a biochemist at CalTech, reported to the California Assembly the results of a study, prepared at the behest of the Los Angeles Chamber of Commerce, in which he concluded that the brown haze that engulfed Los Angeles with increasing frequency during the previous decade was caused by photochemical oxidants that resulted from a photochemical reaction in the upper atmosphere between certain volatile organic hydrocarbon compounds (VOCs) and certain oxides of nitrogen (NO<sub>x</sub>).<sup>81</sup> The VOCs came mostly from petrochemical refineries and automobiles; the NO<sub>x</sub> came mostly from power plants and automobiles.<sup>82</sup> No matter how you

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79. *Id.*

80. *Id.*

81. JAMES E. KRIER & EDMUND URSIN, *POLLUTION AND POLICY* 79 (1977). Until this time, local officials in Los Angeles and other cities operated on the assumption that air pollution was the result of stationary sources like coal-burning power plants that emitted sulfur dioxide and particulates into the air. Many localities therefore enacted pollution ordinances based on the Eastern Seaboard model aimed at such stationary sources and ignored automobiles. *Id.* at 56.

82. *Id.* at 6-7.



sliced it, reported Dr. Haagen-Smit, the automobile was a major contributor to what the locals called "smog."

The automobile manufactures and the petroleum refining companies did what they could to cast doubt on Dr. Haagen-Smit's conclusions,<sup>83</sup> and for the next fifteen years, state and federal agencies were content to study the matter rather than take precipitous action.<sup>84</sup> Further study demonstrated that not only was the smog in Los Angeles attributable in large part to automobile traffic,<sup>85</sup> but the automobile was also responsible for rapidly increasing levels of photochemical oxidants in other urban areas like New York and Houston.<sup>86</sup> In addition, in some especially congested areas, automobiles were present in sufficient numbers to contribute to levels of carbon monoxide in the air that posed a serious health threat.<sup>87</sup> It was becoming increasingly apparent that "smog" was not a problem unique to Los Angeles. Although photochemical oxidant pollution in the South Coast Basin was certainly exacerbated by its unique terrain and frequent temperature inversions, the problem was national in scope,<sup>88</sup> and the solution was not to construct huge fans to blow the polluted air across the mountains and into the surrounding desert.<sup>89</sup>

State and federal agencies first turned their attention to the automobile itself, hoping that a technological fix might render that machine relatively pollution free.<sup>90</sup> The automobile manufacturers had seen the writing on the wall in 1954 and had entered into a cooperative arrangement for funding and sharing research on approaches to controlling emissions to the tune of one million dollars per year.<sup>91</sup> After a decade passed with no noticeable progress, the United States Justice Department concluded that the cooperative agreement was merely a vehicle for discouraging competition among the manufacturers in developing pollution control technologies.<sup>92</sup> During this critical time little thought was given to reducing pollution by reducing the amount of auto traffic.<sup>93</sup>

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83. *Id.* at 80-82.

84. *Id.* at 6-9.

85. *Id.* at 86.

86. JOHN C. ESPOSITO, *VANISHING AIR* 9-11 (1970).

87. No one questioned that carbon monoxide in high levels in the ambient air resulted from the automobile. There are no large stationary sources of carbon monoxide, which is produced through the incomplete combustion of hydrocarbon fuels. FRANK P. GRAD ET AL., *THE AUTOMOBILE AND THE REGULATION OF ITS IMPACT ON THE ENVIRONMENT* 115 (1974). Likewise, no one questioned that human exposure to carbon monoxide in levels that were showing up in some urban areas like New York was dangerous. *Id.* at 43-46.

88. KRIER & URSIN, *supra* note 81, at 41, 90-91.

89. *Id.* at 7.

90. *Id.* at 92-93.

91. *Id.* at 87.

92. DAVIES, *supra* note 1, at 94; KRIER & URSIN, *supra* note 81, at 88. The antitrust suit that the Justice Department filed ended with a controversial consent decree. *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd in part sub nom. Grossman v. Automobile Mfrs. Ass'n*, 397 U.S. 248 (1970); ESPOSITO, *supra* note 86, at 44-46.

93. KRIER & URSIN, *supra* note 81, at 95-96.

The citizens of California were unwilling to wait until Detroit came up with a solution. In 1962, the California Assembly created the Motor Vehicle Pollution Control Board to certify pollution control technology that would be required on new and some existing automobiles.<sup>94</sup> As other states began to consider similar legislation, the automobile manufacturers realized that their industry faced the possibility of fifty different standards for a single vehicle model, and they began to lobby Congress to prescribe uniform standards. In 1965, Congress enacted the Motor Vehicle Air Pollution Control Act, which empowered the Secretary of Health, Education and Welfare (HEW) to establish emission standards for new automobiles limiting emissions of pollutants that “cause or contribute to . . . air pollution which endangers the health or welfare of any persons,” giving “appropriate consideration to technological feasibility and economic costs.”<sup>95</sup> Within a year, HEW had promulgated emissions standards that closely resembled the pending California standards, both of which were to apply to the 1968 model year.<sup>96</sup>

Requiring automobile manufacturers to install pollution controls, however, could not be the end of the matter. Like any other technology, pollution control devices are apt to fail on occasion. Since the absence of a properly working pollution control device does not normally affect driveability or performance, owners had no incentive to check to see if they were working or to fix them when they failed. More ominously, articles in the popular press suggested that pollution control devices adversely affected performance and could even result in engine failure during acceleration, a potentially deadly development.<sup>97</sup> Thus informed, many purchasers of new automobiles equipped with pollution controls promptly headed for the nearest local garage to have those devices disabled.<sup>98</sup> If that were not enough, Detroit’s device of choice, the catalytic converter, was easily “poisoned” by the leaded gasoline that was universally available in local gas stations. If owners ignored the instructions to use unleaded gas, the converters became useless.

All of this pointed to the need for a legal requirement that automobiles be inspected periodically by impartial personnel and repaired when necessary.<sup>99</sup> Nevertheless, when the California pollution control agency initiated the nation’s

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94. *Id.* at 8.

95. Pub. L. No. 89-272, 79 Stat. 992 (1965) (codified as amended at 42 U.S.C.A. § 7521 (West Supp. 1996)); see DAVIES, *supra* note 1, at 54; KRIER & URSIN, *supra* note 81, at 8-9, 173-75.

96. KRIER & URSIN, *supra* note 81, at 175.

97. *Id.* at 366.

98. U.S. EPA, MOTOR VEHICLE TAMPERING SURVEY (1978).

99. KRIER & URSIN, *supra* note 81, at 149.

first mandatory inspection program in 1964, it was quickly abolished by the California Assembly after a large public outcry.<sup>100</sup>

The Air Quality Act of 1967 required states to write air quality standards pursuant to criteria issued by HEW.<sup>101</sup> States were then obliged to draft and submit to HEW state implementation plans containing emissions limitations and control strategies capable of meeting the air quality standards. The Act also provided funds for state automobile inspection programs and provided that national automobile emissions standards preempted all state auto emissions standards except for those of California.<sup>102</sup>

The performance of the states in meeting their responsibilities under the 1967 Act was quite disappointing. Powerful industries played a large role in drafting many state implementation plans, and it appeared that states might have been competing for industrial development by establishing lax requirements.<sup>103</sup> After two years passed without any state submitting an implementation plan,<sup>104</sup> it was apparent that the federal government would have to play a stronger role in cleaning up urban air.

### *B. The Clean Air Act Amendments of 1970*

The Clean Air Act Amendments of 1970 marked "a sharp break with the past."<sup>105</sup> Concluding that little progress was likely if it left air pollution control up to the states, Congress decided to assign a much more prominent role to the federal government acting through the newly created Environmental Protection Agency (EPA).

First, the 1970 Amendments directed EPA to write national primary and secondary ambient air quality standards for pollutants that would have an adverse effect on public health and welfare and would result from numerous or diverse mobile or stationary sources.<sup>106</sup> The NAAQS were to establish concentrations of such pollutants in the ambient air at the levels necessary to protect the public health with an adequate margin of safety, in the case of primary standards, and to protect the public welfare, in the case of secondary standards.<sup>107</sup> The initial standards would be based on the criteria documents already developed or nearly

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100. *Id.* at 151. The mandatory inspection was coupled with a requirement that owners of all existing automobiles install a crankcase pollution control device. The public outcry was probably directed more at this requirement than at the testing requirement per *se. Id.* at 151-52.

101. Pub. L. No. 90-148, 81 Stat. 499 (1967) (codified as amended at 42 U.S.C.A. § 7401 (West 1995)).

102. DAVIES, *supra* note 1, at 57; KRIER & URSIN, *supra* note 81, at 9, 181-82.

103. KRIER & URSIN, *supra* note 81, at 201.

104. *Id.* at 191.

105. *Id.* at 10.

106. Clean Air Act § 108(a)(1)(B), 42 U.S.C.A. § 7408(a)(1)(B) (West 1995).

107. Clean Air Act § 109(a), 42 U.S.C.A. § 7409(a) (West 1995).

developed by HEW,<sup>108</sup> and they would be uniform across the country. Although no longer responsible for promulgating the air quality standards, the states were to play the primary role in ensuring that the standards were attained by the statutory deadlines. Within nine months after the promulgation of a NAAQS, each state was supposed to submit to EPA a state implementation plan (SIP) that, inter alia, provided for the attainment of any primary NAAQS within three years from the date that EPA approved the plan.<sup>109</sup> If a state failed to submit an SIP by the deadline, or if a submitted plan did not meet the statutory requirements, EPA was to write, within two years, a federal implementation plan (FIP) containing regulations capable of meeting the statutory requirements.<sup>110</sup> Congress clearly recognized that attaining the standards by the deadlines would require significant changes in transportation habits in large metropolitan areas. The Senate Report warned that “as much as seventy-five percent of the traffic may have to be restricted in certain large metropolitan areas,”<sup>111</sup> and the Act’s chief sponsor, Edmund Muskie, predicted that “the way in which people move about, go to their work, and live . . . must be modified if the objective of clean air is to be achieved.”<sup>112</sup>

Second, having grown impatient with the speed with which EPA was implementing the mobile source provisions of the 1965 Act, Congress provided for direct regulation of tailpipe emissions from automobiles.<sup>113</sup> EPA was to promulgate tailpipe emission standards for automobiles capable of reducing emissions of hydrocarbons and carbon monoxide by 90% by the 1980 model year.<sup>114</sup> Congress recognized that the new standards were “‘drastic medicine,’

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108. Clean Air Act § 109(a)(1), (2), 42 U.S.C.A. § 7409(a)(1), (2) (West 1995).

109. Clean Air Act § 110(a)(1), 42 U.S.C.A. § 7410(a)(1) (West 1995). The statute provided for an extension of the deadline for submitting a plan for an additional 18 months for the secondary standards. Clean Air Act § 110(b), 42 U.S.C.A. § 7410(b) (West 1995). It further provided for an extension of the three-year attainment deadline for an additional two years if the necessary technology or other alternatives were unavailable and the state had required reasonably available alternative means of achieving the standard. Clean Air Act Amendments of 1970, Pub. L. No. 91-604 § 4(a), 84 Stat. 1680 (1970), *repealed by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 101(d)(4), 104 Stat. 2409 (1990). Thus, the final deadlines envisioned by the 1970 Amendments for attaining the primary standards could be extended until 1977. SIPs were to provide for the attainment of secondary NAAQS within a “reasonable time.” Clean Air Act § 110(a)(2), 42 U.S.C.A. § 7410(a)(2) (West 1995).

110. Clean Air Act § 110(c), 42 U.S.C.A. § 7410(c) (West 1995). The federal plan would not go into effect if the state submitted an adequate plan within the two year period that EPA was preparing its FIP. Clean Air Act § 110(c)(1)(C), 42 U.S.C.A. § 7410(c) (West 1995).

111. S. REP. NO. 91-1196, at 12 (1970).

112. 116 CONG. REC. 42,381, 42,394 (1970) (statement of Edmund Muskie).

113. The Secretary of HEW had testified that “the state of the art has tended to meander along until some sort of regulation took it by the hand and gave it a good pull. . . . There has been a long period of waiting for it, and it hasn’t worked very well.” *Hearings on Air Pollution—1967: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. On Public Works*, 90th Cong. 766-67 (1967) (statement of John W. Gardner, Secretary of Health, Education and Welfare).

114. Clean Air Act § 202(b), 42 U.S.C.A. § 7521(b) (West 1995).

designed to 'force the state of the art.'"<sup>115</sup> But Congress provided an "escape hatch" through which an auto manufacturer could petition EPA for a one-year extension if it could demonstrate the following: (1) The extension was "essential to the public interest or the public health and welfare," (2) the company had undertaken good faith efforts to meet the standards, (3) the necessary technology was unavailable, and (4) a study undertaken by the National Academy of Sciences and other information available to EPA did not indicate that appropriate technology was available.<sup>116</sup> If necessary, EPA was to promulgate more stringent standards for future model years.<sup>117</sup> EPA was empowered to conduct assembly line inspections and monitor in-use performance to ensure that the manufacturers met their statutory obligations.<sup>118</sup> The statute explicitly preempted any state tailpipe standards that differed from the federal standard, except that the more stringent California standards could remain in effect.<sup>119</sup>

Third, the 1970 amendments authorized EPA to regulate mobile source fuels and fuel additives.<sup>120</sup> The statute provided that once EPA had designated a fuel or fuel additive by regulation, no one could sell or distribute any additive that was not registered with EPA. EPA could require manufacturers of fuels and fuel additives to conduct health and environmental testing on such additives.<sup>121</sup> The agency was empowered to control or prohibit the sale of a fuel or fuel additive if it determined that the fuel, the additive or any combustion products would endanger the public health or welfare or would impair to a significant degree the performance of any pollution control device that was or would likely be in general use.<sup>122</sup> States were empowered to regulate fuels and fuel additives in SIPs if necessary to achieve the NAAQS.<sup>123</sup>

### *C. Implementation of the 1970 Amendments*

#### *1. Promulgating the National Ambient Air Quality Standards*

On April 30, 1971, EPA published a final NAAQS for photochemical oxidants (as measured by ambient concentrations of ozone) of 0.08 parts per million as a maximum one-hour concentration.<sup>124</sup> Fortunately for the agency, only

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115. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 623 (D.C. Cir. 1973).

116. Clean Air Act Amendments of 1970, Pub. L. No. 91-604 § 6, 84 Stat. 1692 (1970), *repealed by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 101(d)(3)(C), 104 Stat. 2409 (1990).

117. Clean Air Act § 202(b)(1)(C), 42 U.S.C.A. § 7521(b)(1)(C) (West 1995).

118. Clean Air Act § 206, 42 U.S.C.A. § 7525 (West 1995).

119. Clean Air Act § 209(a),(b), 42 U.S.C.A. § 7543(a),(b) (West 1995).

120. Clean Air Act § 211(a), 42 U.S.C.A. § 7545(a) (West 1995).

121. Clean Air Act § 211(b)(2), 42 U.S.C.A. § 7545(b)(2) (West 1995).

122. Clean Air Act § 211(c)(1), 42 U.S.C.A. § 7545(c)(1) (West 1995).

123. Clean Air Act § 211(c)(4)(C), 42 U.S.C.A. § 7545(c)(4)(C) (West 1995).

124. National Primary and Secondary Ambient Air and Quality Standards, 36 Fed. Reg. 8186, 8187 (1971) (codified at 42 C.F.R. § 410.9).

the secondary NAAQS for sulfur dioxide was actually challenged in court, and that standard was not relevant to automobile pollution.<sup>125</sup> In 1978, EPA changed the one-hour standard for ozone to 0.12 ppm, thereby relieving many urban areas of their nonattainment status.<sup>126</sup>

## 2. *Promulgating Emissions Standards for Automobiles*

EPA published the statutorily required standards and testing procedures for tailpipe emissions on June 23, 1971.<sup>127</sup> Hydrocarbon emissions for 1975 model year automobiles and light duty trucks were limited to 0.41 grams per mile.<sup>128</sup> The regulations limited NO<sub>x</sub> emissions to 3.0 grams per mile for 1973 model year autos, a rate that EPA confidently believed was feasible, and to 0.4 grams per mile for the 1976 model year, the statutory rate about which the agency was much less confident.<sup>129</sup> The agency also required that catalytic converters used to meet the standards be fully operational for at least 50,000 miles of use.<sup>130</sup> EPA's required testing procedures specified that emissions be measured during a "cold start" of the automobile, the time during the driving cycle at which emissions were usually highest.<sup>131</sup> In late August 1971, EPA granted the State of California's request for a waiver to promulgate more stringent automobile emissions standards for cars sold in that state.<sup>132</sup>

The auto manufacturers immediately appealed the Administrator's refusal to allow a one-year extension for meeting the tailpipe standards to the D.C. Circuit Court of Appeals, which, in an expedited opinion, found the Administrator's decision to be "arbitrary and capricious."<sup>133</sup> The court noted that the economic cost of an erroneous decision to deny the one-year extension could be very high

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125. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 847 (D.C. Cir. 1972).

126. *American Petroleum Inst. v. Costle*, 609 F.2d 20, 21 (D.C. Cir. 1979).

127. *Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines*, 36 Fed. Reg. 12,657 (1971).

128. The Natural Resources Defense Council challenged the hydrocarbon standard on the ground that in invoking a better procedure for testing vehicle emissions, the agency had subtly weakened the standard. The District Court for the District of Columbia rejected this challenge in a brief nine-paragraph opinion, only one of which addressed the testing question. *Natural Resources Defense Council, Inc. v. Ruckelshaus*, 3 ELR 20787 (D.D.C. May 5, 1972).

129. *EPA Expresses Moderate Optimism that Emission Standards Can Be Met*, 2 Env't Rep. (BNA) No. 11, at 307 (July 16, 1971).

130. *New Motor Vehicles and Engines*, 36 Fed. Reg. 8698, 8698-99 (1971) (codified at 45 C.F.R. pt. 1201); *EPA Proposes Definition of Useful Life for Emission Controlled Motor Vehicles*, 2 Env't Rep. (BNA) No. 2, at 34 (May 14, 1971).

131. *Hearings on Clean Air Act Oversight Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 92d Cong. 192 (1971-72) (statement of Dr. Edward Ginzton, Chairman, Committee on Motor Vehicle Emissions, National Academy of Sciences, National Research Council).

132. *Motor Vehicle Pollution Control*, 36 Fed. Reg. 17,458, 17,458-59 (1971); *California Request Granted by EPA for Assembly-Line Testing of 1973 Cars*, 2 Env't Rep. (BNA) No. 18, at 527 (Sept. 3, 1971).

133. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 627 (D.C. Cir. 1973).

and that the human health costs of erroneously granting the extension were fairly small, and it suggested that if catalyst-equipped autos did in fact suffer poor driveability, the public would refrain from buying new cars and drive their more heavily polluting existing automobiles, thus causing lower air quality. The court ultimately concluded that the Administrator had not adequately justified his finding that the technology would in fact be available.<sup>134</sup> Among other things, the court was troubled by EPA's assumption that pollution control devices would be adequately maintained by consumers who derived no direct benefit from maintenance expenditures.<sup>135</sup>

There followed a decade-long period of extensions and delay as EPA and then Congress retained the interim standards that EPA had promulgated in 1973 for the 1974 and 1975 model years. The 90% reduction goal was not in fact achieved until the early 1980s after Congress once again imposed that goal in the 1977 amendments to the Clean Air Act. The delays were blamed upon many factors, including the absence of reliable pollution control technologies,<sup>136</sup> the energy crises of the mid and late 1970s,<sup>137</sup> and a brief crisis over the possibility

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134. The court concluded:

We think the vehicle manufacturers established by a preponderance of the evidence, in the record before us, that technology was not available, within the meaning of the Act, when they adduced the tests on actual vehicles; that the Administrator's reliance on technological methodology to offset the actual tests raised serious doubts and failed to meet the burden of proof which in our view was properly assignable to him, in the light of accepted legal doctrine and the intent of Congress discerned, in part, by taking into account that the risk of an "erroneous" denial of suspension outweighed the risk of an "erroneous" grant of suspension.

*Id.* at 648.

135. *Id.* at 634-35. By contrast, the District of Columbia Circuit upheld EPA's regulations on lead-free gasoline in all important regards. *Amoco Oil Co. v. EPA*, 501 F.2d 722, 727 (D.C. Cir. 1974).

136. *International Harvester*, 478 F.2d at 622-28.

137. See *Hearings on Clean Air Act Extension Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 93d Cong. 8 (1973) (statement of William D. Ruckelshaus) [hereinafter *Hearings on Clean Air Act Extension*: Statement of William D. Ruckelshaus]; *Hearings on Decision of the Administrator of the Environmental Protection Agency Regarding Suspension of the 1975 Auto Emissions Standards, Part IV Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 93d Cong. 1691 (1973) (statement of John K. McKinley, President, Texaco, Inc.); *Hearings on Energy and Environmental Standards Before the Subcomm. on Energy of the House Comm. on Science and Astronautics*, 93d Cong. 22-24 (1973) (statement of Dr. Betsy Ancker-Johnson, Assistant Secretary for Science and Technology, Department of Commerce); *Hearings on New Motor Vehicle Emissions Standards and Fuel Economy Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 93d Cong. 49 (1973) (statement of Peter N. Gammelgard, American Petroleum Institute); *id.* at 199-341 (statements of various auto industry representatives); *Chrysler President Tells Committee Emissions Standards Should Be Revised*, 4 Env't Rep. (BNA) No. 6, at 189 (June 8, 1973); *Cole Recommends Congress Freeze Interim 1975 Emissions Standards*, 4 Env't Rep. (BNA) No. 5, at 156 (June 1, 1973); *EPA Seeks Change in NO<sub>x</sub> Standard for 1976 Autos Because of New Findings*, 3 Env't Rep. (BNA) No. 52, at 1549 (Apr. 27, 1973); *Iacocca Asks for Two-Year Extension of 1975 Interim Emissions Standards*, 4 Env't Rep. (BNA) No. 4, at 129-31 (May 25, 1973); *Ruckelshaus Requests New Authority to Change Auto Standards for 1976*, 3 Env't Rep. (BNA) No. 51, at 1519 (Apr. 20, 1973); see also Energy Supply and Environmental Coordination Act, Pub. L. No. 93-319, 88 Stat. 246 (1974) (codified as amended at 15 U.S.C.A. §§ 791-798 (West 1976 & Supp. 1996)).

that catalytic converters were causing automobiles to emit greater quantities of sulfur dioxide.<sup>138</sup>

The delays had the very disruptive effect of rendering obsolete the optimistic assumptions in SIPs and FIPs for urban areas that the stringent statutory tailpipe emissions standards would be in effect by the 1975 model year. Since the tailpipe emissions standards would not go into effect until 1977 at the earliest, even those states that received two-year extensions of the attainment deadline had no hope of achieving the standards on time.

### 3. *Writing the Original State Implementation Plans*

The 1970 Amendments vested responsibility in the states for ensuring that the NAAQS would be met by the three-year deadline. The states were to come up with SIPs that imposed controls on individual stationary sources of air pollution and that required “such other measures as may be necessary” to ensure the attainment and maintenance of the NAAQS.<sup>139</sup> The sponsors of the Clean Air Act Amendments of 1970 knew full well that restrictions on automobile traffic would be necessary to ensure the attainment of the NAAQS in many urban areas,<sup>140</sup> but the statute did not explicitly require states to implement I/M programs. Whether or not an I/M program would be implemented in areas that exceeded the ambient air quality standards was left up to state discretion. As long as a state could arguably demonstrate that the standard would be achieved by the deadline (e.g., through requirements on stationary sources), EPA was powerless to require states to implement I/M programs.

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138. *Hearings on Compliance with Title II (Auto Emissions Standards) of the Clean Air Act Before the Senate Comm. on Public Works*, 93d Cong. 431-38 (1973) (testimony of Russel E. Train, Administrator, EPA); John E. Burby, *Environment Report/Sulfates Present Major New Problem In Growing Debate Over Clean Air Act*, NAT'L J., Sept. 22, 1973, at 1412.

139. Clean Air Act § 110(a)(1)(B), 42 U.S.C.A. § 7410(a)(1)(B) (West 1995).

140. The Senate Report accompanying the amendments stated:

The Committee recognizes that during the next several years, the attainment of required ambient air quality in many of the metropolitan regions of this country will be impossible if the control of pollution from moving sources depends solely on emission controls. The Committee does not intend that these areas be exempt from meeting the standards. Some regions may have to establish new transportation programs and systems combined with traffic control restrictions in order to achieve ambient air quality standards for pollution agents associated with moving sources.

S. REP. NO. 91-1196, at 13 (1970); see *Air Pollution Bill May Force Cities to Curb Use of Automobiles*, NAT'L J., Aug. 15, 1970, at 1756 (reporting that Senator Muskie and others were convinced that the bill about to be reported out of the Senate Environment and Public Works Committee would require transportation controls in urban areas).



## a. EPA's SIP Guidelines

As soon as President Nixon signed the Amendments, EPA began to write regulations to guide the states in writing state implementation plans. The agency issued proposed regulations on April 7, 1971.<sup>141</sup> The proposed regulations required SIPs to include assurance of sufficient legal authority to implement its provisions and adequate control strategies, including emissions limitations, other measures and timetables sufficient to attain the NAAQS by the deadlines.<sup>142</sup> The proposal required SIPs to demonstrate, *inter alia*, that the relevant state agency had sufficient legal authority to “[c]arry out a program of inspection and testing of motor vehicles to enforce compliance with applicable emission standards when necessary and practicable . . .”<sup>143</sup>

When the guidelines were circulated within the Administration, they were sharply criticized by officials in the Department of Commerce and the Office of Management and Budget, both of which wanted the guidelines to place greater emphasis on cost and economic feasibility.<sup>144</sup> The internecine battles precipitated rumors that Administrator Ruckelshaus was planning to resign.<sup>145</sup> Reports of the pressure on EPA in the press also motivated Senator Muskie, a probable Democratic presidential candidate in 1972, to charge that the Administration was attempting to weaken EPA's efforts to implement the Amendments.<sup>146</sup> Ruckelshaus acknowledged the attempts by other agencies to weaken the regulations, but vigorously denied the implication that he had allowed those efforts to influence him.<sup>147</sup> Environmental groups maintained that as the Administration's opposition to stringent SIP requirements became widely known in the states, the willingness of state legislatures and agencies to impose stringent controls rapidly evaporated.<sup>148</sup> In any event, the internal conflicts delayed EPA's release of the

141. National Ambient Air Quality Standards, 36 Fed. Reg. 6680 (1971) (codified at 42 C.F.R. pt 420).

142. *Id.* at 6680-81.

143. *Id.* at 6681.

144. See *Hearings on Clean Air Act Extension*: Statement of William D. Ruckelshaus, *supra* note 137, at 8.

145. E. W. Kenworthy, *Muskie Assails Nixon on Pollution Bill*, N.Y. TIMES, Nov. 8, 1971, at A1.

146. Terence Smith, *Ziegler Confirms Water Code View*, N.Y. TIMES, Nov. 18, 1971, at A22.

147. *Hearings on Implementation of the Clean Air Act Amendments of 1970—Part 1 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong. 239-43 (1972) (statement of William D. Ruckelshaus) [hereinafter *Implementation of 1970 Clean Air Act Amendments*: Statement of William D. Ruckelshaus]; *Ruckelshaus, Congressman Rogers Disagree Over EPA Implementation Plan Guidelines*, 2 Env't Rep. (BNA) No. 40, at 1201 (Feb. 4, 1972).

148. See *Hearings on Implementation of the Clean Air Act Amendments of 1970—Part 1 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong. 3-4 (1972) (statement of Richard Ayres, Natural Resources Defense Council) [hereinafter *Hearings on Implementation of the 1970 Clean Air Act Amendments*: Statement of Richard Ayres].

When OMB took those guidelines and cut them, the result was to break that momentum and in many states what happened was that the agencies decided the federal government would not push them, and they didn't have to do very much to meet the federal rules, and I think the plans

guidelines, leaving the states with less than the statutory nine months to adapt their plans to the guidelines.<sup>149</sup> Once published, the proposed regulations attracted a good deal of negative comment from states, industries, and environmental groups, but few of the negative comments focused on mobile source requirements in SIPs.<sup>150</sup>

EPA published the final regulations on August 14, 1971.<sup>151</sup> The final regulations changed the requirement that states have legal authority to require inspection and maintenance “when necessary and practicable” to a requirement that the plans merely set forth timetables for obtaining such authority.<sup>152</sup> Administrator Ruckelshaus announced that the agency intended for the final regulations to be flexible guidelines to the states, rather than a “straightjacket” within which EPA would limit state discretion.<sup>153</sup> These changes sent a strong message to recalcitrant states that EPA was not very serious about inspection and maintenance requirements.

*b. Drafting Plans in the States*

Despite EPA’s generous offers of assistance,<sup>154</sup> state officials were not optimistic about their ability to write honest SIPs that would be capable of demonstrating attainment within three years of approval. Dr. Haagen-Smit, now the head of the California Air Resources Board (CARB), stated flatly that the NAAQS were “unachievable” in the South Coast Air Basin, which included Los

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demonstrate very strongly the effects of that change.

*Id.*

149. *Automobile-Use Curbs Pose Problems for States*, NAT’L J., Oct. 30, 1971, at 2187; *Hearings on Implementation of the Clean Air Act Amendments of 1970*: Statement of Richard Ayres, *supra* note 148, at 3-4.

150. *EPA Receives Critical Comments on Proposed Implementation Plans*, 2 Env’t Rep. (BNA) No. 11, at 306 (July 16, 1971); *Proposed Rules for State Plans Upheld by Defense Council, Opposed by Others*, 2 Env’t Rep. (BNA) No. 3, at 65 (May 21, 1971).

151. *Requirements for Preparation, Adoption, and Submittal of Implementation Plans*, 36 Fed. Reg. 15,486 (1971).

152. *Id.* at 15,489; *Hearings on Implementation of the 1970 Clean Air Act Amendments*: Statement of Richard Ayres, *supra* note 148, at 6.

153. *Hearings on Implementation of the 1970 Clean Air Act Amendments*: Statement of William D. Ruckelshaus, *supra* note 147, at 229-30.

154. By mid-1971, EPA had already assigned 105 federal employees to the states to help in drafting SIPs, and it was planning to send 295 more. *Hearings on Agriculture-Environmental and Consumer Protection Appropriations for 1972 Before the House Comm. on Appropriations*, 92d Cong. 334 (1971) (statement of William Ruckelshaus, Administrator, EPA). EPA even created a \$2 million fund to allow states to hire contractors to aid in SIP preparation. *States Must Meet Health Standards in Five Years, Steigerwald Tells Board*, 2 Env’t Rep. (BNA) No. 11, at 307 (July 16, 1971). Environmental groups maintained that the resources that EPA provided to the states to help in drafting transportation control plans were not nearly enough to yield high quality plans. *Hearings on the Environmental Protection Agency’s Responsibilities in Relation to its Budget Request Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 93d Cong. 144 (1973) (statement of David Hawkins, Natural Resources Defense Council).

Angeles and surrounding counties.<sup>155</sup> A Colorado official frankly acknowledged that his agency had decided to prepare two implementation plans—an “idealistic” plan to submit to EPA and a “realistic” plan that would actually be implemented.<sup>156</sup> When another state air pollution official was asked how the states would make the required attainment demonstrations, he candidly, if anonymously, replied: “You’re just going to lie like everybody else does.”<sup>157</sup> A state consultant speculated that some of the states with large urban areas would simply refuse to require any transportation measures at all and thereby “call [EPA’s] bluff.”<sup>158</sup>

Inspection and maintenance was critical to ensuring that predicted emissions reductions from improved automobile pollution reduction technologies became a reality.<sup>159</sup> Unfortunately, in the early days equipment for performing inspections was very expensive and often unreliable.<sup>160</sup> Therefore, EPA freely approved SIPs that did not contain provisions requiring inspection and maintenance in areas that were likely to exceed the primary NAAQS for the automobile standards by the 1977 deadline.<sup>161</sup>

#### 4. *The Riverside and NRDC Lawsuits*

When it became clear that EPA was not going to insist that the states prepare adequate transportation control provisions in a timely fashion, the environmental groups and other affected citizens grew impatient with the agency. The cities of Riverside and San Bernardino, California, suburbs of Los Angeles, sued EPA for failing to promulgate an FIP meeting the statutory requirements upon finding the plan that California had submitted was inadequate because, *inter alia*, it had failed to demonstrate that the South Basin would attain the primary NAAQS by the statutory deadline.<sup>162</sup> Concluding that the agency had violated a nondiscretionary duty to write an FIP for Los Angeles by July 31, 1972, the court in a very brief opinion ordered EPA to publish in the Federal Register by January 15, 1973, an

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155. KRIER & URSIN, *supra* note 81, at 213.

156. James A. Noone, *Environment Report/Doubts About ‘Clean’ Fuels Fail To Deter EPA, States On Air Pollution Battle Plans*, NAT’L J., June 24, 1972, at 1050.

157. *Automobile-Use Curbs Pose Problems for States*, *supra* note 149, at 2187.

158. *Id.*

159. Reitze, *supra* note 38, at 718.

160. See *Hearings on Clean Air Act Oversight Before the Subcomm. on Public Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 92d Cong. 1290 (1971-72) (statement of Sidney L. Terry, Vice President, Environmental and Safety Relations, Chrysler Motors Corporation).

161. See *Hearings On Implementation of Clean Air Act Amendments of 1970—Part 1 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong. 31 (1972) (statement of Richard Ayers, Natural Resources Defense Council).

162. *City of Riverside v. Ruckelshaus*, 3 Env’tl. L. Rep. (Env’tl. L. Inst) 20,043 (C.D. Cal. Nov. 16, 1972).

FIP containing provisions sufficient to demonstrate attainment of the NAAQS by 1977, "including all necessary transportation controls and land use controls."<sup>163</sup>

The Natural Resources Defense Council (NRDC) challenged the agency's decision to grant several states an extension to submit transportation control plans until February 17, 1973 and its decision to grant two-year extensions to many areas without following the statutory procedures.<sup>164</sup> The court in a terse opinion agreed with NRDC that the agency had violated the statute, and it ordered the Administrator to rescind the extensions and to require all states to submit complete SIPs by April 15, 1973. In addition, the court ordered EPA to promulgate FIPs by August 15, 1973 for all areas in which the states submitted unacceptable plans. Finally, the court allowed EPA to grant two-year deadline extensions only after following the required procedures, including the requirement that the state demonstrate that reasonably available alternatives would not result in the attainment of the standards by the May 31, 1975 deadline.<sup>165</sup>

##### 5. *Back to the Drawing Board for EPA and the States*

The *Riverside* and *NRDC* cases sent EPA staff scurrying back to the drawing board for several months' worth of ten and twelve hour days devoted to coming up with approaches for achieving the standards in ways that were politically acceptable.<sup>166</sup> In this massive effort, EPA received very little help from the states, nearly all of which had thrown in the towel.<sup>167</sup> The Director of the Los Angeles County Air Pollution Control District bluntly stated that the "[c]hances of Los Angeles County or any neighboring county meeting the Federal oxidant standard even by 1977 are zero."<sup>168</sup> Indeed, many state and local officials now became harsh critics of EPA's efforts to comply with the law.<sup>169</sup> They did not deny that air pollution posed a significant health threat to urban dwellers, but instead of forging ahead in a common effort with EPA to achieve the pollution reduction goals, they began to complain about the unreasonableness of the statute and to express their resentment that the heavy hand of the federal government was interfering with local prerogatives.<sup>170</sup>

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163. *Id.*

164. *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 968, 970 (D.C. Cir. 1973).

165. *Natural Resources Defense Council*, 475 F.2d at 971.

166. KRIER & URSIN, *supra* note 81, at 219-20.

167. *Id.*; Thomas B. Bracken, *Transportation Controls Under the Clean Air Act: A Legal Analysis*, 15 BOSTON INDUS. & COM. L. REV. 749, 750-51 (1974).

168. *Coast Air Pollution Aide Criticizes U.S. Standards*, N.Y. TIMES, Dec. 3, 1972, at E13. The official was optimistic, however, that the standard could be attained by sometime between 1980 and 1982. *Id.*

169. *Id.* (Director of Los Angeles County Air Pollution Control District complains that the NAAQS lack an adequate scientific basis).

170. KRIER & URSIN, *supra* note 81, at 219; *Coast Air Pollution Aide Criticizes U.S. Standards*, *supra* note 168, at E13 (Executive Director of California Air Resources Board opines that the Clean Air Act is "probably unreasonable" in subjecting large cities to the same deadlines as smaller urban areas); *id.* (Director

In writing FIPs for areas in which state plans were inadequate, EPA elected to require the states to implement and enforce the federally promulgated requirements, rather than attempting the vast implementation task on its own.<sup>171</sup> The agency realized that to implement inspection and maintenance requirements, it would have to establish a federal licensing regime (which no doubt would duplicate many similar state safety licensing regimes), construct testing facilities, and come up with a way to take licenses away from noncompliant drivers. EPA concluded that the only practical solution was to order states to take the necessary implementation and enforcement actions.<sup>172</sup> EPA claimed authority to back up such orders with various sanctions, including injunctive relief, imposing a receivership on certain state functions, holding state officials in civil contempt, and requiring a state to allocate funds from one portion of its budget to another in order to finance the undertakings required by the Agency.<sup>173</sup> This strategy, of course, raised sensitive issues of federal/state comity that would later contribute heavily to the collapse of the transportation control program.

*a. California*

In drafting FIPs, EPA felt constrained by the statute to write FIPs that were, in fact, capable of attaining the NAAQS by the 1977 deadline. Therefore, the FIP for Los Angeles provided for 100% gas rationing by 1977.<sup>174</sup> Not surprisingly, this drew sharp criticism from powerful congresspersons. After hearing from the staunchest congressional supporters of stringent regulation that it would be best advised to back off, EPA began to withdraw the plan's most controversial aspects.<sup>175</sup> Not satisfied with EPA's conciliatory actions, the State of California filed suit against EPA in late November 1973. The lawsuit alleged, *inter alia*, that EPA could not constitutionally order state officials to take any action pursuant to

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of Los Angeles County Air Pollution Control District urges Congress to "re-evaluate the whole program and bring back some sanity").

171. Transportation and Land Use Controls; Texas Plan, 38 Fed. Reg. 30,626, 30,632-33 (1973).

172. *Id.* at 30,633. There was good support for this position in the legislative history of the 1970 Amendments. Congressman Staggers, the House floor manager for the bill, stated:

If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore, the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the states, and we expect them to have the means to do the actual enforcing.

116 CONG. REC. 19204 (1970) (statement of Rep. Staggers).

173. *Brown v. EPA*, 521 F.2d 827, 831 (9th Cir. 1975), *vacated in part*, 431 U.S. 99 (1977).

174. Air Programs; Approval and Promulgation of Implementation Plans, California Transportation Control Plan, 38 Fed. Reg. 31,232, 31,240 (1973).

175. Environmental Protection Agency Approval and Promulgation of Implementation Plans, 39 Fed. Reg. 1848, 1848-49 (1974); Environmental Protection Agency Approval and Promulgation of Implementation Plans, 40 Fed. Reg. 28,064, 20,864-65 (1975); Environmental Protection Agency Approval and Promulgation of Implementation Plans, 40 Fed. Reg. 29,713, 29,713-14 (1975).

the FIP. EPA then issued a “notice of violation” to the CARB for its failure to submit a compliance schedule demonstrating compliance by the deadline and for failure to establish an inspection and maintenance program.<sup>176</sup> In May 1975, the CARB, now composed mostly of appointees of Governor Ronald Reagan,<sup>177</sup> defiantly voted to repeal some aspects of the federal plan, an action that could not have gone into effect without EPA approval.<sup>178</sup>

*b. Texas*

EPA also rejected many important aspects of the Texas SIP. EPA was not persuaded that the Texas Air Control Board’s (TACB’s) allegedly more sophisticated pollution reduction model was any more accurate than EPA’s Appendix J model. The State had produced no actual data on the relative reactivity of different hydrocarbons to support its conclusion that particular emissions would combine less readily with NO<sub>x</sub> to produce smog.<sup>179</sup> But in order to give Texas the benefit of the doubt, EPA decided to use a more lenient “straight rollback” model to calculate the extent to which hydrocarbon emissions would have to be reduced to meet the NAAQS. The straight rollback model was based on the simple assumption of linear proportionality—reductions in photochemical oxidants would be directly proportional to reductions in hydrocarbon emissions.<sup>180</sup> For the Houston region, however, this dispute made little difference, because under both models Houston was so badly polluted that at least a 75% reduction in hydrocarbon emissions would be required.<sup>181</sup>

TACB disagreed vehemently with EPA, however, on the extent to which reducing hydrocarbon emissions from the numerous stationary sources of hydrocarbons (*e.g.*, petrochemical plants and oil refineries) would achieve the required 75% reduction. EPA estimated that even if fully enforced, EPA’s emissions limitations on stationary sources would only achieve a 65.5% decrease in hydrocarbon emissions in the Houston/Galveston Air Quality Control Region.<sup>182</sup> Consequently, EPA prescribed various transportation control measures to achieve the additional 10% reduction. By EPA’s own calculations, however, transpor-

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176. *Brown*, 521 F.2d at 830.

177. *KRIER & URSIN*, *supra* note 81, at 244.

178. *Id.* at 231-32.

179. *Texas v. EPA*, 499 F.2d 289, 298 (5th Cir. 1974).

180. *Id.* at 298.

181. *Id.* at 302.

182. *Id.* EPA estimated that in 1972, “294,000 tons per year of reactive hydrocarbons were emitted from stationary sources and 106,000 tons per year from mobile sources.” *Id.* (emphasis omitted). The state’s calculations were 481,000 and 99,000, respectively. *Id.* To a large extent the disparity turned upon a disagreement about what percentage of overall hydrocarbon emissions from stationary sources consisted of reactive hydrocarbons. *Id.*

tation controls would bring about only a relatively small percentage (2.6%) of the reductions in hydrocarbon emissions necessary to attain the NAAQS.<sup>183</sup>

## 6. *Judicial Review of Implementation Plans*

Things rapidly began to unravel for EPA as state after state challenged in court EPA's disapproval of their SIPs and promulgation of its own FIPs.

### a. *California*

More than 200 petitions were filed to review various aspects of the California FIP in the Ninth Circuit Court of Appeals.<sup>184</sup> Without reaching the question of the constitutionality of the Clean Air Act, the court held that the statute did not grant EPA authority to force states to take any particular regulatory or enforcement action by way of implementing an FIP. The court recognized that insofar as the state itself engaged in polluting activities (e.g., driving state-owned motor vehicles), such activities were subject to regulation by EPA, and the federal government could impose sanctions on states for violating EPA regulations. The states also had a judicially enforceable obligation to refrain from hindering EPA in its efforts to implement and enforce the Clean Air Act with respect to polluting activities within the state. The court, however, rejected EPA's contention that the Act empowered it to impose sanctions against the state or its officials for failure to administer and enforce EPA-promulgated requirements. In the words of the court, "the Act, as we see it, permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs."<sup>185</sup> The court noted that had it interpreted the statute to support EPA's position, the statute would have raised serious constitutional questions.<sup>186</sup>

The Supreme Court granted certiorari to hear EPA's appeal of the Ninth Circuit ruling. While the case was pending, the Supreme Court decided *National League of Cities v. Usery*,<sup>187</sup> in which it held that Congress could not constitutionally require states and their political subdivisions to comply with the wage and hour provisions of the Fair Labor Standards Act. The Court found that Con-

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183. *Id.* at 310 n.38.

184. *Brown v. EPA*, 521 F.2d 827, 830 (9th Cir. 1975), *vacated in part*, 431 U.S. 99 (1977).

185. *Id.* at 832.

186. *Id.*; see *Alaska v. EPA*, 521 F.2d 842, 844 (9th Cir. 1975) (affirming the reasoning of *Brown*). The District of Columbia Circuit reached the same conclusion in a challenge to EPA's FIP for Maryland, Virginia, and the District of Columbia. *District of Columbia v. Train*, 521 F.2d 971, 984-85 (D.C. Cir. 1975), *vacated sub nom. Costle v. District of Columbia*, 431 U.S. 99 (1977). The court found that the inspection and maintenance requirements were arguably authorized by the Clean Air Act, but held that they were unconstitutional as intruding too greatly on state sovereignty under the Tenth Amendment. *Id.* at 992-93.

187. 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

gress lacked the power under the Commerce Clause “to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.”<sup>188</sup>

Although requiring states to enact and enforce regulatory programs was not the same as requiring them to comply with wage and hour requirements, it arguably forced choices about the conduct of integral governmental function on the states. The *Usery* opinion therefore required an abrupt change in EPA’s strategy. At EPA’s behest, the Solicitor General informed the Court that the agency had conceded that all of the FIPs would have to be reworked to eliminate any requirement that any state legislature or regulatory authority enact implementing legislation or regulations.<sup>189</sup> The Supreme Court obligingly remanded the pending appeals to the appellate courts to consider whether the case was moot in light of EPA’s concession.

EPA’s revised FIP for California omitted any requirements that the State enact legislation or pass regulations, but it did place on the State the affirmative obligation to inspect all automobiles at periodic intervals, flunk a specified number of vehicles consistent with the emissions reductions relied upon in the State’s SIP, and ensure that failed vehicles received the required maintenance.<sup>190</sup> Analogizing the State’s roads to stationary sources of pollution, EPA contended that the Clean Air Act and the Constitution authorized it to impose the foregoing obligations on the states, because it had the power to require any polluter to reduce pollution.<sup>191</sup> In this view, the state-owned highway was equivalent to a state-owned power plant. The agency believed that this adroit shift in focus fell within the Ninth Circuit’s prior dicta.

The Ninth Circuit nevertheless held that the Clean Air Act did not authorize EPA’s revised FIP.<sup>192</sup> The court declined EPA’s innovative suggestion that Congress had authorized it to treat state-owned roads as indirect sources of pollution.<sup>193</sup> Once again, the court believed that accepting EPA’s reading of the statute would have raised serious constitutional concerns, especially in light of the Supreme Court’s opinion in *National League of Cities v. Usery*.<sup>194</sup> Ironically, the Supreme Court seven years later overruled the *Usery* case, thus removing many

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188. *National League of Cities*, 426 U.S. at 855.

189. *EPA v. Brown*, 431 U.S. 99, 103 (1977). EPA’s petitions for review of court opinions involving the FIPs for Arizona, Maryland, and Washington, D.C. were consolidated in the appeal from the Ninth Circuit’s opinion involving the California plan. *Id.* at 102. EPA’s petition for certiorari was limited to the inspection and maintenance issue. *Id.* at 103-04.

190. *Brown v. EPA*, 566 F.2d 665, 669 n.2 (1977).

191. *Id.* at 669.

192. *Id.* at 669 n.2.

193. *Id.* at 670. The court noted that Congress had, in the interim, enacted the 1977 Amendments and in the process had rejected an EPA-sponsored provision that would have empowered EPA to seek injunctive relief against states that refused to implement required inspection and maintenance programs. *Id.* at 670-71.

194. *Id.* at 672-74.



of the constitutional doubts surrounding EPA's original assertion of power over state governmental functions.<sup>195</sup>

*b. Texas*

Twenty-five petitions for review of EPA's rejection of the Texas SIP and promulgation of its own FIP were filed in the Fifth Circuit Court of Appeals.<sup>196</sup> The petitioners challenged EPA's rejection of Texas's model for determining the emissions reductions required to meet a given level of air quality for photochemical oxidants and its assessment of how effective the pollution reduction measures selected by Texas would be. Although it found little support for EPA's straight rollback model in the record, the court could not find EPA to be arbitrary and capricious in adopting it. The EPA model, at least, squared with the "common-sensical proposition that pollutants will be reduced proportionally to reductions in their chemical precursors."<sup>197</sup>

The court also upheld EPA's rejection of TACB's stationary source inventory for Houston from which TACB had deduced that the required 75% reduction in hydrocarbon emissions could be achieved solely by regulating stationary sources. The court could make little sense out of the jumble of unexplained tables that TACB had submitted to EPA to justify its inventory.<sup>198</sup> The court, however, also rejected EPA's calculations for petroleum refineries, because it failed adequately to explain why it based them on reactivity factors drawn from similar plants in Louisiana. Since EPA's choice of Louisiana plants over similar plants in California was outcome determinative on the issue of the need for transportation controls, the court remanded to EPA to provide better support for the reactivity factors that it selected for petroleum refineries.<sup>199</sup> Thus, because the petitioners prevailed on a single issue among the dozens of issues raised in the appeal, the transportation controls prescribed in EPA's FIP for Houston never went into effect.<sup>200</sup>

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195. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

196. *Texas v. EPA*, 499 F.2d 289, 294 (5th Cir. 1974).

197. *Id.* at 301.

198. *Id.* at 303.

199. *Id.* at 309-10.

200. The issue of EPA's authority to order state and local governments to take particular implementing actions was raised by Harris County, but the court found it unnecessary to address it because Harris County had failed to raise it in EPA's hearings and because the State of Texas did not voice any objections. The court took Texas's silence as an understanding that it would require Harris County to take implementing action if TACB were convinced that transportation controls were in fact necessary in order to meet the NAAQS. *Id.* at 320.

### 7. *Administrative and Congressional Backpedaling*

The judicial setbacks forced EPA to undertake a thorough re-examination of its approach to administering the Clean Air Act in heavily polluted cities. Without the power to commandeer state resources, EPA was faced with the prospect of writing implementing regulations governing traffic-related pollution for dozens of separate cities and employing a federal police force to enforce those regulations.<sup>201</sup> Not surprisingly, the agency began to engage in some serious backtracking. Congress was more than willing to join in the backpedaling exercise.

Just as several Arab nations announced a boycott on exports of oil to the United States, EPA announced that it would no longer require gasoline rationing in major cities.<sup>202</sup> Although it was unclear how this action advanced the cause of energy conservation, it undoubtedly helped reduce the considerable political pressures that were building on the agency and its allies in Congress. According to John Quarles, who was the Assistant Administrator for Enforcement and General Counsel at the time, Administrator Ruckelshaus took this action only after meeting with congressional supporters of the Clean Air Act and being assured that the Clean Air Act would otherwise be amended to take away EPA's authority to impose gasoline rationing and perhaps other authorities as well.<sup>203</sup>

By the end of 1975, EPA's transportation control program was effectively dead in nearly all major cities in which photochemical oxidants were a serious problem. Only in the very few cities like Los Angeles and New York where states had (perhaps foolishly) attempted to cooperate by coming up with their own transportation control plans (albeit consisting mostly of vague promises) were any enforceable transportation controls in place. And even in those cities, state officials were struggling mightily to avoid the responsibilities that they had earlier promised to fulfill.

#### D. *The Clean Air Act Amendments of 1977*

As the 1977 deadline for attaining the primary NAAQS passed, nearly all of the most heavily polluted urban areas in the country were far out of attainment, and it was clear that "mid-course corrections" were in order. Congress enacted comprehensive amendments to the Clean Air Act on August 7, 1977.<sup>204</sup> By that

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201. KRIER & URSIN, *supra* note 81, at 233.

202. *EPA Softens Plans for Gasoline Rationing in Cities, But Keeps Other Transport Rules*, WALL ST. J., Oct. 16, 1973, at 3.

203. John Quarles, *The Transportation Control Plans—Federal Regulation's Collision with Reality*, 2 HARV. ENVTL. L. REV. 241, 250 n.39 (1977).

204. Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C.A. §§ 7401-7671 (West 1995)). Although the bill signed by the President contained its own numbering scheme, it also followed for the most part the numbering scheme of the 1970 Amendments. It did not attempt to conform to the numbering scheme of the United States Code, which by then had become hopelessly complicated. The 1990 Amendments

time, fewer than ten cities had established I/M programs.<sup>205</sup> The 1977 Amendments required EPA and the states to identify all areas of the country in which the standards for photochemical oxidants, carbon monoxide, and NO<sub>x</sub> were not attained by the enactment date.<sup>206</sup> For these areas, states were to submit a "non-attainment SIP" to EPA for approval or disapproval by January 1, 1979.<sup>207</sup> The nonattainment SIP had to correct the deficiencies of the existing plan and ensure that the NAAQS would be achieved by the new deadline of December 31, 1982.<sup>208</sup> If a state could demonstrate that, despite the implementation of all reasonably available measures, it could not achieve the standards for photochemical oxidants or carbon monoxide by December 31, 1982, it could submit an "extension SIP" by July 1, 1982,<sup>209</sup> that provided for attainment by December 31, 1987.<sup>210</sup> The extension SIP had to include "a specific schedule for implementation of a vehicle emission control inspection and maintenance program" and any "other measures" necessary to meet the NAAQS by the 1987 deadline.<sup>211</sup>

The 1977 Amendments provided for a variety of sanctions for states that failed to: (1) Submit an adequate SIP by the January 1, 1979 deadline; (2) reach attainment by the December 31, 1982 (or extended December 31, 1987) deadline; or (3) failed to take adequate steps to implement their nonattainment plans. The allowable sanctions included a moratorium on the construction of major stationary sources in the relevant area,<sup>212</sup> a cutoff of sewage treatment construction grants and other EPA aid, and a cutoff of all federal highway funds other than those essential for safety and those devoted to mass transit and air quality improvement.<sup>213</sup> The 1977 Amendments also prohibited any federal agency from funding or licensing any project that did not conform to the relevant SIP.<sup>214</sup> In addition, federal agencies like the Department of Transportation were obliged to give priority to programs with air-quality related transportation consequences.<sup>215</sup>

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to the Clean Air Act also followed the 1970 Amendments' numbering scheme. For purposes of the following description, the 1970 numbering scheme will be adopted except for those relatively rare instances, usually concerning transitory plan submission dates in which the 1977 Amendments did not adhere to the 1970 numbering scheme. The reader should be forewarned, however, that the 1990 Amendments have rendered most of the substantive provisions of the 1977 Amendments obsolete.

205. Reitze & Needleman, *supra* note 38, at 415 n.411 (citing NATIONAL ACADEMY OF SCIENCES, REPORT BY THE COMMITTEE ON MOTOR VEHICLE EMISSIONS 132 (1974)).

206. Clean Air Act § 107(d)(1)(A), 42 U.S.C.A. § 7407(d)(1)(A) (West 1995).

207. Clean Air Act § 172(c), 42 U.S.C.A. § 7502(c) (West 1995).

208. Clean Air Act § 172(a)(2), (b), 42 U.S.C.A. § 7502 (West 1995).

209. Clean Air Act § 172(a)(2)(A), (C), 42 U.S.C.A. § 7502 (West 1995).

210. Clean Air Act § 172(a)(2), 42 U.S.C.A. § 7502(a)(2) (West 1995).

211. Clean Air Act § 172(c), 42 U.S.C.A. § 7502(b)(11) (West 1995).

212. Clean Air Act §§ 113(a)(5), 179, 173(4); 42 U.S.C.A. §§ 7413(a)(5), 7503(4), 7509 (West 1995).

213. Clean Air Act §§ 176(A), (C), 316(b), 42 U.S.C.A. §§ 7506(a), 7506(b), 7616(b) (West 1995).

214. Clean Air Act § 176(c), 42 U.S.C.A. § 7506(c) (West Supp. 1996).

215. Clean Air Act § 176(d), 42 U.S.C.A. § 7506(d) (West 1995).

E. Implementation of the 1977 Amendments

In March, 1978, EPA designated over 400 areas as nonattainment for one or more primary or secondary NAAQS.<sup>216</sup> Although the 1977 Amendments did not draw a distinction between urban and rural areas, EPA required nonattainment SIPs to implement inspection and maintenance programs only in areas with populations of 200,000 or more.<sup>217</sup>

1. EPA Approval/Disapproval of Plans and Extension Requests

EPA published regulations on February 24, 1978, providing the criteria that it would use in evaluating SIPs that provided for attainment by the December 31, 1982 deadline and submittals accompanying requests for deadline extensions until December 31, 1987.<sup>218</sup> With respect to the required I/M programs, EPA agreed to approve "committal SIPs" upon a proper showing that the state planned to promulgate an adequate program and that the state agency was diligently seeking legislation to give it the authority to implement the program.<sup>219</sup> Those states requesting a 1987 extension had to submit to EPA by January 1, 1979, a demonstration of adequate legal authority to implement an I/M program, a commitment to implement and enforce a program that would reduce hydrocarbon and carbon monoxide exhaust emissions from light duty vehicles in 1987 by 25%, and a schedule for implementation.<sup>220</sup> EPA made it clear that it would hold the states to the promises made in their committal SIPs, and it took the firm position that a fully functioning I/M plan had to be in effect by December 31, 1982, or the state would be guilty of failing to implement its committal SIP and appropriate sanctions would be forthcoming.<sup>221</sup>

Despite EPA's extreme flexibility with respect to approving committal SIPs containing mostly promises about what the state planned to do in the future, several states failed to make any submission.<sup>222</sup> For the most part, these failures

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216. General Preamble for Proposed Rulemaking on Approval of State Implementation Plan Revisions for Nonattainment Areas, 43 Fed. Reg. 8902 (1978).

217. Reitze & Needleman, *supra* note 38, at 416 (citing U.S. EPA, INFORMATION DOCUMENT ON AUTOMOBILE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM 53 (1978)).

218. State Implementation Plans Under Clean Air Act, 43 Fed. Reg. 21,673, 21,674-75 (1978); State Implementation Plans General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas, 44 Fed. Reg. 20,372, 20,373 n.6 (1979).

219. State Implementation Plans Under Clean Air Act, 43 Fed. Reg. 21,673 (1978).

220. *See* Approval and Promulgation of State Implementation Plans; Colorado, 45 Fed. Reg. 47,682 (1980) (describing general requirements).

221. State Implementation Plans Under Clean Air Act, 43 Fed. Reg. 21,673 (1978). EPA then approved extension SIPs for 28 states and the District of Columbia for about 40 nonattainment areas. U.S. EPA, State Implementation Plans; Approval of 1982 Ozone and Carbon Monoxide Plan Revisions for Areas Needing an Attainment Date Extension, 46 Fed. Reg. 7182 App. A, B (1981); OTA OZONE REPORT, *supra* note 4, at 31.

222. OTA OZONE REPORT, *supra* note 4, at 30. By January 1, 1983, states containing 17 ozone nonattainment areas had failed to request extensions and EPA proposed construction bans for all 17 areas.

were attributable to the unwillingness of the state legislatures to enact legislation empowering state agencies to implement I/M programs. In California, for example, the relevant legislative committees had considered I/M legislation for five years, but it had never been voted out of committee despite extensive meetings between EPA officials, state officials, and representatives of business, labor and environmental groups.<sup>223</sup> As a consequence, EPA imposed a construction moratorium, highway funding limitations, and sewage treatment grant limitations on nonattainment areas in California,<sup>224</sup> as well as Kentucky<sup>225</sup> and Colorado.<sup>226</sup> The moratoria were gradually lifted as the states passed the necessary legislation.

Anticipating that many states that had requested deadline extensions for the automobile pollutants would submit inadequate I/M programs, EPA on January 22, 1981, published a guidance document stating the criteria by which it would judge such programs in extension SIPs.<sup>227</sup> EPA reiterated its firm position that "[f]ull implementation of [the I/M] program . . . is required in all cases by December 31, 1982."<sup>228</sup> The January 22 guidance document was one of the "midnight regulations" issued at the very end of the Carter Administration before the Reagan Administration assumed office,<sup>229</sup> and it did not take the new Administration long to begin to backtrack from its relatively strict position on I/M programs. In several important states, including Arizona, California, Connecticut, Maryland, Michigan, New York, and Pennsylvania, state and local agencies ran into fierce citizen opposition to proposed inspection and maintenance programs, and implementation efforts began to bog down.<sup>230</sup>

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223. Federal Assistance Limitations; State of California, 45 Fed. Reg. 81,746, 81,747 (1980).

224. *Id.*

225. Federal Assistance Limitations; Kentucky, 45 Fed. Reg. 81,752, 81,754 (1980) (to be codified at 40 C.F.R. ch. 1).

226. Approval and Promulgation of State Implementation Plans; Colorado, 45 Fed. Reg. 72,150, 72,150-51 (1980).

227. U.S. EPA, State Implementation Plans; Approval of 1982 Ozone and Carbon Monoxide Plan Revisions for Areas Needing an Attainment Date Extension, 46 Fed. Reg. 7182, 7186 (1981) (to be codified at 40 C.F.R. pt. 51). The SIP revision was supposed to include:

(1) inspection test procedures; (2) emission standards; (3) inspection station licensing requirements; (4) emission analyzer specification and maintenance/calibration requirements; (5) recordkeeping and record submittal requirements; (6) quality control, audit, and surveillance procedures; (7) procedures to assure that noncomplying vehicles are not operated on the public roads; (8) any other official program rules, regulations, and procedures; (9) a public awareness plan; and (10) a mechanics training program if additional emission reduction credits are being claimed for mechanics training.

*Id.*

228. *Id.* at 7186.

229. Timothy B. Clark, *Outgoing Carterites Rush to the Printer with a Flood of Rules*, 13 NAT'L J. 127 (1981); Timothy B. Clark, *Task Force to Work to Implement Reagan's Regulatory Freeze*, 13 NAT'L J. 215 (1981).

230. See Reitze & Needleman, *supra* note 38, at 416 (citing U.S. GAO, VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM IS BEHIND SCHEDULE 15 (1985)).

In April and June, 1982, EPA notified twelve governors that their states had not met important milestones set out in their plans and warned them that if EPA made formal findings of nonimplementation, certain nonattainment sanctions would go into effect.<sup>231</sup> By December 31, 1982, only one of the twelve states had put an adequate I/M program in place and one state had adequately demonstrated that all relevant areas were no longer nonattainment areas and were therefore not subject to the I/M requirements. EPA therefore proposed to find that ten states had not implemented the nonattainment provisions in their SIPs.<sup>232</sup> As a consequence, EPA noted that it could withhold all or part of the funds that it had made available to states for developing SIPs. More importantly, EPA concluded that upon publication of a final finding of nonimplementation, the statutory construction moratorium would go into place and no new major stationary sources of ozone precursors could be constructed in the affected nonattainment areas.<sup>233</sup> Finally, EPA mentioned the possibility of cutting off all federal highway funds for the affected nonattainment areas.<sup>234</sup> Since EPA was not anxious to impose any of these sanctions, it elicited comments on whether it should forego the sanctions if the affected states, prior to the final finding of nonimplementation, submitted "evidence to EPA that it has taken concrete steps toward starting its I/M program in an expeditious manner."<sup>235</sup> This approach, of course, flatly contradicted EPA's position, taken at the end of the Carter Administration, that sanctions would be imposed if a state receiving an extension did not have a fully operable I/M program in place on December 31, 1982.

At the same time that it was deciding how to deal with states that did not have fully operable I/M programs in place by December 31, 1982, EPA had to address how it would react to the seventeen areas that did not request 1987 extensions for the automobile pollutants and did not reach attainment by December 31, 1982, as the statute envisioned.<sup>236</sup> Arguably, the statute required EPA to impose sanctions for these nonattainment areas as well. On February 3, 1983, the agency proposed a construction ban in all such areas and all areas that were designated nonattainment after that deadline, except for those areas that could demonstrate that nonattainment was attributable to ozone transport.<sup>237</sup>

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231. Federal Assistance Limitations and Construction Moratorium; Notice of Proposed Actions, 48 Fed. Reg. 35,312 (1983) (to be codified at 40 C.F.R. pt. 52).

232. *Id.* The 10 states were Maryland, Kentucky, Tennessee, Illinois, Indiana, Michigan, Wisconsin, Texas, Missouri, and Nevada.

233. *Id.* at 35,313.

234. *Id.* at 35,314.

235. *Id.*

236. OTA OZONE REPORT, *supra* note 4, at 30.

237. Compliance with the Statutory Provisions of Part D of the Clean Air Act, 48 Fed. Reg. 4972, 4975 (1983) (to be codified at 40 C.F.R. pt. 52).

The affected states reacted very negatively to this proposal.<sup>238</sup> They pointed out that the statute technically required only that nonattainment plans "provide" for attainment by December 31, 1982; it did not actually require that the states "achieve" attainment. By this logic, the sanctions were not appropriate for any nonattainment area with an approved SIP "providing" for attainment by the 1982 deadline, even if in retrospect it became clear that the goal had not been achieved. The states noted that when the 1977 deadline approached under the 1970 Amendments, EPA declined to impose a construction moratorium if the state, in good faith, revised its plan so as to meet the standards as expeditiously as practicable.<sup>239</sup>

On July 12, 1983, Congress came to the rescue of the recalcitrant states by enacting an appropriations rider prohibiting EPA from using any appropriated funds to implement the threatened construction moratoria for states that failed to achieve the NAAQS by the December 31, 1982 deadline.<sup>240</sup> The legislative history made it plain that the language was aimed precisely at EPA's February 3 proposal. Although the appropriations rider would last for only one year, EPA took it as a signal that the states' interpretation of the statute was the correct one. On November 2, 1983, EPA re-interpreted the statute to say that sanctions could not go into effect so long as a state had an approved plan that "provided" for attainment by December 31, 1982, even if attainment did not result by that date.<sup>241</sup> It therefore withdrew its proposed disapprovals. The agency did, however, feel obliged to find that the plans were inadequate, because they had in fact failed to reach the statutory goal. It therefore issued a "SIP call" demanding that states containing nonextension areas that did not meet the December 31, 1982 deadline amend their SIPs within a reasonable time to provide for attainment by December 31, 1987.<sup>242</sup> So long as the states responded to the SIP call in a reasonable way, EPA would impose no sanctions.<sup>243</sup> The agency also adhered to its proposal to decline to impose sanctions on areas that were nonattainment solely because of

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238. *Mayors Say EPA Air Act Sanctions Policy Attempts to Use Cities to Weaken Statute*, 13 *Env't Rep.* (BNA) No. 43, at 1890 (Feb. 25, 1983).

239. *Compliance with the Statutory Provisions of Part D of the Clean Air Act*, 48 *Fed. Reg.* 50,686, 50,687 (1983) (to be codified at 40 C.F.R. pts. 51, 52).

240. The appropriation's rider read as follows:

None of the funds provided in this Act may be obligated or expended to impose sanctions under the Clean Air Act with respect to any area for failure to attain any national ambient air quality standard established under Section 109 of such Act by the applicable dates . . . .

Pub. L. No. 98-45, 97 Stat. 226 (1983).

241. *Compliance with the Statutory Provisions of Part D of the Clean Air Act*, 48 *Fed. Reg.* at 50,688-89. EPA also agreed with the states that this interpretation was consistent with its past position with respect to state plans that had missed the original 1977 deadline of the 1970 Amendments. Indeed, EPA opined that the 1977 Amendments effectively ratified that position. *Id.*

242. *Id.*

243. The agency would also decline to impose sanctions on newly designated nonattainment areas so long as they submitted plans within a reasonable time demonstrating compliance with the NAAQS within five years of approval. *Id.* at 50,693-94.

ozone transport.<sup>244</sup> For the automobile pollutants, then, the appropriations rider and EPA's timely re-interpretation had the effect of putting those areas for which states had not requested extensions on roughly the same footing as those areas for which extensions had been requested.<sup>245</sup>

This solved the problem of the failed SIPs in areas not receiving extensions, but it left open the question of what to do with the states containing areas that had received extensions to December 31, 1987, but were not effectively implementing their SIPs. In its November 2, 1983 reinterpretation, EPA took the position that sanctions would only go into effect for those states that did not undertake a good faith effort to revise their SIPs to cure the deficiencies.<sup>246</sup> If a state with a deficient SIP (*e.g.*, because the state was not implementing its I/M program) "commits to remedy its deficiency by a specific date and, at the same time, shows that it cannot possibly move any more quickly, EPA may defer final action until that date, unless it learns later that the State will not meet its commitment."<sup>247</sup> As a last resort, EPA noted that it would consider imposing its own control measures in a federal implementation plan (FIP) in addition to imposing sanctions. But it cautioned that "[r]esource constraints will almost certainly make it impossible for EPA to promulgate Federal plan revisions immediately in all areas where they might be needed."<sup>248</sup>

All of this amounted to a considerable retreat from the firm position the agency had previously taken with respect to the states that were not carrying out their I/M responsibilities. The worst was yet to come. The states that had not submitted adequate extension SIPs in 1982 did submit SIPs purporting to demonstrate that they would come into attainment by December 31, 1987, but EPA did not get around to evaluating their adequacy until after the December 31, 1987 deadline had expired.<sup>249</sup> Although EPA took action with respect to some especially recalcitrant states,<sup>250</sup> the states that avoided directly spitting in EPA's eye escaped sanctions until after the December 31, 1987 deadline had passed.

The I/M programs that did go into effect were often ineffective. EPA never published definitive regulations providing criteria for adequate I/M programs, and after the initial furor in the early 1980s, it stressed flexibility for the states over

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244. *Id.* at 50,692.

245. The sanctions remained in effect, however, for Kentucky, the only state that had failed to submit an approveable nonattainment SIP for the automobile pollutants and had not had the resulting sanctions lifted prior to February, 1983. *Id.* at 50,688. The sanctions also remained in effect for nonattainment areas for nonautomobile pollutants that had failed to submit approveable SIPs.

246. *Id.* at 50,691-92. States could also avoid sanctions by getting the relevant area redesignated as "attainment" if the monitoring evidence warranted redesignation. *Id.* at 50,691.

247. *Id.* at 50,692-93.

248. *Id.* at 50,692.

249. OTA OZONE REPORT, *supra* note 4, at 30.

250. See Federal Assistance Limitations and Construction Moratorium; State of Pennsylvania, 47 Fed. Reg. 9477, 9478 (1982) (to be codified at 40 C.F.R. ch. 1) (EPA notice proposing to find that Pennsylvania was not implementing its previously approved extension SIP).



effectiveness.<sup>251</sup> States with I/M programs were given emissions reduction credit based on exceedingly optimistic assumptions about how well they were working in the real world. As a result, the efficacy of I/M programs varied widely from state to state.<sup>252</sup> An EPA audit published in 1991 found that in many cases automobiles that it had deliberately modified so as to fail the tests nevertheless passed. EPA attributed this to unreliable test equipment, inadequately trained personnel, and insufficient state enforcement programs.<sup>253</sup>

## 2. *The Second Failure to Attain the Standards*

As the 1987 deadline passed, it became painfully clear that dozens of non-attainment areas had not attained the primary NAAQS by that deadline, despite the illusory assurances that the states had been making "reasonable further progress" toward that end for the previous decade. EPA's 1988 prognosis for Los Angeles, for example, was almost exactly what it had been in 1973—the standards for carbon monoxide and photochemical oxidants could not be met over the next five years without wholesale social and economic disruption.<sup>254</sup>

Although much of the ensuing national attention focused on the most difficult trouble spots, like Los Angeles, New York, and Houston, the shameful fact of the matter was that some of the areas that had nearly attained the 0.08 ppm primary standard for ozone in 1970 had not attained the considerably less stringent revised 0.12 ppm primary standard by 1987.<sup>255</sup> Indeed, instead of making "reasonable further progress" as the approved SIPs had promised, some less severely polluted areas in fact got worse.<sup>256</sup>

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251. Reitze & Needleman, *supra* note 38, at 418.

252. *Id.*

253. *Id.* (citing EPA, FINAL REPORT OF THE AUDIT ON THE VEHICLE INSPECTION/MAINTENANCE PROGRAM (1991)).

254. In late 1988, EPA concluded that:

a plan that provides for attainment in the [Los Angeles area] immediately or even within five years would have to prohibit most traffic, shut down major business activity, curtail the use of important consumer goods, and dramatically restrict all aspects of social and economic life. Implementation and enforcement of such drastic measures may well be impossible, and could prevent satisfaction of the basic necessities of life—including food, shelter, and medical services. Such a plan would effectively usurp many state and local government functions and would radically restrict individual opportunity. Indeed, an immediate or a near-term attainment FIP for ozone would destroy the economy of the South Coast, so that most of the population would be forced to resettle elsewhere.

Approval and Promulgation of Implementation Plans; California-South Coast Air Basin; Ozone and Carbon Monoxide Plans, 53 Fed. Reg. 49,494, 49,495 (1988) (to be codified at 40 C.F.R. pt. 52).

255. For example, the State of Texas convinced the Fifth Circuit Court of Appeals in 1974 that the Dallas/Ft. Worth area was so close to attaining the 0.08 ppm ozone standard that EPA was arbitrary and capricious in not granting the state an additional year (to 1976) to meet the standard. *Texas v. EPA*, 499 F.2d 289, 317-18 (5th Cir. 1974). By 1991, Fort Worth had still not attained the relaxed 0.12 ppm standard. 1991 EMISSIONS TRENDS REPORT, *supra* note 3, tbl.4-5.

256. 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at tbl.5-2.

Nevertheless, EPA's posture with respect to SIPs that had obviously failed to attain the standards by the statutory deadline was to sidestep the statute's automatic sanctions; the agency took the position that it would impose sanctions only if the state failed to carry out its SIP commitments in good faith or if the plan was inadequate on its face.<sup>257</sup> In other words, absent bad faith on a state's part, EPA would impose no sanctions so long as the SIP appeared to demonstrate attainment by the 1987 deadline, even though the deadline had passed and the area remained out of attainment. EPA proposed sanctions for eleven areas with deficient SIPs in July 1987, but Congress, as usual, came to the rescue with legislation extending the deadlines for a year and prohibiting EPA from carrying out the sanctions.<sup>258</sup>

Several reasons were given for the wholesale failure to meet the statute's goals even in areas where doing so was not an especially difficult task. First, President Reagan had appointed officials to the top offices at EPA who were far from committed to meeting the statutory goals. And the disdain that they had for long-time agency employees reduced agency morale to painfully low levels.<sup>259</sup>

Second, the states no doubt received subtle and sometimes explicit messages that few consequences would attend the failure to meet their SIP obligations. They also correctly surmised that, after the transportation control fiasco of the mid-1970s, the probability that EPA would write its own FIPs for the states was vanishingly small. States simply had no incentive to implement effective inspection and maintenance programs over the determined opposition of local service station owners and vocal automobile drivers.

Third, the petroleum industry had reacted to EPA's regulations requiring that lead be phased out of gasoline by changing the blend so that gasoline contained more of the "light ends" like butane, benzene, and xylene. While this eliminated the knocking problem that lead additives had previously addressed, it also greatly increased the volatility of new blends. This in turn greatly increased running VOC emissions from both new and existing automobiles as well as emissions from storage and transfer facilities.<sup>260</sup> None of these increases in emissions were taken into account in the extension SIPs that were written during the early 1980s. By the late 1980s, some states were attempting to place limitations on the volatility of gasoline marketed within their borders, but a court held that any such state regulations violated the Commerce Clause if unapproved by EPA.<sup>261</sup>

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257. OTA OZONE REPORT, *supra* note 4, at 30.

258. Pub. L. No. 100-202, 101 Stat. 1329 (1987); OTA OZONE REPORT, *supra* note 4, at 31.

259. This author personally observed flyers in EPA elevators during this period questioning the extent to which EPA employees could in good conscience do the bidding of a "corrupt regime."

260. Arnold W. Reitze, *The Regulation of Fuels and Fuel Additives Under Section 211 of the Clean Air Act*, 29 TULSA L.J. 485, 515 (1994).

261. *American Petroleum Inst. v. Jorling*, 710 F. Supp. 421, 429-30 (N.D.N.Y. 1989).

## *F. The Clean Air Act Amendments of 1990*

By the end of the 1980s it was clear that EPA and the states had once again failed to attain the primary NAAQS in the most heavily populated areas by the statutory deadlines. It was equally clear that automobile emissions were a primary reason for this failure. Yet, while the reasons for the wholesale failure to achieve clean air were painfully obvious, there was very little agreement about how to proceed. For more than two years, political stalemate prevented the enactment of much needed amendments to the Clean Air Act. Finally, the Bush Administration seized the initiative, and after much serious deliberation and good faith compromise, Congress enacted comprehensive amendments in November 1990.

### *1. New Designations*

In enacting the 1990 Amendments, Congress wanted very much to put in place a regulatory regime that had a legitimate chance to succeed. The Amendments therefore divided the ozone nonattainment areas into five categories, depending upon the degree to which the maximum exposure (or "design value") for the area exceeded the primary NAAQS for ozone.<sup>262</sup> The five ozone nonattainment areas were named "marginal, moderate, serious, severe, and extreme."<sup>263</sup> At the time that EPA made the initial designations, there were forty-three marginal, thirty-one moderate, fourteen serious, nine severe, and one extreme areas.<sup>264</sup> Areas with more serious pollution problems were given longer to attain the primary standards, but they were subject to increasingly stringent implementation plan requirements.

### *2. Reasonable Further Progress*

Like the 1977 Amendments, the 1990 Amendments required that SIPs for nonattainment areas assure "reasonable further progress," which was defined to prevent any temporary increases in pollution and to require "annual incremental reductions" in emissions as needed to achieve the standards by the relevant deadlines.<sup>265</sup> The 1990 Amendments went beyond the 1977 Amendments, however, in specifying a 15% reduction in VOC emissions from the 1990 baseline by

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262. Clean Air Act §§ 181(a)(1), 186(a)(1), 42 U.S.C.A. §§ 7511(a)(1), 7512(a)(1) (West 1995). A "design value" for an area is the fourth highest of all of the daily peak one-hour average ozone concentrations actually observed over the most recent three-year period. It is meant to be a measure of the maximum one-hour of exposure in a particular area. OTA OZONE REPORT, *supra* note 4, at 52-53.

263. Clean Air Act § 181(a)(1), 42 U.S.C.A. § 7511(a)(1) (West 1995).

264. 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at 1-10.

265. Clean Air Act §§ 171(1), 172(c)(2), 42 U.S.C.A. §§ 7501(1), 7502(c)(2) (West 1995).

1996 in moderate areas<sup>266</sup> and an additional 3% per year on average after 1996 for serious, severe, and extreme areas.<sup>267</sup>

### 3. Inspection and Maintenance

The 1990 Amendments required all states containing nonattainment areas for which I/M programs had been put into place under the 1977 Amendments and moderate ozone nonattainment areas that lacked I/M programs to revise their SIPs immediately to ensure that they did in fact contain I/M programs that were adequate under the pre-existing criteria.<sup>268</sup> Recognizing that in the name of flexibility EPA's previous vague guidance to the states had allowed for considerable variation, Congress required EPA by November 15, 1991 to revise the previous guidance to the states on "basic I/M" programs, taking into account what the agency had learned from its audits of the ongoing programs in the states.<sup>269</sup> Although the statute did not prescribe criteria for the new guidance, it did specify what aspects of I/M the new guidance should cover.<sup>270</sup> At the same time the amendments made it clear that the guidance should "provide the States with continued reasonable flexibility to fashion effective, reasonable, and fair programs for the affected consumer."<sup>271</sup> Once EPA's basic I/M guidance was issued in final form, all moderate ozone nonattainment areas were to incorporate that guidance into all SIPs requiring basic I/M programs.<sup>272</sup>

Serious, severe, and extreme ozone nonattainment areas with a 1980 population of greater than 200,000 and all metropolitan statistical areas in the Northeast Ozone Transport Region with a population of 100,000 or more were required

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266. Clean Air Act § 182(b)(1)(A)(i), 42 U.S.C.A. § 7511a(b)(1)(A)(i) (West 1995). A reduction of less than fifteen percent is allowable in moderate nonattainment areas if the state puts into place a new source-permitting regime that is equivalent to that required in extreme areas, and RACT is in place for existing sources. Clean Air Act § 182(b)(1)(A)(ii), 42 U.S.C.A. § 7511a(b)(1)(A)(ii) (West 1995).

267. Clean Air Act § 182(c)(2)(B), 42 U.S.C.A. § 7511a(c)(2)(B) (West 1995).

268. Clean Air Act §§ 182(a)(2)(B), 182(b)(4), 187(a)(4), 42 U.S.C.A. §§ 7511a(a)(2)(B), 7511a(b)(4), 7512a(a)(4) (West 1995).

269. Clean Air Act § 182(a)(2)(B)(ii), 42 U.S.C.A. § 7511a(a)(2)(B)(ii) (West 1995).

270. The new guidance was to cover:

the frequency of inspections, the types of vehicles to be inspected (which shall include leased vehicles that are registered in the nonattainment area), vehicle maintenance by owners and operators, audits by the State, the test method and measures, including whether centralized or decentralized, inspection methods and procedures, quality of inspection, components covered, assurance that a vehicle subject to a recall notice from a manufacturer has complied with that notice, and effective implementation and enforcement, including ensuring that any retesting of a vehicle after a failure shall include proof of corrective action and providing for denial of vehicle registration in the case of tampering or misfueling.

Clean Air Act § 182(a)(2)(B)(ii), 42 U.S.C.A. § 7511a(a)(2)(B)(ii) (West 1995).

271. Clean Air Act § 182(a)(2)(B)(ii), 42 U.S.C.A. § 7511a(a)(2)(B)(ii) (West 1995).

272. Clean Air Act § 182(a)(2)(B)(ii), 42 U.S.C.A. § 7511a(a)(2)(B)(ii) (West 1995).

to include "enhanced I/M" programs in their SIPs by November 15, 1992.<sup>273</sup> The enhanced I/M programs were to comply "in all respects" with EPA guidance as it became available.<sup>274</sup> Congress meant for the enhanced programs to cover more of the vehicles in operation, employ more sophisticated inspection methods for finding high emitting vehicles, and contain additional features to ensure that all vehicles were tested properly and effectively repaired.<sup>275</sup> In particular, the amendments required that an enhanced I/M program operate "on a centralized basis, unless the State demonstrates to the satisfaction of the Administrator that a decentralized program will be equally effective."<sup>276</sup> In addition, states were required to enact regulations providing for inspection and maintenance of any new diagnostic devices that EPA required auto manufacturers to include on new model automobiles within two years after EPA's requirements became effective.

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273. Clean Air Act § 182(c)(3)(A), 42 U.S.C.A. § 7511a(c)(3)(A) (West 1995); Vehicle Inspection and Maintenance Requirements for State Implementation Plans, 57 Fed. Reg. at 31,059.

274. Clean Air Act § 182(c)(3)(B), 42 U.S.C.A. § 7511a(c)(3)(B) (West 1995). The guidance was to include:

a performance standard achievable by a program combining emission testing, including on-road emission testing, with inspection to detect tampering with emission control devices and misfueling . . . and program administration features necessary to reasonably assure that adequate management resources, tools, and practices are in place to attain and maintain the performance standard.

*Id.*

275. Vehicle Inspection and Maintenance Requirements for State Implementation Plans, 57 Fed. Reg. at 31,059. At the very least a state's enhanced I/M program had to include the following elements:

- (i) Computerized emission analyzers, including on-road testing devices.
- (ii) No waivers for vehicles and parts covered by the emission control performance warranty . . . unless a warranty remedy has been denied in writing, or for tampering-related repairs.
- (iii) In view of the air quality purpose of the program, if, for any vehicle, waivers are permitted for emissions-related repairs not covered by warranty, an expenditure to qualify for the waiver of an amount of \$450 or more for such repairs (adjusted annually as determined by the Administrator on the basis of the Consumer Price Index. . .).
- (iv) Enforcement through denial of vehicle registration (except for any program in operation before [the date of the enactment of the Clean Air Act Amendments of 1990] whose enforcement mechanism is demonstrated to the Administrator to be more effective than the applicable vehicle registration program in assuring that noncomplying vehicles are not operated on public roads).
- (v) Annual emission testing and necessary adjustment, repair, and maintenance, unless the State demonstrates to the satisfaction of the Administrator that a biennial inspection, in combination with other features of the program which exceed the requirements of this [Act], will result in emission reductions which equal or exceed the reductions which can be obtained through such annual inspections.
- (vi) Operation of the program on a centralized basis, unless the State demonstrates to the satisfaction of the Administrator that a decentralized program will be equally effective. An electronically connected testing system, a licensing system, or other measures (or any combination thereof) may be considered, in accordance with criteria established by the Administrator, as equally effective for such purposes.
- (vii) Inspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems.

Clean Air Act § 182(c)(3)(C), 42 U.S.C.A. § 7511a(c)(3)(C) (West 1995). Each state was required to prepare biannual reports for EPA on the efficacy of its enhanced I/M program. *Id.*

276. Clean Air Act § 182(c)(3)(C)(iv), 42 U.S.C.A. § 7511a(c)(3)(C) (West 1995).

tive.<sup>277</sup> Finally, states that allowed waivers from repair requirements for especially expensive repairs could not set the waiver ceiling below \$450.<sup>278</sup>

#### 4. *Sanctions*

The 1990 Amendments provided that if a state failed to submit a plan that met the minimal criteria for plan submission, submitted an inadequate plan, or failed to implement any provision of an approved SIP, EPA could elect one of two sanctions against the state. First, the Administrator could impose a prohibition on the award of certain federal highway funds for the area subject to the sanction. Second, the Administrator could limit the construction or modification of major new sources in the area by requiring two-for-one offsets in the permit process that was applicable to major new stationary sources.<sup>279</sup> The first sanction was available under the 1977 amendments. The second sanction represents something of a retreat from the new source moratorium of the 1977 Amendments. In addition, EPA was obliged to give the affected state eighteen months to cure the defect before invoking the sanction. Finally, any area that failed to attain the standards by the new deadline would be automatically “bumped up” to the next higher classification and would have to implement all additional requirements applicable to that category.<sup>280</sup>

### G. *EPA’s Inspection and Maintenance Regulations*

#### 1. *The Proposed Rule*

Soon after President Bush signed the 1990 Amendments, EPA undertook an extensive public outreach process in which it attempted to elicit the views of a broad range of potentially affected people and institutions. The agency naively hoped that it could forge a consensus on the need for I/M and on the proper techniques for conducting basic and enhanced I/M programs.<sup>281</sup> At first, it looked like EPA’s consensus-building efforts would succeed. Nearly everyone who

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277. Clean Air Act § 182(a)(2)(B), 42 U.S.C.A. § 7511a(a)(2)(B) (West 1995).

278. Clean Air Act § 182(c)(3)(C)(iii), 42 U.S.C.A. § 7511a(c)(3)(C)(iii) (West 1995).

279. Clean Air Act § 179(b), 42 U.S.C.A. § 7509(b) (West 1995).

280. Clean Air Act § 181(b)(2), 42 U.S.C.A. § 7511(b)(2) (West 1995).

281. *Hearings Before the Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety of the Senate Comm. on Environment and Public Works* (1995) (statement of Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA), available at 1995 WL 408045, \*5 (copy on file with the *Pacific Law Journal*) [hereinafter *Hearings: Statement of Mary D. Nichols*] (“After the Clean Air Act Amendments of 1990 became law, EPA initiated an extensive public participation and outreach process to develop a consensus on how to proceed with enhanced I/M regulations.”).

contributed to the initial outreach process, including the affected states, supported centralized testing at test-only facilities using high-tech equipment.<sup>282</sup>

EPA issued a proposal for enhanced I/M guidelines and for revising its basic I/M guidelines on July 13, 1992, nearly eight months after the statutory deadline for the issuance of *final* guidelines.<sup>283</sup> The agency proposed a model program for basic I/M that was identical to the I/M model program that EPA had implemented under the 1977 Amendments in which the state could implement a test-and-repair regime using the simple idle test.<sup>284</sup> The agency proposed to require a minimum repair expenditure of \$75 for pre-1981 vehicles and \$200 for 1981 and later vehicles.<sup>285</sup> The bulk of the proposal was devoted to the enhanced I/M that would replace basic I/M in the most heavily polluted areas.

In the agency's view, the effectiveness of an I/M program depended upon its "ability to accurately fail problem cars and pass clean cars," a "comprehensive quality control and aggressive enforcement" policy and "skillful diagnostics and capable mechanics."<sup>286</sup> The agency found that these critical elements were "lacking" in most of the I/M programs that the states had adopted pursuant to the 1977 Amendments.<sup>287</sup> EPA auditors found problems in many areas, including "excessive waivers, motorist noncompliance, inadequate quality assurance and quality control measures, outdated test procedures, insufficient enforcement against inspectors that violate regulations, inadequate data collection and analysis, inadequate resources, and improper testing."<sup>288</sup> Covert EPA audits of state I/M programs revealed that about one-half of the inspections at existing test-and-repair stations were conducted improperly.<sup>289</sup> To EPA this suggested that the states were not enforcing their SIPs adequately.<sup>290</sup> Similar audits revealed that state efforts to educate I/M mechanics were "often poor or nonexistent."<sup>291</sup>

There were technical problems with the state regimes as well. The simple idle test had worked well for pre-1981 automobiles with carburetors rather than computerized ignition systems because typical emission control problems involved "rich" air/fuel mixtures that affected idle as well as cruising emissions. In the day and age of computerized ignition systems, effective inspections involved "cycles

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282. See *id.* ("Almost all sectors—industry, states, and environmental groups—strongly supported a high performance standard for enhanced I/M, one that would involve both advanced testing procedures and separation of testing from repair to make the programs effective.").

283. Vehicle Inspection and Maintenance Requirements for State Implementation Plans, 57 Fed. Reg. at 31,058.

284. *Id.* at 31,062.

285. *Id.* at 31,072.

286. *Id.* at 31,059.

287. *Id.*

288. *Id.* at 31,075.

289. *Id.* at 31,059.

290. *Id.*

291. *Id.*

of acceleration and deceleration under loaded conditions.”<sup>292</sup> For similar reasons, simple visual inspection was rarely sufficient to determine whether the emissions control system is working properly.<sup>293</sup> More importantly, the I/M tests typically employed in existing regimes were incapable of detecting NO<sub>x</sub> emissions and excess running emissions caused by leaks at various points in the fuel system.<sup>294</sup>

Finally, EPA was concerned about the potential for fraud in existing test-and-repair regimes that allowed local service stations to inspect automobiles, to repair the autos that flunked the tests and to check whether the repairs were successful in a single session. Since the service station made money on the test and repairs there was a perverse incentive to issue the required certification, whether or not the repairs were successfully completed.<sup>295</sup> EPA and state audits showed that the test-and-repair regime using relatively sophisticated BAR90 testing devices passed vehicles that should have failed about 30% of the time.<sup>296</sup> The audits also demonstrated that states employing decentralized systems lacked both the authority and the enforcement resources to pursue miscreant testing facilities aggressively.<sup>297</sup> The agency noted that “[e]ven very tightly designed and run quality assurance schemes in decentralized systems have not insured that proper inspections take place, that forms are adequately controlled, or that the program actually achieves estimated emission reductions.”<sup>298</sup> Although recognizing that centralized programs “are not completely immune” to fraud and tampering, it would be virtually impossible to test vehicles improperly with high-tech testing equipment.<sup>299</sup> Similarly, in a centralized test-only system it would be very difficult for a vehicle owner to bribe the tester/repairperson or to “game” the system by doping gasoline with additives or disconnecting vacuum hoses.<sup>300</sup> The results of EPA audits indicating that tampering rates were 20% to 50% higher in areas using decentralized testing suggested that centralized regimes were more effective in deterring tampering.<sup>301</sup>

The agency therefore expressed a strong preference for testing at centralized “test-only” facilities, but did not require that all testing facilities be operated by

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292. *Id.*

293. *Id.* Visual inspection was useful primarily in detecting tampering and evidence of misfueling. Misfueling is fortunately a thing of the past with the phase-out of leaded gasoline, and tampering is very difficult to accomplish with computerized emission control technologies. *Id.*

294. *Id.*

295. Dana Wilkie, *Lawmakers Shun Federal Smog Plan*, SAN DIEGO UNION-TRIB., Sept. 1, 1993, at A3.

296. Vehicle Inspection and Maintenance Requirements for State Implementation Plans, 57 Fed. Reg. at 31,076.

297. *Id.* at 31,078. The agency concluded that “[l]ack of authority, low fines or penalties, and lack of consistent and systematic penalty schedules have appeared as serious impediments to program enforcement in audits of decentralized programs across the country.” *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 31,069.

301. *Id.* at 31,075.



the same entity.<sup>302</sup> EPA was firm in concluding that “it is not possible for a decentralized test-and-repair program to meet the proposed performance standard for enhanced I/M, regardless of the test type or vehicle class coverage,”<sup>303</sup> but it acknowledged that the statute allowed states an opportunity to convince the agency that a test-and-repair program would be equally effective as the model centralized program.<sup>304</sup> To avoid delays in the event of failure, however, EPA announced that it would not approve any test-and-repair regime as enhanced I/M unless the state legislation creating the regime provided for automatic conversion to a test-only regime as soon as the program failed to meet an emissions reduction benchmark.<sup>305</sup>

EPA proposed a model enhanced I/M regime requiring centralized testing with a high-tech “IM-240” testing device that would simulate actual driving conditions to allow more accurate measurement of tailpipe emissions (including NO<sub>x</sub> emissions), employ a pressure check to find leaks in the fuel system, and check the “purge” system that removes gasoline vapors stored in the charcoal canister and routes them to the engine where they can be burned as fuel.<sup>306</sup> The “cut points” for requiring repairs would be set so as to fail only vehicles emitting at least twice the levels of their design standards.<sup>307</sup> To serve as a backstop, the model program would conduct “on road” testing using remote sensing or a selective pull-over program that would test at least 0.5% of all vehicles as they operated on the road.<sup>308</sup> EPA was confident that the enhanced tests that it proposed would be so effective that they could be conducted biennially and be just as effective, and states could decline to test new autos for two or three years.<sup>309</sup> Moreover, although the equipment necessary for enhanced I/M would be much more expensive (approximately \$140,000 per lane versus \$10,000 to \$15,000 for existing equipment),<sup>310</sup> the cost per year for biennial inspections would actually be less than two annual inspections under the existing regime (nine dollars per year versus eight dollars per year for centralized tests).<sup>311</sup> The enhanced tests would, however, take somewhat longer to perform (ten to fifteen minutes versus five minutes). EPA noted that any I/M program would identify some vehicles needing repairs, and that would entail unbudgeted expenses for some car owners. The agency noted, however, that manufacturer warranties should cover many of

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302. *Id.* at 31,066.

303. *Id.* at 31,067.

304. *Id.*

305. *Id.* at 31,067.

306. *Id.* at 31,059.

307. *Id.* at 31,064.

308. *Id.* at 31,065. Remote sensing was not, however, to serve as a substitute for periodic testing at centralized facilities. *Id.*

309. *Id.* at 31,059, 31,065. EPA concluded that “doing the test right has proved much more important than doing it often.” *Id.*

310. *Id.* at 31,081-82.

311. *Id.* at 31,059.

these costs, and it pointed out that the tests would also result in a fuel economy savings of 7% to 13% that would largely offset repair costs.<sup>312</sup>

Rather than mandate a particular testing regime, EPA proposed a “performance standard” under which the states would have flexibility to use alternatives to EPA’s model requirements if they could achieve the same degree of pollution reduction as EPA’s model technology. EPA predicted that its model enhanced I/M program would achieve emissions reductions of 28% for VOCs, 31% for carbon monoxide, and 9% for oxides of nitrogen by the year 2000.<sup>313</sup> The agency therefore required that states attempting to use alternative programs demonstrate equivalent reductions by specified benchmarks.

EPA was convinced that the proposed model testing program would not be unduly inconvenient to the public. By far the most important factor in assessing convenience was frequency of testing. Under the model program, as opposed to decentralized test-and-repair alternatives, automobiles would only have to be tested once every two years, thus increasing convenience by a factor of two. The agency acknowledged that decentralized regimes made testing available in hundreds or even thousands of places, whereas centralized testing facilities would only be available at less than one hundred locations in a large city.<sup>314</sup> But the agency believed that strategically located automated facilities should not greatly inconvenience the public. The agency noted that “[c]onvenient, contractor-run, centralized programs are currently being operated in a wide range of large and small cities and result from good network design, contractual requirements to insure convenience, and competition in the bidding process.”<sup>315</sup> It cited a survey indicating that a majority of the surveyed motorists reported that testing centers were conveniently located in both centralized and decentralized networks.<sup>316</sup>

EPA was concerned about the “ping-pong” phenomenon, under which a driver faced the possibility of traveling back and forth between the testing facility and repair facilities until the repair facility finally identified the malfunction that was causing the vehicle to flunk the test. The agency noted, however, that only 10% to 20% of the tested vehicles would fail the test and thus be subject to repairs and retesting. The agency even expressed a willingness to allow retesting at the repair facilities, but it cautioned that this might not yield as effective a program.<sup>317</sup> It observed that repairs needed to pass the new high-tech test might “require greater diagnostic proficiency on the part of technicians,” and repair stations in

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312. *Id.*

313. *Id.* at 31,064.

314. *Id.* at 31,068.

315. *Id.*

316. *Id.* (citing RITER RESEARCH, ATTITUDES AND OPINIONS REGARDING VEHICLE EMISSION TESTING (1991), which was conducted for the Coalition for Safer Cleaner Vehicles).

317. *Id.* at 31,071.

a test-only regime were, in any event, not likely to possess the expensive equipment needed to retest.<sup>318</sup>

One solution would be for the repair technician to take the automobile to the centralized testing facility, but EPA had no way to guarantee that repair facilities would be willing to undertake this additional responsibility.<sup>319</sup> EPA could, however, encourage this solution by requiring testing facilities to allow repair technicians priority access for a free retest of vehicles that failed the initial test. EPA also proposed to require that centralized testing facilities provide diagnostic information to owners of vehicles that failed the test and suggestions regarding how their vehicles might be repaired.<sup>320</sup> More advanced computerized onboard diagnostic systems would also prove of great value as they became available in future model years. In addition, EPA predicted that increased demand would lead to the development of relatively inexpensive testing equipment designed to simulate real-world driving conditions that could be employed at repair facilities for diagnostic purposes.<sup>321</sup>

The ultimate solution to the ping-pong problem was a highly trained cadre of mechanics at repair facilities. EPA strongly suggested that states initiate repair-person certification programs under which only certified technicians could perform repairs on vehicles that flunked centralized tests. The agency also recommended implementing state-run technical assistance programs, with hot line services, newsletters, and other outreach efforts, for repair persons who encountered diagnostic difficulties. The proposed rule would also have required a computerized technician performance monitoring program that would track the effectiveness of individual technicians and issue them "report cards." Finally, to ensure against a second trip back to the testing facility, EPA suggested that states could issue a certificate of compliance to any vehicle that failed the retest after being repaired by a certified technician and after passing a thorough physical inspection.<sup>322</sup>

EPA recognized that the statutory \$450 cutoff for required repairs in areas needing enhanced I/M was much higher than the \$50 to \$75 cutoffs typically employed in states currently employing I/M. Although EPA predicted that the average repair would come to less than \$120, the \$450 cap would place an additional burden on impecunious vehicle owners, and it could allow unscrupulous repair facilities to install \$450 worth of repairs knowing full well that more expensive repairs were needed to pass the test.<sup>323</sup> One solution was for states simply to purchase and retire old vehicles for which \$450 in repairs would either

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318. *Id.* at 31,069.

319. *Id.* at 31,071.

320. *Id.* at 31,070.

321. *Id.* at 31,071.

322. *Id.* at 31,070.

323. *Id.* at 31,071.

exceed or amount to a large share of the automobile's blue book value. Many states had already been considering a "cash-for-clunkers" program that would implement this solution. The program could be financed by charging higher testing fees for all vehicles. To avoid abusive practices like raiding junkyards for old clunkers and importing out-of-state clunkers, the vehicles would be required to have a current registration from the nonattainment area and proof of past registration for some suitable period of time. A final solution would be for states to allow time extensions to the owners of the vehicles requiring major repairs to come up with the money to pay for the repairs or to sell the vehicle.<sup>324</sup>

EPA also recognized that existing test-and-repair facilities that had invested in training and equipment that was adequate for basic testing would be opposed to any transformation into a test-only regime that rendered such equipment obsolete, and it proposed three approaches for mitigating the adverse impact on existing facilities. First, states could offer direct financial assistance to stations "either in the form of cash for recently purchased test equipment or in the form of subsidized software or peripherals to give that equipment new functionality."<sup>325</sup> Second, states could design the enhanced program to include "transitional mechanisms" to soften the economic burden of moving to the new system. Third, states could provide less direct assistance, such as establishing programs to "assist stations and inspectors through retraining and retooling programs."<sup>326</sup>

EPA calculated the overall costs and benefits of enhanced I/M under its proposed performance standard. When fully implemented in the year 2000, the testing itself would cost about \$451 million, and required repairs would total about \$710 million. There would be offsetting fuel efficiency benefits of \$825 million, because testing would increase engine performance and decrease evaporative emissions.<sup>327</sup> This net expenditure of \$336 million would yield 268,000 tons of reduced VOC emissions and 779,000 tons of reduced carbon monoxide emissions.<sup>328</sup>

## 2. *The Final Rule*

In the preamble to the final rule, EPA reiterated its conclusion that the agency's "experience over the last fifteen years has shown that the lack of federal minimum requirements has led to less than effective I/M programs."<sup>329</sup>

The more than 300 comments did nothing to shake EPA's conclusion that a centralized test-only system was far preferable to a decentralized test-and-repair

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324. *Id.* at 31,072.

325. *Id.*

326. *Id.*

327. *Id.* at 31,080.

328. *Id.* at 31,081.

329. Inspection/Maintenance Program Requirements, 57 Fed. Reg. at 52,953. The agency determined that I/M programs would have to be implemented in 181 areas, 56 of which lacked any I/M program. *Id.*

regime. Many states had in fact urged EPA to stick to the centralized test-only approach. For example, both the State of California and the South Coast Air Quality Management District asked EPA to delete a proposal to allow test-and-repair facilities for a trial period to see if past problems could be solved.<sup>330</sup> EPA was unpersuaded by the arguments that decentralized systems were more convenient to automobile owners. In the most recent audit of the operation of decentralized test-and-repair SMOGPROS stations in California, 82% of the motorists getting tested waited for the test and only 9% dropped the vehicle off and went to work. About 62% of those who waited remained for more than twenty minutes. Of the 18% that failed, only 33% sought repairs elsewhere. Although the audit did not ascertain whether the 66% who did not go elsewhere waited for the repairs to be completed, anecdotal evidence suggested that most made appointments to return on another day. Any added convenience to the owners over centralized testing was therefore at best marginal.<sup>331</sup> A random audit of a similar decentralized test-and-repair system in Missouri revealed that the average wait to get a test was forty-eight minutes, and 40% of those auditors who showed up unannounced were told that they would have to come back another time.<sup>332</sup> EPA also cited a California study of the total time consumed in traveling to the facility, administering the test and returning home that found that decentralized facilities consumed eighty-three minutes while centralized facilities consumed about seventy-six minutes.<sup>333</sup> To EPA these studies reinforced other studies that demonstrated that the wait at decentralized test-and-repair facilities was considerably longer than at centralized test-only facilities, which EPA estimated to be about five minutes per car.<sup>334</sup>

The comments added additional support to EPA's conclusion that test-and-repair systems were grossly ineffective. A 1992 draft report by the California I/M Review Committee demonstrated that "the enhanced BAR90 system being used in California is achieving only 42% of the potential for hydrocarbons, 32% for carbon monoxide, and 34% for hydrocarbons."<sup>335</sup> The California report also noted the "inherent conflict of interest between the desire of the Smog Check station to satisfy the customer and the need to perform a proper and thorough inspection that may cause the vehicle to fail."<sup>336</sup> The report concluded that while increased enforcement could reduce the incidence of fraudulent tests, it would probably not

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330. *Hearings*: Statement of Mary D. Nichols, *supra* note 281, at \* 4.

331. Inspection/Maintenance Program Requirements, 57 Fed. Reg. at 52,973.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 52,974.

336. *Id.* at 52,972. EPA was generally of the opinion that "[t]here's a built-in conflict of interest unless you totally separate testing and repair, [because] mechanics who run service stations have an interest in pleasing their customers." Elliot Diring, *California Gets Air Ultimatum*, S.F. CHRON., Apr. 15, 1993, at A3.

be cost-effective.<sup>337</sup> Similarly, New York, which also used the BAR90 decentralized test-and-repair system agreed that a 50% discount factor was appropriate.<sup>338</sup>

The final rule adopted the proposed “performance standard” based on the levels that could be achieved by the IM-240 testing technology, an evaporative system integrity (pressure) test, and an evaporative system performance (purge) test.<sup>339</sup> The final rule also adopted the proposed rule’s \$450 waiver cap (EPA presumed that this would lead to a 1% waiver rate), “cut points” to fail only vehicles emitting twice their design standards, and requirement for on-road testing of at least 0.5% of the subject vehicle population using either remote sensing or a pullover program.<sup>340</sup> In addition, the final rule adopted the following: (1) The proposed rule’s “report card” monitoring requirement for technician performance, (2) its requirement that owners of failing vehicles be provided diagnostic information, and (3) its additional solutions to the “ping-pong” problem.<sup>341</sup> Although many commentators requested that EPA implement a national certification program for repair technicians, EPA decided to limit certification to those states that elected to create such programs.<sup>342</sup> Finally, in order to allow existing test-and-repair facilities to recoup investments in I/M technology, the final rule allowed states to phase out the decentralized test-and-repair portion of the program through January 1, 1996.<sup>343</sup>

According to EPA, the IM-240 equipment was the most sophisticated equipment available, and it was especially effective in detecting pollutants emitted from vehicles employing newer pollution control technologies.<sup>344</sup> The agency concluded that the IM-240 was at least three times as effective as the best of the existing I/M programs.<sup>345</sup> Following the statute, the rule required that enhanced I/M testing be performed at a centralized facility unless a state could demonstrate that a decentralized system was as effective as EPA’s model program.<sup>346</sup> The regulations went on to provide that decentralized testing would be presumptively as effective as centralized testing if the local service stations were not allowed both to test-and-repair vehicles. By contrast, decentralized “test-and-repair” regimes were presumptively not equivalent, and if the state did not demonstrate

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337. Inspection/Maintenance Program Requirements, 57 Fed. Reg. at 52,974.

338. *Id.* at 52,972.

339. *Id.* at 52,951.

340. *Id.* at 52,954.

341. *Id.* at 52,961.

342. *Id.* at 52,977.

343. *Id.*

344. *Id.* at 52,953-54.

345. *Id.* at 52,950.

346. *Id.* at 52,951.

equivalency,<sup>347</sup> the emissions reductions that it could claim toward meeting the performance standard (and other statutory emissions reduction goals) would have to be discounted by 50%. EPA's justification for this hard line toward decentralized test and repair programs was a series of audits that it had conducted of such systems that revealed "egregious levels of improper testing" at test-and-repair facilities.<sup>348</sup>

EPA concluded that its model enhanced I/M program would reduce VOC and carbon monoxide emissions by about one-third at a cost of about \$500 per ton for VOC emissions.<sup>349</sup> This was a good deal more cost-effective than some of EPA's stationary source standards that cost up to \$10,000 per ton.<sup>350</sup> EPA later predicted that moving to a centralized test-only regime in seriously polluted areas would help achieve the NAAQS at a savings of about \$1 billion.<sup>351</sup>

For basic I/M programs, EPA also promulgated a performance standard, but it varied only slightly from the I/M programs in place under the 1977 Amendments.<sup>352</sup> In particular, it was not based on the IM-240 technology and was therefore not nearly as stringent.<sup>353</sup> Centralized testing was not required, and there was no presumption in favor of "test only" programs. EPA predicted that a city could meet the basic I/M performance standard by using "a reasonably comprehensive, conventional [decentralized] test-and-repair system."<sup>354</sup>

### 3. *Judicial Review*

The final I/M rule was challenged in the D.C. Circuit by the National Automobile Dealers Association and several environmental groups who also challenged EPA's policy of approving "committal SIPs" for I/M programs.<sup>355</sup> In a May 4, 1994 opinion, the court held that EPA's committal SIP policy was unlawful, but rejected the challenges to EPA's I/M regulations.

NRDC challenged EPA's extension of the November 5, 1992 deadline by which enhanced I/M programs in serious, severe, and extreme areas were to "take effect."<sup>356</sup> The final rule required that states have enhanced I/M programs fully implemented by 1996 with looser cutpoints and by 1998 with more stringent cutpoints. The court agreed with EPA that the congressional mandate that enhanced

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347. The final regulations dropped the "provisional equivalency" suggestion of the proposed regulations in which a state could presume that a decentralized test-and-repair regime was equivalent to EPA's model for a period of time until equivalency could be demonstrated. *Id.* at 52,950.

348. *Id.* at 52,959.

349. *Hearings*: Statement of Mary D. Nichols, *supra* note 281, at \*2-3.

350. *Id.*

351. *Id.* at \*3.

352. *Inspection/Maintenance Program Requirements*, 57 Fed. Reg. at 52,954.

353. *Id.* at 52,959.

354. *Id.*

355. *Natural Resources Defense Council, Inc. v. EPA*, 22 F.3d 1125, 1129 (D.C. Cir. 1994).

356. *Id.* at 1137.

I/M programs “take effect” within two years meant only that the state had to adopt all necessary statutory and regulatory authority, not that the state had to have a fully implemented program by then.<sup>357</sup> The court mentioned only in passing that EPA had not even promulgated its enhanced I/M regulations by the November 1992 deadline.<sup>358</sup> According to the court, “it strains credulity to assert that Congress expected states simultaneously to undertake the legal legwork necessary to implement a wholly new enhanced I/M program and to begin, much less complete, the task of getting such a program up and running within a year of promulgation of the EPA’s guidance.”<sup>359</sup> The court also rejected NRDC’s argument that EPA was arbitrary and capricious in choosing the deadlines that it did for full implementation.<sup>360</sup>

NRDC’s most serious challenge was to the enhanced I/M standards themselves. NRDC argued that the final rule employed unduly lenient testing methods in order to dilute the enhanced I/M performance standard and that EPA used the weak performance standard, in turn, to justify allowing biennial testing. In particular, NRDC challenged EPA’s decision to exempt older automobiles from many testing requirements, arguing that EPA was obliged to require the most stringent testing that was technologically feasible for all automobiles.<sup>361</sup> The court found that EPA had not been arbitrary and capricious in concluding that the costs of imposing IM-240 “high tech” inspection requirements on pre-1986 autos greatly exceeded the benefits.<sup>362</sup> The agency could sensibly conclude that idle tests would suffice for older carbureted, noncomputerized models, but would be insufficient for newer cars, which come equipped with sensors and computers that continually adjust emissions. But the statute did not provide EPA with discretion to exempt any vehicles from visual inspection to detect tampering.<sup>363</sup>

The court next took up the National Automobile Dealers Association (NADA) claims that EPA’s enhanced model I/M program reflected an unlawful and arbitrary bias against decentralized test-and-repair networks. NADA first argued that EPA had no authority to impose a 50% penalty on such systems for purposes of meeting the performance standard. The court, however, found nothing in the language of the statute to preclude EPA from levying a 50% penalty on states that could not demonstrate equivalency. Moreover, the evidence in the record “amply” supported EPA’s conclusion that decentralized test-and-repair regimes were only about one-half as effective as centralized test-only regimes. The court observed:

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357. *Id.* at 1137-38.

358. *Id.* at 1138 n.15.

359. *Id.* at 1138.

360. *Id.* at 1139-40.

361. *Id.* at 1142-43.

362. *Id.* at 1144.

363. *Id.*



The fundamental problems with these networks appear to be the incompetence of unlicensed and ill-trained testers and the inherent incentive on the part of testers simply to pass cars along for a quick fee (or the customer's satisfaction) instead of engaging in time-consuming repairs. The audits also revealed that testers frequently pass the vehicles of familiar customers, and that customers sometimes "shop" test-and-repair stations in search of a free pass.<sup>364</sup>

The agency also reasonably concluded that a decentralized test-only system was presumptively equivalent to a centralized test-only system based on the same audits of test and repair networks.<sup>365</sup> Finally, the court held that EPA was not arbitrary and capricious in using the IM-240 testing vehicle as the model for the performance-based equivalency determination. According to the court, the agency reasonably rejected the alternative BAR90 test that was in effect in some test-and-repair programs.<sup>366</sup>

## V. THE COLLAPSE OF THE 1990 INSPECTION AND MAINTENANCE REGIME

### A. *Progress Under the 1990 Amendments*

Congress hoped that the exceedingly complex, but relatively stringent 1990 Amendments would bring about relatively rapid improvements in air quality in less polluted areas and significant progress over a fairly short period in more heavily polluted areas. In 1991, just after the amendments were signed, there were ninety-eight nonattainment areas for photochemical oxidants and forty-two areas that did not meet the standards for carbon monoxide.<sup>367</sup> The statute envisioned that all but one of the carbon monoxide nonattainment areas would be in attainment by December 31, 1995,<sup>368</sup> and that seventy-four of the ninety-eight ozone nonattainment areas would attain the standards by November 15, 1996.<sup>369</sup>

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364. *Id.* at 1149.

365. *Id.* The court did not explain how audits of test-and-repair networks demonstrate the equivalence of centralized and decentralized test-only networks.

366. *Id.*

367. 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at 1-4, 1-10; *National Ambient Air Quality Standards: Hearings Before the Subcomm. on Oversight and Investigations and the Subcomm. on Health and Environment of the House Comm. on Commerce*, 104th Cong. 124 (1995) (statement of Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA) [hereinafter *National Ambient Air Quality Standards: Statement of Mary D. Nichols*].

368. Clean Air Act § 186(a)(1), 42 U.S.C.A. § 7512(a)(1) (West 1995). Only one carbon monoxide nonattainment area met the statutory definition for "serious"; the remaining 41 were designated "moderate." See 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at 1-4.

369. Clean Air Act § 181(a)(1), 42 U.S.C.A. § 7511(a)(1) (West 1995). EPA designated 43 ozone nonattainment areas "marginal" and 31 "moderate." 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at 1-10.

Although the results are mixed, it is clear that significant progress has been made in modestly polluted areas. According to EPA, only nine areas are currently in nonattainment for carbon monoxide, and fifty-five of the seventy-four marginal and moderate areas currently meet the standard for photochemical oxidants. On the other hand, only eight of the forty-two carbon monoxide and twenty-two of the seventy-four ozone areas have formally been redesignated as being in attainment, because formal redesignation must await three-years' worth of monitoring data.<sup>370</sup> In addition, eight of the forty-two carbon monoxide nonattainment areas apparently did not meet the primary NAAQS by the new deadline,<sup>371</sup> and it is likely that ten to twenty marginal and moderate areas will fail to meet the November 15, 1996 deadline for photochemical oxidants. Finally, ambient levels of nitrogen dioxide have actually risen since 1970 due primarily to a 14% increase in NO<sub>x</sub> emissions from power plants and non-road vehicles.<sup>372</sup> Although only one area (Los Angeles) is currently in nonattainment for NO<sub>x</sub>,<sup>373</sup> the increases in emissions is troubling because of the role that NO<sub>x</sub> plays in the formation of photochemical oxidants.

Despite significant progress in some states, others are making very little progress. A 1995 report prepared by Clean Air Network found that little or no progress was being made in Michigan, Missouri, Montana, Texas, and Virginia, and that fifteen other states were making only minimal progress.<sup>374</sup> The bottom line is that despite significant progress, more than 90 million people live in counties that are in nonattainment for carbon monoxide and photochemical oxidants, and many of those counties are still experiencing days during which pollution levels are quite high.<sup>375</sup> At the same time, some areas that have been in attainment for years or that have been nearly in attainment are now at risk of going non-

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370. Among the areas that have formally been redesignated as in attainment for ozone are Indianapolis, Toledo, Detroit, Winston-Salem, Memphis, and San Francisco. Areas now meeting the standards for carbon monoxide include Philadelphia, Baltimore, Washington, Cleveland, Memphis, Syracuse, and Winston-Salem. See *National Ambient Air Quality Standards*: Statement of Mary D. Nichols, *supra* note 367, at 126. Some of these areas may not retain that status for long. For example, Detroit may have to be redesignated "non-attainment" in light of recording its fourth exceedance of the primary standard in the last three years. See *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigation and the Subcomm. on Health and Environment of the House Comm. on Commerce*, 104th Cong. 20 (1995) (statement of Dennis Drake, Chief, Air Quality Division, Michigan Department of Environmental Quality) [hereinafter *Hearings Clean Air Act Oversight: State of Dennis Drake*].

371. These areas will presumably be "bumped up" to the status of "serious" nonattainment areas for which the statutory deadline is December 31, 2000.

372. *National Ambient Air Quality Standards*: Statement of Mary D. Nichols, *supra* note 367, at 125.

373. 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at 1-8.

374. *Several States Make Little or No Progress in Meeting Air Act Requirements, Report Says*, 26 *Env't Rep.* (BNA) No. 30, at 1286 (Dec. 1, 1995).

375. *Hearings on the Clean Air Act before the Subcomm. on Oversight of Governmental Affairs of the Senate Comm. on Governmental Affairs*, 104th Cong. 34 (1995) (testimony of Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA).

attainment.<sup>376</sup> Although this phenomenon is attributable to some extent to the very hot weather that the United States experienced in the summer of 1995, increased vehicle traffic in growing urban areas may have also played a role.

### *B. State Reactions to the 1994 Elections*

The 1994 elections did not just change the landscape of Congress. Soon after the 104th Congress convened, representatives of several state organizations, including the National Governors' Association and the Environmental Council of the States, drafted a long list of sixty-five proposals for "improving" the implementation of the Clean Air Act. Among other things, the sixty-five proposals included (1) a two year moratorium on the initiation of any sanctions against any state for failure to meet its obligations when the state acted in good faith, (2) EPA approval "committal SIPs" that adopted controls sufficient to produce a "substantial portion" of emissions reductions and promised to adopt additional controls in the future, and (3) revisions in the enhanced I/M requirements to do away with the preference for centralized test-only facilities and to allow states to adopt as enhanced I/M programs that were "only slightly more stringent" than basic I/M.<sup>377</sup>

Under the leadership of Governors George Allen of Virginia and Christine Todd Whitman of New Jersey, representatives of several states met with EPA Assistant Administrator Mary Nichols on January 18, 1995 to present their proposals. After an all-day meeting, EPA officials essentially declared an unconditional surrender.<sup>378</sup> State officials expressed their pleasure with EPA's newfound flexibility. The head of the State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials reported that the "states were extremely pleased with the level of cooperation and responsiveness that EPA provided at the meeting."<sup>379</sup>

EPA Administrator Browner denied that EPA was sacrificing clean air goals in its attempts to be more flexible with respect to the states: "We tried to give

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376. *Higher Temperatures Prompt Exceedances of EPA's Ambient Air Standard for Ozone*, 26 Env't Rep. (BNA) No. 10, at 862 (Sept. 1, 1995). At least 10 of the 61 areas designated as in attainment suffered at least one exceedence of the ozone standard during the summer of 1995. *Id.* The Detroit area, which had only recently been one of the success stories by achieving attainment status prior to 1995, suffered several exceedences during the summer of 1995. *Id.*

377. *Moratorium on Sanctions Under Clean Air Act Among Dozens of EPA Actions Sought by States*, 25 Env't Rep. (BNA) No. 38, at 1828 (Jan. 27, 1995) [hereinafter *Moratorium on Sanctions Under Clean Air Act*].

378. Gary Lee, *Compromising on Clean Air Act; Under Republican Pressure, EPA Reduces Enforcement Efforts*, WASH. POST, Feb. 21, 1996, at A1; see *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 19 (1995) (statement of Carol M. Browner, Administrator, EPA) [hereinafter *Hearings on Clean Air Act Oversight: Statement of Carol M. Browner*] ("EPA agreed to almost every recommendation from the states.").

379. *Moratorium on Sanctions Under Clean Air Act*, *supra* note 377, at 1828.

state officials as much flexibility as possible in reaching the goals set under the act. But we did not relax a single standard for improving air quality. We are not backtracking on the objectives of the statute.”<sup>380</sup> Browner hoped that by avoiding a showdown with those who would gut the Clean Air Act, the agency’s strategic retreat would avoid disastrous amendments.<sup>381</sup> The retreat, however, quickly became a rout. From that date forward, EPA backed down from virtually every confrontation with state officials.

### C. Continued Resistance to Inspection and Maintenance and the Demise of IM-240

According to EPA, automobile inspection and maintenance programs are “critical” to the nation’s efforts at improving air quality.<sup>382</sup> Yet most states remain bitterly opposed the concept. Although EPA had compiled a solid administrative record to support its strong preference for centralized test-only I/M programs, the battle was far from over. The same local car dealers and service stations that opposed centralized test-only I/M in Congress, in the rulemaking hearings, and in court continued to fight for decentralized test-and-repair regimes in the state legislatures.

#### 1. California

When Pete Wilson was running for Governor of California in 1990, he garnered many environmentalist votes by promising to be a Teddy Roosevelt-style conservationist.<sup>383</sup> Among other things, he promised to create a new cabinet-level Environmental Protection Agency to consolidate the regulatory functions of several state agencies, including the CARB.<sup>384</sup> Soon after he was elected, Wilson confidently predicted: “We are going to take charge of California’s

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380. Lee, *supra* note 378, at A1; see *Hearings on Clean Air Act Oversight*: Statement of Carol M. Browner, *supra* note 377, at 19.

381. Lee, *supra* note 378, at A1. According to Browner: “There are some in Congress who believe that the Clean Air Act should be repealed. By giving the states flexibility in enforcing the law, we hope to avoid a congressional fight over the act.” *Id.*

382. *Hearings on Clean Air Act Oversight*: Statement of Mary D. Nichols, *supra* note 54, at 175.

383. James P. Sweeney, *Governor a Letdown to ‘Green’ Boosters*, SAN DIEGO UNION-TRIB., Nov. 27, 1993, at A1.

384. Robert B. Gunnison, *Wilson Seeks State EPA To Coordinate Regulation*, S.F. CHRON., Apr. 18, 1991, at A1. Wilson’s promise to create a new CalEPA came in response to the unsuccessful “Big Green” initiative that was also on the 1990 ballot. Wilson opposed the environmentalist initiative, but promised to create a powerful agency to address the state’s environmental problems. Daniel C. Carson, *James Strock Takes Decisive Approach to Environment Post*, SAN DIEGO UNION-TRIB., Nov. 24, 1991, at A3.

environment in the 1990s.”<sup>385</sup> He hoped that the creation of a CalEPA, “[would] prove useful both in terms of a better physical environment, a safer physical environment and also, hopefully, a clearer regulatory picture for those who are regulated.”<sup>386</sup> Wilson was so certain that he could convince the legislature to create the new agency that he announced that he planned to appoint James M. Strock, the thirty-four-year-old Assistant Administrator for Enforcement at the U.S. Environmental Protection Agency during the Bush Administration, to head the agency as soon as the bill was passed.<sup>387</sup> Standing next to Wilson at a press conference, Strock promised to establish “a Cal-EPA that is tough, smart, creative and vigorous in its protection of our environment and public health.”<sup>388</sup> He believed that vigorous enforcement of the environmental laws “not only protects the public health, but it also assures that good corporate citizenship is not undercut by ill-gotten gains accruing to unscrupulous competitors.”<sup>389</sup> Both industry and environmental group representatives applauded Wilson’s selection.<sup>390</sup>

During hearings on the creation of the new cabinet level agency, Strock promised not to interfere with the independence of the environmental boards, like CARB, that would come under the new agency’s authority.<sup>391</sup> But Strock soon proposed a plan for consolidating and speeding up environmental permitting that would have taken away from the boards and local governments several of their traditional powers and vested them in regional boards appointed by the governor.<sup>392</sup> Environmentalists and many state legislators complained that this restructuring was designed primarily to address business complaints that state and local permit actions took too long. They worried that the move would undermine powerful local boards like the South Coast Air Quality Management District (SCAQMD) that had traditionally taken strong environmental positions on permitting issues.<sup>393</sup> Strock denied that the proposal was motivated by any desire to relax environmental standards.<sup>394</sup>

The legislature soon expressed its displeasure with Strock’s failure to consult the relevant legislative committees before announcing major new reorganizational initiatives that could adversely effect agencies like the CARB and SCAQMD.

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385. Robert B. Gunnison, *EPA Aide Picked as State Environment Boss*, S.F. CHRON., Jan. 30, 1991, at A3 [hereinafter Gunnison, *EPA Aide Picked as State Environment Boss*]; Richard C. Paddock, *Wilson Picks U.S. Official to Run 'Cal-EPA'*, L.A. TIMES, Jan. 30, 1991, at A3.

386. Paddock, *supra* note 385, at A3.

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*; Gunnison, *EPA Aide Picked as State Environment Boss*, *supra* note 385, at A3.

391. Ann Bancroft, *Lawmakers Criticize Proposal for State EPA*, S.F. CHRON., May 23, 1991, at A24.

392. Virginia Ellis & William Trombley, *Central Environmental Licensing Process Urged*, L.A. TIMES, Jan. 16, 1992, at A3.

393. Todd Woody, *Cal-EPA Ambushed by Legislators*, THE RECORDER, Apr. 13, 1992, at 1 [hereinafter Woody, *Cal-EPA Ambushed by Legislators*]; Ellis & Trombley, *supra* note 392, at A3.

394. Ellis & Trombley, *supra* note 392, at A3.

Assemblymember Byron Scher complained to the Budget Committee that instead of improving environmental protection, the new agency “seems more intent on seizing control over existing environmental protection programs.”<sup>395</sup> Speaker of the California Assembly Willie Brown, having played a role in the agency’s creation,<sup>396</sup> complained that CalEPA had improperly used funds from a CARB account for auto pollution programs to fund more than one half of CalEPA’s budget.<sup>397</sup> Budget committees in both houses later proposed severe cuts in the new agency’s budget.<sup>398</sup>

Surprised by the vehemence of the legislature’s negative reaction to the agency’s initial reorganizational efforts, Strock set about some serious fence mending in anticipation of his confirmation hearings in June.<sup>399</sup> Strock and his underlings spent much time during the next several weeks roaming the halls of the legislature attempting to soothe ruffled feathers by promising to limit his agency to a coordinating, rather than a supervisory role.<sup>400</sup> Although the agency’s budget took a significant hit, Strock’s conciliatory stance and a well-orchestrated barrage of letters of support from industry ensured his confirmation and the continued existence of CalEPA.<sup>401</sup> Struggling to deal with an unexpected budget deficit of \$10 billion resulting from a serious recession, the legislature had little time or inclination to engage the governor in a battle over a relatively minor state agency.<sup>402</sup>

Not long after its creation, the new CalEPA began to draw rave reviews from the California business community. Praising the agency’s “new spirit of cooperation,” the head of the Santa Clara County Manufacturing Group noted that the CARB “seems more interested in talking to business.”<sup>403</sup> State environmental groups reserved judgment. The League of Conservation Voters in late 1993 graded Wilson’s environmental performance and awarded him a “C.”<sup>404</sup>

Governor Wilson had also promised during the gubernatorial campaign to do something about the enormous growth in population in the state’s urban areas and

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395. Woody, *Cal-EPA Ambushed by Legislators*, *supra* note 393, at 1.

396. Dana Wilkie, *State EPA Draws Fire From Brown*, SAN DIEGO UNION-TRIB., Mar. 18, 1992, at A3. Among other things, Brown was expressing irritation at CalEPA’s failure to provide information to the legislature and its failure to complete a study on the disposal of used tires.

397. Woody, *Cal-EPA Ambushed by Legislators*, *supra* note 393, at 1.

398. *Id.*

399. Todd Woody, *After Rough Start, Strock Likely to Be Confirmed*, THE RECORDER, June 10, 1992, at 3 [hereinafter Woody, *After Rough Start, Strock Likely to Be Confirmed*].

400. *Id.*

401. *Id.*; Todd Woody, *Cal-EPA’s Strock Awaits Confirmation*, THE RECORDER, July 6, 1992, at 2 [hereinafter Woody, *Cal-EPA’s Strock Awaits Confirmation*].

402. Woody, *After Rough Start, Strock Likely to Be Confirmed*, *supra* note 399, at 3.

403. Jack Martin, *Business Backing, Business People Support California Environmental Protection Agency*, BUS. J., Feb. 17, 1992, at S17.

404. James P. Sweeney, *Study Gives Wilson An Environmental ‘C,’* SAN DIEGO UNION-TRIB., Dec. 21, 1993, at A3.

the adverse effects of the resulting urban sprawl.<sup>405</sup> In early July 1991, the governor appointed a fifteen member Growth Management Council to hold hearings and make recommendations on a comprehensive growth management plan for the state.<sup>406</sup> The governor's director of Policy and Research, who chaired the Commission, reported that he and Wilson shared the belief that the state would have to play a major role in growth related issues like air pollution and traffic congestion.<sup>407</sup> By the middle of March 1992, the Growth Management Council had submitted wide-ranging recommendations, but it was becoming clear that economic decline, rather than population growth, had climbed to the top of the Governor's agenda.<sup>408</sup> As the economic recession in California deepened in early 1992, the governor became more concerned with improving the state's business climate than with managing growth and its environmental consequences.<sup>409</sup> The Growth Management Council was soon overshadowed by the newly created Council on California Competitiveness, headed by former Los Angeles Olympic Games organizer Peter V. Ueberroth, that was charged with attracting new businesses and keeping existing businesses from fleeing the state.<sup>410</sup>

Increasingly, retaining existing industries and preventing job loss overwhelmed environmental protection in the state's hierarchy of goals.<sup>411</sup> Several reports, including one issued by the Ueberroth Council on Competitiveness, cited California's regulatory climate as a primary reason for the flight of companies from that state.<sup>412</sup> Governor Wilson announced in December 1992, that "we are going to try to undo all of these different layers of regulation" that Ueberroth had called "a job killing machine."<sup>413</sup> Wilson ordered all of the state agencies to review their policies, regulations, and permit procedures with an eye toward reducing red tape.<sup>414</sup> To administer this "red tape initiative," Governor Wilson created a new cabinet-level agency called the Department of Trade and Com-

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405. William Trombley, *Wilson Attacks Problems Tied to Growth*, L.A. TIMES, July 12, 1991, at A3 [hereinafter Trombley, *Wilson Attacks Problems Tied to Growth*]; William Trombley, *Wilson Has Yet to Act on Growth Plan*, L.A. TIMES, Mar. 9, 1992, at A3 [hereinafter Trombley, *Wilson Has Yet to Act on Growth Plan*].

406. Ron Sonenshine, *Dire Warnings On Development In California*, S.F. CHRON., July 16, 1991, at A3.

407. Trombley, *Wilson Attacks Problems Tied to Growth*, *supra* note 405, at A3.

408. Trombley, *Wilson Has Yet to Act on Growth Plan*, *supra* note 405, at A3.

409. Louise Kehoe, *Backlash in Golden State—After Years of Leading the Green Movement, Californians Have Had Enough*, FIN. TIMES, Apr. 22, 1992, at 15; Trombley, *Wilson Has Yet to Act on Growth Plan*, *supra* note 405, at A15.

410. Trombley, *Wilson Has Yet to Act on Growth Plan*, *supra* note 405, at A3.

411. Robert Reinhold, *California, Struggling in Slump, Faces High Hurdles to Recovery*, N.Y. TIMES, Dec. 21, 1992, at A1.

412. Howard Fine, *Wilson Steps Up Drive to Reduce Regs on Business*, ORANGE COUNTY BUS. J., Dec. 21, 1992, at 1 [hereinafter Fine, *Wilson Steps Up Drive to Reduce Regs on Business*]; Michael Parrish, *State's Regulators Laying a Gentler Hand on Business*, L.A. TIMES, Feb. 13, 1993, at A1.

413. Fine, *Wilson Steps Up Drive to Reduce Regs on Business*, *supra* note 412, at 1.

414. *Id.*

merce.<sup>415</sup> The business community, however, kept up the pressure on the clearly sympathetic governor. The chairman of the Industrial League of Orange County opined: "There has been an awful lot of good talk of streamlining state regulations, but so far, we have not seen any results at all."<sup>416</sup> Responding to this criticism, CalEPA head James Strock ordered a detailed study of the burden of California regulations on businesses and solicited ideas from industry on how costs could be shaved.<sup>417</sup> Yet despite the concern for the state's business climate, Strock wrote EPA in August 1992, in support of the centralized test-only I/M option, and expressed concern over "strong pressure from participants in our current smog-check program to preserve the status quo."<sup>418</sup>

By the spring of 1993, however, environmental groups were growing nervous. Sensing that the Wilson Administration was beginning to side with industry in most environmental disputes, they began to brace themselves "for an all-out attack on environmental regulation under the guise of spurring economic growth in the state."<sup>419</sup> This concern was well justified. Within months, Strock was singing a very different tune, and close observers were suggesting that partisan politics, not technological progress, was responsible for the change.<sup>420</sup>

Under heavy pressure from service station owners and with the active encouragement of the CalEPA head Strock, the state legislature refused to enact legislation providing for a centralized test-only enhanced I/M system.<sup>421</sup> Strock and Governor Wilson had become convinced that the existing decentralized test-and-repair system based on a somewhat improved BAR90 technology would be more effective than EPA's preferred decentralized test-only system based on IM-240. State officials expressed confidence in the integrity of the existing biennial decentralized test-and-repair system, despite a December 1992 "sting" operation in Los Angeles in which 32 service mechanics and station owners were arrested for fraudulently issuing almost 100,000 bogus smog certificates, nearly 3% of all certificates issued in Los Angeles for the year.<sup>422</sup> The service stations were able to fool the statewide computers by entering the serial number of a heavily polluting car into the computer while inserting the smog check probe into a clean burning auto.<sup>423</sup> Pointing out that a fraudulent certificate could be purchased for

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415. *Id.*

416. *Id.*

417. *Id.*

418. *Dirty-Air Politics*, SACRAMENTO BEE, Jan. 28, 1994, at B8.

419. Daniel M. Weintraub, *Wilson Juggles Ecology and Jobs*, L.A. TIMES, Mar. 15, 1993, at A3.

420. *Dirty-Air Politics*, *supra* note 418, at B8.

421. Elliot Diringier, *California Gets Air Ultimatum*, S.F. CHRON., Apr. 15, 1993, at A3; Greg Lucas, *EPA Plan for Cleaner Air*, S.F. CHRON., May 24, 1993, at A1.

422. Maria La Ganga, *32 Arrested in Sting Aimed at Fraudulent Smog Checks*, L.A. TIMES, Dec. 18, 1992, at A1.

423. *Id.*



about \$50-60, Los Angeles District Attorney Gil Garcetti reported that "Los Angeles is known as the Smog Check fraud capital of California."<sup>424</sup>

As the November 15, 1993 deadline for submitting enhanced I/M SIPs for serious, severe, and extreme urban nonattainment areas loomed on the not-too-distant horizon, EPA began to worry that states like California had no intention of complying with the statutory requirement. Reacting to reports that California intended to submit an enhanced I/M plan that would allow testing and repairs to take place at the same facility,<sup>425</sup> EPA Administrator Browner and Secretary of Transportation Fredrico Pena, on April 13, 1993, threatened California Governor Pete Wilson with a cutoff of \$1.7 billion in highway funds and two-for-one offset sanctions if the state did not submit an adequate enhanced I/M program in a timely fashion.<sup>426</sup> Nevertheless, abandoning test-and-repair was difficult in the face of determined opposition from service station owners who stood to lose almost \$450 million per year in inspection and repair business if the state moved to a centralized test-only system.<sup>427</sup> Strock estimated that moving to the EPA-preferred regime would cost the state 3000 jobs and cause up to 1300 businesses to close.<sup>428</sup> This prediction came at a time in which many businesspersons and public officials were complaining that environmental regulations were causing an "out-migration" of jobs from California to other states.<sup>429</sup> Invoking a popular anti-regulatory theme, a spokesperson for Governor Wilson maintained that California merely opposed EPA's "one-size-fits-all" approach to the enhanced I/M program and promised that California would submit an equally effective program that paid attention to the interests of California consumers and "small business employers."<sup>430</sup> Strock urged EPA to consider California's "unique" concern for environmental protection and the severe economic downturn that the state was suffering.<sup>431</sup>

After months of legislative paralysis, it looked as if EPA and the state had reached a compromise in late August. In a letter to California state senator Robert Presley, Administrator Browner agreed to a program in which all autos would have to be tested at centralized test-only facilities, but the car would have to be returned to the centralized facility to verify repairs only if it had been a "gross emitter."<sup>432</sup> Local environmental groups hoped that this would achieve a break-

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424. *Id.*

425. *State Warned of Possible Sanctions for Failure to Enhance Smog Check Program*, 24 *Env't Rep. (BNA)* No. 3, at 154 (May 21, 1993) [hereinafter *State Warned of Possible Sanctions*].

426. Diringer, *supra* note 421, at A3; *State Warned of Possible Sanctions*, *supra* note 425, at 154.

427. Lucas, *supra* note 421, at A1.

428. *Id.*

429. Mary B. Barber, *Is California Driving Business Out of the State?*, *CAL. J.*, May 1, 1993, at 9.

430. *State Warned of Possible Sanctions*, *supra* note 425, at 154.

431. Dale Vargas, *Wilson Blasts Federal Threat Over Car Smog Checks*, *SACRAMENTO BEE*, Apr. 23, 1993, at B1.

432. Marla Cone & Melissa Healy, *Plan to Revamp State Smog Check Endorsed by EPA*, *L.A. TIMES*, Aug. 27, 1993, at A3 (explaining how Browner agreed to be more flexible in California's smog check system).

through in the stalled negotiations.<sup>433</sup> Members of the State Assembly, however, did not approve of the compromise and continued to press for a test-and-repair system with greater enforcement of anti-fraud measures.<sup>434</sup> A California lobbyist reported that: "Some legislators are just itching for a fight with the EPA, saying: 'We dare you to impose sanctions.'"<sup>435</sup> Assembly Speaker Willie Brown, a prominent Democrat, opined: "No way in the world . . . would Clinton cut off highway funds."<sup>436</sup> A consultant to the Senate Transportation Committee noted: "They're talking big, but we have a hard time believing Bill Clinton would shut California down in the middle of a gubernatorial election."<sup>437</sup> A CalEPA official warned, however, that EPA would have to impose sanctions in light of California's intransigence, because "if they don't, everybody in the nation will know that the EPA is just full of hot air."<sup>438</sup>

The Wilson Administration also declined to sign on to the compromise, preferring instead to call EPA's bluff.<sup>439</sup> Throughout, CalEPA head William Strock maintained that California's test-and-repair program was just as effective as centralized test-only I/M.<sup>440</sup> In support of California's recalcitrant position, Strock quoted General Patton: "Never tell people how to do things . . . . Tell them what to do and they will surprise you by their ingenuity."<sup>441</sup>

Under heavy lobbying pressure from service station owners, the Senate Transportation Committee, on August 31, 1993, rejected the compromise bill and substituted a program favored by Governor Wilson that added little to the state's existing biennial "Smog Check" program.<sup>442</sup> CalEPA head Strock assured the committee that this program would be "much more protective of the environment" than EPA's favored program, citing a Rand Corporation study commissioned by the Senate committee that cast doubt on some of the assumptions

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433. *Id.*

434. *Id.*

435. *Id.*

436. Dana Wilkie, *State Plays \$1 Billion Game of Chicken with EPA Over Smog Checks*, SAN DIEGO UNION-TRIB., Aug. 30, 1993, at A3 [hereinafter Wilkie, *State Plays \$1 Billion Game*].

437. Dana Wilkie, *Smog-Check Standoff with EPA Grows Testy—Billions in Balance*, SAN DIEGO UNION-TRIB., Aug. 16, 1993, at A3.

438. *Id.*

439. Cone & Healy, *supra* note 432, at A3; Wilkie, *State Plays \$1 Billion Game*, *supra* note 436, at A3.

440. Stephen Green, *Smog-Check Showdown Looming*, SACRAMENTO BEE, Sept. 1, 1993, at A1.

441. Dana Wilkie, *Lawmakers Shun Federal Smog Plan*, SAN DIEGO UNION-TRIB., Sept. 1, 1993, at A3 [hereinafter Wilkie, *Lawmakers Shun Federal Smog Plan*].

442. *California Senate Panel Backs Measure That Could Result in Federal Sanctions*, 24 Env't Rep. (BNA) No. 19, at 859 (Sept. 10, 1993) [hereinafter *California Senate Panel Backs Measure*]; Green, *supra* note 440, at A1; Wilkie, *Lawmakers Shun Federal Smog Plan*, *supra* note 441, at A3. EPA Administrator Browner announced that EPA could have approved a system that provided for centralized test-only facilities for new autos and decentralized test-and-repair facilities for older autos. *Id.* The bill would have added to the existing test-and-repair program only additional training for inspectors, remote sensing to detect extremely heavily emitting autos, and somewhat greater enforcement resources. *Id.*

underlying EPA's model.<sup>443</sup> EPA's Assistant Administrator for Policy, Planning, and Evaluation, Tom Gardener, strongly disagreed with Strock and stated for the record: "We mean what we say. . . We intend to impose the sanctions on a more rapid timetable if we don't get a piece of acceptable legislation out of this session of the state Legislature."<sup>444</sup> Ultimately, the Senate failed to enact either bill. CalEPA head Strock later suggested that Senate President Pro Tem David Roberti torpedoed the bill at the behest of EPA Administrator Carol Browner.<sup>445</sup>

As the California legislative session drew to a close, Browner warned that EPA would impose sanctions within eight days after the session ended, if the legislature did not pass an acceptable bill.<sup>446</sup> State Assemblymember Richard Katz declared: "I refuse to sit here and be cowed by EPA's threat or force a bad solution down the throats of my constituents just to make a bureaucrat in D.C. happy."<sup>447</sup>

The republican members of the California congressional delegation wrote to EPA and DOT to urge them to accept California's I/M program, while the Democratic members wrote Governor Wilson urging him to come up with a program that could meet the federal requirements.<sup>448</sup> The Republicans demanded that EPA give California a chance to demonstrate that its test-and-repair program was just as effective as a centralized test-only regime. The Democrats urged Governor Wilson to demonstrate some political courage.<sup>449</sup> Suspecting that EPA would delay imposing sanctions if the California legislature enacted legislation allowing test-and-repair I/M, State Assemblymember Tom Hayden sent EPA a sixty-day letter informing EPA that he would sue the agency if it failed to invoke sanctions on November 16, 1993.<sup>450</sup>

The General Accounting Office (GAO), an investigatory agency of Congress, threw ice water on EPA's tough stance in early October 1993 when it criticized EPA's centralized test-only approach and opined that EPA did not have the legal authority to impose sanctions upon California immediately upon its failure to adopt an adequate enhanced I/M plan by November 15, 1993.<sup>451</sup> The GAO report argued that EPA's approach was too restrictive and was based on scientific con-

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443. *California Senate Panel Backs Measure*, *supra* note 442, at 859; Cone & Healy, *supra* note 432, at A3.

444. Wilkie, *Lawmakers Shun Federal Smog Plan*, *supra* note 441, at A3.

445. Chris Bowman, *U.S. Puts Deadline on Smog Dispute*, SACRAMENTO BEE, Jan. 8, 1994, at B1.

446. Greg Lucas, *EPA's Threat on Smog Testing*, S.F. CHRON., Sept. 3, 1993, at A17; Dana Wilkie, *EPA Ready to Act to Cut Off Money*, SAN DIEGO UNION-TRIB., Sept. 3, 1993, at A3.

447. Wilkie, *EPA Ready to Act to Cut Off Money*, *supra* note 446, at A3.

448. *State Warned of Possible Sanctions*, *supra* note 425, at 154.

449. *Id.*

450. *State's Failure to Adopt Enhanced I/M Plan Calls for EPA Sanctions, Lawmaker Tells EPA*, 24 *Env't Rep. (BNA) No. 23*, at 1083 (Oct. 8, 1993).

451. *GAO Report on Inspection-Maintenance Rule Draws Fire at Clean Air Act Oversight Hearing*, 24 *Env't Rep. (BNA) No. 27*, at 1238 (Nov. 5, 1993).

clusions that were laden with too many uncertainties.<sup>452</sup> The report was especially critical of EPA's decision to discount emissions reduction credits for decentralized test-and-repair programs by 50%.<sup>453</sup> Not surprisingly, California made frequent reference to the GAO report in renewing its request to EPA to approve its test-and-repair system.<sup>454</sup> But in congressional hearings on EPA's regulations and the GAO response, Congressman Henry Waxman criticized GAO for ignoring relevant information about enhanced I/M.<sup>455</sup> Referring to GAO's conclusion that EPA was required to give California an additional eighteen months to submit an adequate SIP before implementing sanctions, Waxman allowed that he was "struck by the brazen manner in which GAO lawyers dismiss provisions in the Clean Air Act. Perhaps GAO should consider that Congress meant what it said."<sup>456</sup>

When the November 15 deadline arrived, California submitted an I/M plan that did not differ substantially from its existing basic test-and-repair I/M program.<sup>457</sup> The primary addition was a promise to implement a vigorous remote sensing program to detect very badly polluting vehicles. The Wilson Administration thus consciously threw down the gauntlet and challenged EPA to make good on its threat to impose immediate sanctions.<sup>458</sup> Assistant Administrator Mary Nichols announced that the agency was considering invoking sanctions against California (and Illinois and Indiana as well) for failing to enact the legislation necessary to put a test-only system into place.<sup>459</sup> She noted that twenty-two states had submitted complete I/M programs by the deadline, fifteen states had submitted incomplete programs, and some had failed to submit adequate plans.<sup>460</sup> Although automatic sanctions would kick in upon the expiration of the statutory eighteen month sanctions clock, the Clean Air Act gives EPA the discretion to impose sanctions at any time on recalcitrant states.<sup>461</sup> Another EPA official expressed regret that some states were "totally thumbing their noses at

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452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. *EPA May Propose Sanctions for California Within Weeks for Inadequate I/M Program*, [1993] Daily Env't Rep. (BNA) No. 211, at A9 (Nov. 18, 1993), available in WESTLAW, BNA-DEN Database (on file with the *Pacific Law Journal*); Greg Lucas, *EPA Sure to Reject Smog Check Plan*, S.F. CHRON., Nov. 16, 1993, at C3. Interestingly, the legislation favored by Governor Wilson had still not passed the state senate by the time that California submitted its I/M program to EPA. *Id.*

458. Lucas, *supra* note 457, at C3.

459. *States that Failed to Authorize I/M Programs Considered for Sanctions, Air Office Chief Says*, 24 Env't Rep. (BNA) No. 29, at 1333 (Nov. 19, 1993).

460. *Id.*

461. *Id.*

EPA,” and opined that the discretionary sanctions could be expected sometime in March 1994.<sup>462</sup>

To make it clear that California was in fact thumbing its nose at EPA, Strock and two state senators joined California service station owners in a November 15, 1993 protest against EPA.<sup>463</sup> Three days later, Governor Wilson announced that Jananne Sharpless, the head of the CARB for the past eight years, had agreed to transfer to a lesser position in the state’s energy office.<sup>464</sup> Although Strock had earlier promised to preserve CARB’s independence, the transfer grew out of disagreements between Strock and Sharpless over I/M programs.<sup>465</sup> Unlike Strock, Sharpless had urged the state to cooperate with EPA in coming up with an acceptable centralized test-only system. The environmental director of the Los Angeles branch of the American Lung Association suggested that Sharpless’s removal was “an indication that California is going to step backward . . . .”<sup>466</sup> With polls indicating that most members of the public were more concerned about crime and the economy than the environment, Governor Wilson wanted to go into the 1994 gubernatorial campaign as the candidate devoted to preserving jobs, even if that cost him some “green” votes.<sup>467</sup>

The core of the California program consisted of biennial inspections at decentralized test-and-repair facilities coupled with the assurance that increased vigilance would identify and prosecute the facilities that were conducting fraudulent tests and issuing bogus certificates. CalEPA promised increased enforcement despite severe cutbacks in enforcement resources at both the state and local levels. Only six months before, Strock had complained that “grievous cuts” in CalEPA’s budget left it unable to fill the slack left by cuts in city and county enforcement programs.<sup>468</sup> With more than 9000 separate test-and-repair facilities to monitor and more than 2500 facilities in Los Angeles alone, it was not at all clear that the state could deliver on its promise of stepped up enforcement.<sup>469</sup> EPA Assistant Administrator Nichols opined that “[t]he state has added some features to the existing fraud-ridden and scandalous program designed to improve it a little, but they don’t come close to meeting the requirements.”<sup>470</sup>

After some intense negotiations between EPA Administrator Carol Browner and California Assemblymember Richard D. Katz and additional meetings bet-

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462. *Id.*

463. *Id.*

464. Chris Bowman & Judy Tachibana, *Air Board Chief's Exit Fuels Suspicion*, SACRAMENTO BEE, Nov. 19, 1993, at A1; Dan Walters, *Wilson Pushing Economy First*, SACRAMENTO BEE, Nov. 28, 1993, at A3.

465. See Walters, *supra* note 464, at A3 (discussing the disagreements between Strock and Sharpless).

466. Bowman & Tachibana, *supra* note 464, at A1.

467. Walters, *supra* note 464, at A3.

468. Erin Hallissy, *Pollution Prosecution Units Scaled Back as Budgets Shrink*, S.F. CHRON., May 10, 1993, at A15.

469. Green, *supra* note 440, at A1.

470. Jim Mayer, *State Given More Time to Devise Clean-Air Plan*, SACRAMENTO BEE, Nov. 25, 1993, at A1.

ween state leaders and EPA officials in late November 1993, EPA announced that it had decided not to seek immediate sanctions for the time being.<sup>471</sup> Assistant Administrator Nichols reported that: "Within the last few days there has been a recognition on the part of business, environmentalists, and legislators that we will be flexible, that the Smog Check was not just an unpleasant problem that had to be dealt with, but that we had to fix a program that is failing drastically."<sup>472</sup> CalEPA head Strock was "confident that this new spirit of cooperation on EPA's part will result in timely and swift action."<sup>473</sup> Katz was impressed with Browner's willingness to be flexible: "We decided that our goals were the same: to clean up the air in California, allowing small (smog-check) businesses to stay in business and not force anyone out of work during a recession."<sup>474</sup> Nichols cautioned, however, that the discussions had not reached any breakthroughs. At this point "our hope is not just to close our eyes and hold our nose and say the program meets the requirements, but that the state will live up to its past and come up with a plan that exceeds the federal requirements."<sup>475</sup> A Sierra Club lobbyist summed up the problem that faced state and federal negotiators: "Smog checks are like taxes and the EPA in this case is about as popular as the IRS. But both of them are necessary."<sup>476</sup>

As a possible compromise, California officials suggested requiring 30% of Los Angeles automobiles to undergo I/M at test-only facilities in 1995, and 60% in 1996. In the meantime, California would conduct a demonstration project of alternatives to centralized test-only facilities, including such alternatives as remote sensing techniques for identifying gross emitters.<sup>477</sup> As Assistant Administrator Nichols announced that the prospects were good that the California legislature would enact an acceptable bill in the Spring legislative session,<sup>478</sup> lower level EPA officials privately suggested that the agency had "caved in" to political pressure.<sup>479</sup>

The rapprochement, however, was short-lived. On January 7, 1994, EPA announced that it would impose discretionary sanctions on California (and on

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471. *Sanctions Against California Put On Hold*, 24 Env't Rep. (BNA) No. 31, at 1481 (Dec. 3, 1993); Mayer, *supra* note 470, at A1.

472. Mayer, *supra* note 470, at A1.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. *Failure to Adopt Proper I/M Programs Brings Proposed Sanctions in Three States*, 24 Env't Rep. (BNA) No. 37, at 1623 (Jan. 14, 1994) [hereinafter *Failure to Adopt Proper I/M Programs*]; *Remote Sensing Program on Auto Emissions Expected to Generate Profile, Satisfy EPA*, [1994] Daily Env't Rep. (BNA) No. 112, at d15 (June 14, 1994), available in WESTLAW, BNA-DEN Database (on file with the *Pacific Law Journal*) [hereinafter *Remote Sensing Program*].

478. *State, Federal Regulators Assess Problems In Implementing I/M Programs*, 24 Env't Rep. (BNA) No. 32, at 1505-06 (Dec. 10, 1993).

479. *Id.* at 1506.

Illinois and Indiana as well), because the state had failed to come up with an acceptable enhanced I/M program.<sup>480</sup> Despite “promising efforts,” the California legislature had still not passed the necessary legislation, and Assistant Administrator Nichols concluded that another threat of sanctions was necessary to inspire action.<sup>481</sup> The sanctions could be expected as early as May 1994.<sup>482</sup> Taken aback by this turn of events, Strock accused EPA of “playing games” with California officials: “We were negotiating together in good faith, then out of the blue, they say they’ll issue these sanctions.”<sup>483</sup> The announcement was, in his opinion, a “foolish action by the federal government” that raised “a question of good faith and even competence” of federal officials.<sup>484</sup> State Assemblymember Katz expressed disappointment at EPA’s apparent change of heart, noting that he had been engaged in serious negotiations with agency staff up until the day that the decision to invoke discretionary sanctions was announced.<sup>485</sup> He complained: “I don’t know how you negotiate with people that act like that.”<sup>486</sup> Invoking an ad hominem popularized by Alabama Governor George Wallace in the 1960s, Katz declared: “We will not roll over for some pointy-headed bureaucrat in Washington.”<sup>487</sup> He worried that the announcement could aid and abet legislators who opposed compromise measures: “I don’t see why the EPA feels the need to prove it’s the biggest kid on the block . . . . Particularly for people who don’t like the compromise, it could be a convenient excuse to go to war on this thing.”<sup>488</sup> Other officials maintained that the EPA announcement *was* tantamount to a declaration of war.<sup>489</sup>

Noting that for the last two weeks EPA had warned state officials that it could not delay sanctions for much longer, Assistant Administrator Nichols (whose head, in truth, is not especially pointed) maintained that the announcement should have come as no surprise to Katz and other California officials.<sup>490</sup> She pointed out that the SIPs for the only other area in which an adequate centralized I/M regime had not been approved (Chicago) needed only minor technical and funding

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480. Imposition of Statewide Sanctions on California Under the Clean Air Act Section 110(m) for Failure to Submit a Complete SIP Revision for an Enhanced Motor Vehicle Inspection and Maintenance Program, 59 Fed. Reg. 3534 (1994); *Failure to Adopt Proper I/M Programs*, *supra* note 477, at 1623.

481. Bowman, *supra* note 445, at B1.

482. *Citing Hardship from Los Angeles Quake, EPA Scuttles Plan for California Sanctions*, 24 Env’t Rep. (BNA) No. 39, at 1697 (Jan. 28, 1994) [hereinafter *Hardship from Los Angeles Quake*].

483. Bowman, *supra* note 445, at B1.

484. Marla Cone, *EPA Begins Steps to Penalize State Over Smog Plans*, L.A. TIMES, Jan. 8, 1994, at B1; Greg Lucas, *EPA Turns Up the Heat on State in Smog-Test War*, S.F. CHRON., Jan. 8, 1994, at A5.

485. *Failure to Adopt Proper I/M Programs*, *supra* note 477, at 1623.

486. *Id.*

487. Lucas, *supra* note 484, at A5.

488. Cone, *supra* note 484, at B1.

489. *Id.*

490. Bowman, *supra* note 445, at B1.

revisions, whereas the California legislation required a complete overhaul.<sup>491</sup> Nevertheless, she fully expected that acceptable legislation would be forthcoming before the sanctions took effect in late spring.<sup>492</sup> Democratic State Senator Robert Presley, author of a bill calling for centralized inspection and maintenance, suggested that far from being obstreperous, EPA had “been very patient and cooperative with California to this point.”<sup>493</sup> California Representative Henry Waxman, a primary author of the 1990 Clean Air Act Amendments, praised the announcement as a much-needed “wake up call to Governor Wilson and the California legislature.”<sup>494</sup> Environmental groups also praised the announcement.<sup>495</sup>

When the California legislature reconvened the next week, the Senate Transportation Committee quickly approved the same bill that it had approved in the previous session. The Bill’s sponsor, State Senator Newt Russell, declared that decentralized test-and-repair would be “user-friendly” and would “preserve the jobs of the current smog technicians.”<sup>496</sup> State Senator Tom Hayden, however, complained that the action would “plunge us into a legal and political confrontation with the federal government.”<sup>497</sup> Despite EPA’s warnings that the bill was unacceptable, Governor Wilson promised to sign it as soon as the full Senate passed it, which it did on January 20, 1994.<sup>498</sup>

Mother Nature provided EPA with a convenient excuse to forestall further confrontation in the form of a strong earthquake on January 17, 1994.<sup>499</sup> In light of the damage done to the Los Angeles transportation system, EPA announced that it would cancel its accelerated discretionary sanctions, but at the same time it urged Governor Wilson to veto the recently passed legislation.<sup>500</sup> The eighteen-month mandatory sanctions clock, however, continued to run, and it was scheduled to expire in June 1995.<sup>501</sup> EPA hoped that this conciliatory action would encourage the state to enact acceptable legislation,<sup>502</sup> but environmentalists worried that it would further reduce EPA’s credibility with recalcitrant states.<sup>503</sup>

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491. Cone, *supra* note 484, at B1.

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. Greg Lucas & Robert B. Gunnison, *Smog Bill Pits State Against EPA*, S.F. CHRON., Jan. 21, 1994, at A17.

497. *Id.*

498. *Legislature Plans Decentralized I/M Law Despite EPA Pressure, Proposed Sanctions*, 24 Env’t Rep. (BNA) No. 38, at 1657 (Jan. 21, 1994); Lucas & Gunnison, *supra* note 496, at A17. The California Assembly had already passed the bill during the previous session.

499. Greg Lucas, *EPA Gives State Smog Breather*, S.F. CHRON., Jan. 25, 1994, at A15.

500. *See id.* (citing *Hardship from Los Angeles Quake*, *supra* note 482, at 1697).

501. *Id.*

502. In a letter to Governor Wilson, EPA Administrator Browner wrote: “The tragedy in Southern California underscores the importance of all levels of government working together to meet the health and safety needs of our constituents.” Lucas, *supra* note 499, at A15.

503. California I/M Sanctions, 24 ELR 10101 (1994).



Governor Wilson accepted the proffered olive branch and announced on January 25, 1994, that the state would resume negotiations with EPA.<sup>504</sup> But the governor insisted that an agreement would have to be hammered out within two days to give the legislature time to enact the agreed-upon bill.<sup>505</sup> In a letter of the same date addressed to Administrator Browner, CalEPA head Strock insisted that any agreement must ensure that the 9000 existing smog check garages were not thrown out of business.<sup>506</sup> Browner agreed to send her chief of staff immediately to California to negotiate for her.<sup>507</sup> But it was naive to expect that an agreement could be hammered out on such a complex issue in two days.

On March 9, 1994, EPA and California announced that they had entered into a memorandum of understanding through which EPA agreed to approve a "hybrid" program in which the most heavily polluting 30% of the automobiles in Southern California would be required to undergo biennial testing at decentralized test-only facilities beginning in 1995.<sup>508</sup> All gross emitters detected through remote sensing would be required to engage in test-only inspections on an annual basis and the remaining vehicles would be selected randomly. Since California predicted that 26% of on-road vehicles were in the gross-emitter category, only 4% would have to be chosen randomly.<sup>509</sup> A \$15 million remote sensing demonstration project in Sacramento would be used to determine if more automobiles would need to undergo biennial test-only inspections. If necessary, an additional 30% of the automobiles in nonattainment areas would be subjected to biennial test-only inspections in 1996.<sup>510</sup> The program would employ very stringent cutpoint standards that would result in a failure rate of about 40% for those vehicles that were subjected to the test-only requirements.<sup>511</sup> This was double the 20% failure rate assumed in centralized test-only regimes.

CalEPA head Strock was pleased with the compromise: "California's program will meet or exceed Clean Air Act requirements—and do so while providing consumer convenience and relying on market competition."<sup>512</sup> Service station owners also applauded the agreement.<sup>513</sup> Environmental groups, however,

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504. Carl Ingram, *Wilson Sets Deadline on Smog Check*, L.A. TIMES, Jan. 26, 1994, A3.

505. *Id.*

506. *Id.*

507. *Id.*

508. Carl Ingram, *Accord Would Toughen Auto Smog Testing*, L.A. TIMES, Mar. 10, 1994, at A1; John Matthews, *Pact Near on State Smog Test Program Key Legislators OK Accord with U.S.*, SACRAMENTO BEE, Mar. 10, 1994, at A1; Dana Wilkie, *State, U.S. Agree on Stricter Smog Checks for Some*, SAN DIEGO UNION-TRIB., Mar. 10, 1994, at A1 [hereinafter Wilkie, *State, U.S. Agree*].

509. Wilkie, *State, U.S. Agree*, *supra* note 508, at A1.

510. *State, Federal Officials Set Agreement on I/M Plan to Bring About CAA Compliance*, 24 Env't Rep. (BNA) No. 46, at 1982 (Mar. 18, 1994).

511. *States Urged to Avoid California Example in Pursuing Alternative Vehicle I/M Programs*, 24 Env't Rep. (BNA) No. 46, at 1960 (Mar. 18, 1994) [hereinafter *States Urged to Avoid California Example*].

512. Matthews, *supra* note 508, at A1.

513. Ingram, *supra* note 508, at A1.

were dismayed by EPA's backtracking. A representative of the Natural Resources Defense Council observed that: "It sounds to me as if EPA has compromised much more than the legislative leaders."<sup>514</sup> The head of the California Coalition for Clean Air, however, thought that his organization could "live with" the agreement.<sup>515</sup>

On March 30, 1994, Governor Wilson signed three bills implementing the compromise.<sup>516</sup> One of the bills established a subsidy program to help low-income auto owners repair or retire grossly polluting vehicles.<sup>517</sup> Wilson announced that the compromise represented "a win-win situation for California," because it gave the state "the flexibility to target the worst polluting vehicles, get them fixed or off the road."<sup>518</sup> Environmentalists believed that the "hybrid" program would be much less effective than a centralized test-only regime, and predicted that the agreement would open up a "Let's Make A Deal" atmosphere in other states.<sup>519</sup> EPA urged other states not to regard the California agreement as a model for future "hybrid" programs where centralized test-only regimes were already in place.<sup>520</sup> At the time, several states, including Arizona, Louisiana, New York, Pennsylvania, and Virginia, were considering abandoning their centralized test-only I/M programs, and EPA was worried that they would begin to slide back toward the California hybrid program as a lowest common denominator.<sup>521</sup>

EPA's concerns were well-founded. Within days after the California compromise became public, the Environmental Protection Division of Georgia announced that it would delay entering into a contract with a private company to administer a centralized test-only I/M program for Atlanta. Noting significant public opposition to the centralized program, Georgia officials believed that delay was in order because the California agreement demonstrated that it was possible to come up with an acceptable enhanced I/M regime without implementing a centralized test-only regime.<sup>522</sup>

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514. *Id.*

515. *Id.*

516. *California Governor Signs Three I/M Bills*, 24 *Env't Rep. (BNA) No. 50*, at 2116 (Apr. 15, 1994) [hereinafter *California Governor Signs Three I/M Bills*].

517. *Legislature Approves Compromise I/M Bills; Wilson Says He Will Sign All Three Measures*, 24 *Env't Rep. (BNA) No. 47*, at 2017 (Mar. 25, 1994).

518. *California Governor Signs Three I/M Bills*, *supra* note 516, at 2116.

519. *States Urged to Avoid California Example*, *supra* note 511, at 1960.

520. *Id.*

521. *Id.* at 1960. New York Governor Mario Cuomo had written EPA on January 31, 1994, to ask whether EPA would accept a similar test-and-repair with enhanced enforcement program as a substitute for New York's proposed centralized test-only system. *Cuomo Seeks Clarification from Agency on Enhanced Inspection/Maintenance Programs*, 24 *Env't Rep. (BNA) No. 42*, at 1796 (Feb. 18, 1994).

522. *Georgia Delays Signing Contract for I/M Program*, 24 *Env't Rep. (BNA) No. 47*, at 2019 (Mar. 25, 1994). The State had already promulgated rules providing for only 25 test-only stations in the Atlanta area.

## 2. Texas

Unlike California, Texas initially decided to take EPA at its word, and initiated a centralized biennial test-only regime for the Houston and Dallas areas.<sup>523</sup> In July, 1993, the State entered into a seven-year contract with Tejas Testing Technology, Inc. to construct twenty-five centralized facilities in Dallas and twenty-eight facilities in Houston and begin operating them in January 1995.<sup>524</sup> The centers would service approximately 3,000,000 post-1968 model year vehicles in Houston alone.<sup>525</sup> The Texas partners in Tejas Testing owned companies that conducted safety inspections at multiple stations in Dallas and Houston, but they agreed to close their businesses upon being awarded the contract.<sup>526</sup> Another partner was Systems Control, Inc., a large testing company that had operated in California for eighteen years.<sup>527</sup> The stations were to be built so that most residents would be no more than five miles from a station and no person in the metropolitan area would be more than twelve miles away.<sup>528</sup> Tejas expected that each test would cost about \$20 and take about twenty minutes.<sup>529</sup> The state agency estimated that only about 20% of the tested vehicles would fail.<sup>530</sup> A state agency official promised that the agency was doing all it could "to make sure the consumer doesn't have to spend a lot of money, drive very far or wait very

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523. Scott Harper, *State Announces 'No-Risk' Emission Testing Period*, HOUSTON POST, Nov. 22, 1994, at A1. The state law provided for a two-year waiver of repair requirements for low-income auto owners and owners of certain specialty vehicles. *Id.* Tejas Testing was also required to provide referees to administer the waiver program. *Fueling Cleaner Air*, HOUSTON CHRON., Nov. 28, 1994, at E1. Some state officials later maintained that the Texas Air Control Board was coerced into a centralized test-only regime by an overly zealous EPA. *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigation of the House Comm. on Commerce*, 104th Cong. 297 (1995) (statement of Jim Horn, Texas State Representative) [hereinafter *Hearings on Clean Air Act Oversight: Statement of Jim Horn*]. In fact, the state legislature was under very little "pressure" from EPA when it enacted the legislation empowering the Texas Air Control Board to implement a centralized test-only regime, and the state agency touted the new regime as a major plus for the environment.

524. Terry Box, *Firm Picked to Run Auto Emissions Tests*, DALLAS MORNING NEWS, July 17, 1993, at A12; John Williams, *Emissions Test Plans Clearing Up*, HOUSTON CHRON., July 17, 1993, at A25. Since Dallas was not a severe nonattainment area, centralized I/M was essentially voluntary. The state therefore left in place about 2000 test-and-repair facilities for that area. The centralized facilities were to serve as a supplement to the decentralized facilities. *See* Box, *supra*, at A12.

525. Harper, *supra* note 523, at A1.

526. Williams, *supra* note 524, at A25.

527. Box, *supra* note 524, at A12. The partnership was formed by Merrill-Lynch in New York with financing from several international banks, including Bank of Montreal, Credit Suisse and Fuji Bank Ltd. David Plesa & Mary Lenz, *House Votes On Tailpipe Test Amid Warnings*, HOUSTON-POST, Jan. 26, 1995, at A1.

528. Box, *supra* note 524, at A12.

529. *Id.*; Williams, *supra* note 524, at A25.

530. Williams, *supra* note 524, at A25.

long.”<sup>531</sup> Elaborate precautions would be taken to prevent cheating.<sup>532</sup> Because local service stations would continue to provide annual state safety inspections, few jobs would be lost, and more than 900 jobs would be created.<sup>533</sup> To provide an additional incentive to avoid delays, operators of individual stations would be subject to fines if waiting times exceeded fifteen minutes on more than three occasions per month.<sup>534</sup> The head of the Texas Natural Resources Conservation Commission (TNRCC) anticipated a good deal of grumbling by affected drivers, but he maintained that the program was critical to achieving air quality in the Houston and Dallas areas.<sup>535</sup> The agency’s primary concern was ensuring that enough repair facilities became certified to meet the expected demand.<sup>536</sup>

#### D. EPA’s Cave-In

Meanwhile, the enhanced I/M programs that had already been implemented were encountering some problems. At the annual North American Motor Vehicle Emission Control Conference in Austin, Texas, on December 8, 1993, the head of the Emissions Control Strategies Branch of EPA’s Mobile Sources Office reported that administrative costs for the enhanced I/M program were running “substantially higher” than expected in areas where that program was in effect. The cost per test was also slightly higher at \$16 to \$21 per car, as compared to EPA’s original estimate of \$17 per car.<sup>537</sup> Another EPA official reported the agency’s concern that not enough technicians were being trained to run the high tech centralized testing facilities required by EPA regulations.<sup>538</sup> He worried that without well-trained technicians, there would be more frequent misdiagnoses, higher repair costs, and lower consumer satisfaction, all of which could threaten the political viability of the program.<sup>539</sup> The agency was pleased to report, however, some encouraging developments. For example, in some states with test-only regimes, the testing facilities were beginning to share information with the repair facilities to help ensure the adequacy of the repairs.<sup>540</sup>

Although EPA urged the states not to take the California experience as a signal that they were free to abandon EPA-approved centralized test-only I/M

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531. Robert Ingrassia, *Firms to Feel Impact of Air-Pollution Laws*, DALLAS MORNING NEWS, Aug. 7, 1993, at H1.

532. Williams, *supra* note 524, at A25.

533. Box, *supra* note 524, at A12; Williams, *supra* note 524, at A25.

534. Ingrassia, *supra* note 531, at A1.

535. Harper, *supra* note 523, at A1 (quoting John Hall as saying that “without implementing this program, it would be impossible to comply with our overall goals”).

536. *Id.*

537. State, *Federal Regulators Assess Problems In Implementing I/M Programs*, 24 Env’t Rep. (BNA) No. 32, at 1505 (Dec. 10, 1993).

538. *Id.* at 1506.

539. *Id.*

540. *Id.*

programs, it could not maintain that position in the face of numerous demands by similarly situated states for equal treatment. After meeting with governors from seven affected states, EPA, on December 8, 1994, announced that it would allow any state to substitute a hybrid program based on the California plan so long as the state demonstrated that the change would not prevent it from achieving the 15% "reasonable further progress" reduction in VOC emissions from both mobile and stationary sources that the statute required by November 15, 1996.<sup>541</sup> The agency even allowed states that had already begun to implement centralized I/M based on the IM-240 technology to claim extra credit toward the 15% VOC reduction target.<sup>542</sup> Some states were in fact counting on IM-240 based I/M for up to 40% of the required VOC emissions reductions.<sup>543</sup> Several states also decided to make greater use of remote sensing devices to identify autos in need of repairs.<sup>544</sup>

The agency, however, retained the 50% discount in emissions reductions that could be claimed by states using decentralized I/M.<sup>545</sup> Despite some attacks on the scientific basis for the 50% discount factor, EPA believed that it was supported by the best available data.<sup>546</sup> Determined to force EPA to abandon the 50% discount, Governor Wilson of California appointed a special committee on I/M to study the matter. As chairperson, Wilson appointed Lynn Scarlett,<sup>547</sup> vice-president of the Reason Foundation, a Santa Monica libertarian think tank specializing in privatizing governmental services.<sup>548</sup> Not surprisingly, the carefully chosen panel, which included no representatives from environmental groups,<sup>549</sup> rejected EPA's explanation<sup>550</sup> and vowed to conduct its own study of

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541. David Plesa, *EPA to Give States More Leeway on Emission Tests*, HOUSTON POST, Dec. 10, 1994, at A1; *States Allowed to Draft Hybrid I/M Programs But Must Reduce VOC Emissions By 15 Percent*, 25 Env't Rep. (BNA) No. 33, at 1606 (Dec. 16, 1994) [hereinafter *States Allowed to Draft Hybrid I/M Programs*].

542. *States Allowed to Draft Hybrid I/M Programs*, *supra* note 541, at 1606.

543. *Id.*

544. *Id.*

545. *California Panel Challenges Science of Emissions 50 Percent Discount Rule*, 25 Env't Rep. (BNA) No. 40, at 1911 (Feb. 10, 1995) [hereinafter *California Panel Challenges Science*].

546. *Id.*

547. James M. Strock, *U.S. Strings Tie Up State's Smog-Check Innovations*, SACRAMENTO BEE, Mar. 24, 1995, at B7. Ms. Scarlett was a frequent guest columnist in *U.S.A. Today*. Prior to the appointment, Ms. Scarlett's main claims to fame had been her crusade against mandatory recycling and food labeling laws and her libertarian advocacy of the repeal of drug and narcotics laws. See, e.g., Lynn Scarlett, *Forced Food Labeling Will Hurt Consumers*, USA TODAY, Mar. 12, 1990, at A6; Lynn Scarlett, *Give Up the Drug War; Legalize Drugs Instead*, USA TODAY, Sept. 6, 1989, at A8; Lynn Scarlett, *Make Your Environment Dirtier—Recycle*, WALL ST. J., Jan. 14, 1991, at A12; Lynn Scarlett, *Trash Glut Overrated; Recycling Overrated*, USA TODAY, Feb. 19, 1991, at A10.

548. Larry Gordon, *One Think Tank's Reasoning*, L.A. TIMES, May 29, 1992, at B1. The Reason Foundation's major contributors have included Amoco Corp., Ford Motor Co., Mobil Oil Corp., Xerox Corp., and several politically conservative trust funds. *Id.*

549. *Remote Sensing Program*, *supra* note 477, at 112.

550. For the committee's critique of EPA's mobile source model, see *Hearings on Clean Air Act: Statement of Lynn Scarlett*, *supra* note 63.

decentralized I/M.<sup>551</sup> Before the study had been completed, CalEPA head Strock wrote an editorial in which he excoriated EPA for refusing to let California claim more than 50% reductions for its hybrid program. Strock claimed that “[t]his invidious discount—which has no technical basis—is especially frustrating in California, where Governor Pete Wilson and a bipartisan group of legislators succeeded in a battle to retain the state’s privately run, decentralized testing and repair program.”<sup>552</sup> Strock applauded legislation pending in Congress that would prevent EPA from imposing centralized I/M on any state.<sup>553</sup>

EPA began to read the writing on the wall when EPA Administrator Browner and Assistant Administrator Nichols met with several state governors and other representatives for nearly eight hours on January 18, 1995. The governors threatened to seek legislation to overhaul the Clean Air Act in the newly installed Congress, a body that was by any measure much more hostile to EPA and the programs it administered than any previous Congress. EPA officials were no doubt also aware of the fact that Newt Gingrich had written the governor of Georgia in March, 1994, to express his view that EPA “has once again overstepped its bounds by mandating Georgia use a centralized emission testing system,” and to ensure the governor that “I am really trying to stop this plan.”<sup>554</sup> As part of a general agreement to allow more “flexible” implementation approaches, EPA agreed to approve decentralized test-and-repair systems as enhanced I/M.<sup>555</sup> At the same time, the agency opposed any changes to the statute, arguing that “within the existing Clean Air Act we can find answers to the specific problems or concerns that have been raised.”<sup>556</sup>

After enduring some very hostile House oversight hearings in March,<sup>557</sup> the agency, on April 28, 1995, proposed formal amendments to its enhanced I/M regulations that promised still more “flexibility.” The agency proposed a less stringent performance standard in areas like Houston, where automobile emissions did not contribute as greatly to overall VOC emissions and in areas where states could make the 15% reasonable further progress demonstrations on the basis of emissions reductions from other sources. EPA predicted that this “low enhanced” performance standard would prove especially useful in ozone transport areas. The proposal would also allow states to experiment with “hybrid” systems using different combinations of testing equipment, remote sensing devices, and centralized and decentralized regimes. States would be allowed to employ less

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551. *California Panel Challenges Science*, *supra* note 545, at 1911.

552. Strock, *supra* note 546, at B1.

553. *Id.*

554. Katie Kerwin, *Moves to Kill Emissions Programs*, ROCKY MOUNTAIN NEWS, Jan. 23, 1995, at A4.

555. Lee, *supra* note 378, at A1.

556. Katie Kerwin, *EPA Bucks Plan to Dump Tailpipe Tests*, ROCKY MOUNTAIN NEWS, Jan. 26, 1995, at A16.

557. *Hearings on Clean Air Oversight Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. (1995).

expensive technologies than IM-240 if they were suitably effective. But the states using hybrid systems could only claim 50% of the emissions reductions that the technology was capable of achieving in demonstrating reasonable further progress. States would be given additional credit for effective technician training programs. Finally, states would be allowed to phase in the \$450 repair waiver floor over a period of years and drop the previous one-waiver-per-vehicle requirement to soften the impact on low-income drivers.<sup>558</sup>

Assistant Administrator Mary Nichols explained that the concessions were merely an acknowledgment of the reality that "many states had already either abandoned or slowed down their progress on adopting and moving forward with inspection and maintenance programs because of opposition, sometimes from the service station industry, sometimes from members of the legislature, or various constituency groups."<sup>559</sup> She urged Congress to allow EPA to attempt to implement "common sense revisions" to its enhanced I/M regulations.<sup>560</sup>

The concessions were not enough to satisfy the agency's critics. The state agencies and service station owners were adamantly opposed to the 50% discount for hybrid enhanced I/M programs.<sup>561</sup> They argued that the factor was based on audits of unknown accuracy and not "systematically defined by mathematical relationships."<sup>562</sup> The Service Station Dealers of America argued that "[s]o long as decentralized programs continue to be subjected to the 50% credit discount, then this entire procedure is nothing but fluff, and will assuredly be seen by Congress, the states, and the public as a thinly disguised attempt to head off legislative action."<sup>563</sup> It also argued against any suggestion that IM-240 should be required in testing facilities and urged that EPA allow BAR90 plus remote sensing or on-road testing as an alternative.<sup>564</sup> The Executive Director of the Texas Natural Resource Conservation Commission (TNRCC) argued that EPA should find decentralized test-and-repair regimes to be presumptively equivalent to centralized test-only regimes, thereby placing the burden on EPA to justify refusal to approve plans containing the former systems.<sup>565</sup>

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558. Inspection/Maintenance Flexibility Amendments, 60 Fed. Reg. 20934 (1995); *Hearings on Clean Air Act Oversight: Statement of Mary D. Nichols*, *supra* note 38, at 177; *Proposal Would Allow Varied Approaches for State Inspection-Maintenance Programs*, 25 Env't Rep. (BNA) No. 51, at 2524 (Apr. 28, 1995).

559. *Morning Edition: Government Will Relax Auto Emissions Testing for Now* (National Public Radio broadcast, Apr. 20, 1995) (statement of Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA) (on file with the *Pacific Law Journal*).

560. *National Ambient Air Quality Standards: Statement of Mary D. Nichols*, *supra* note 367, at 126.

561. *Commentators Have Doubts About I/M Changes; Sufficient Flexibility Still Said Lacking*, 26 Env't Rep. (BNA) No. 8 at 458 (June 23, 1995) [hereinafter *Commentators Have Doubts About I/M Changes*].

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

On the other hand, representatives of the centralized testing industry urged EPA not to cave into pressure from states that were themselves pressured by local service station owners into opposing EPA's centralized testing presumption.<sup>566</sup> They warned that "[t]he assignment of SIP credits based on what is politically expedient at the time will only undermine the most cost-effective emission reduction strategy that has been identified to date."<sup>567</sup> Environmental groups agreed, arguing that EPA was in reality providing not for greater flexibility, but for reduced effectiveness.<sup>568</sup>

EPA soon began to back away from its 50% discount position. In May 12 hearings before the House Appropriations Committee, Administrator Browner testified that the agency would be willing to allow greater than 50% credit for a decentralized test-and-repair system if the state could show that it was equally effective.<sup>569</sup>

The final revision to the enhanced I/M rule, published on September 7, 1995, contained few deviations from the proposal.<sup>570</sup> EPA was confident that the new regulations provided "maximum flexibility" to the states. The final rule retained the "low enhanced" performance standard.<sup>571</sup> It also provided for biennial testing, but did not require centralized test-only facilities or the IM-240 testing technology. Predicting that the new performance standard would achieve "slightly less than one-third" the emissions reductions of the original regulations,<sup>572</sup> the agency also retained the 50% discount factor.<sup>573</sup> Congress later sealed this victory for the advocates of decentralized test-and-repair programs when it passed on, November 18, 1995, a rider to the Highway Appropriations Act (which was signed by President Clinton) that prohibited EPA from insisting that states adopt test-only enhanced I/M based on IM-240 technology.<sup>574</sup>

### 1. *Effect of EPA's Retrenchment in California*

While the proposed changes to EPA's regulations were pending, EPA approved on July 5, 1995 California's hybrid enhanced I/M program, thereby halting the eighteen month automatic sanctions clock in the nick of time.<sup>575</sup> The

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566. *Id.*

567. *Id.*

568. *Id.*

569. *Id.*

570. *Rule On Inspection, Maintenance Programs Gives States Greater Flexibility, EPA Says*, 26 Env't Rep. (BNA) No. 19, at 896 (Sept. 15, 1995).

571. *Id.*

572. *Id.*

573. *Id.*

574. *Congress Passes Bill that Would Delete Requirement for Test-Only I/M Facilities*, 26 Env't Rep. (BNA) No. 29, at 1262 (Nov. 24, 1995).

575. *Hybrid Inspection/Maintenance Program Approved by EPA, Halting Sanctions Threat*, 26 Env't Rep. No. 11, at 570 (July 14, 1995) [hereinafter *Hybrid Inspection/Maintenance Program*].



proposed SIP had been submitted to EPA hours before the expiration of the sanctions clock, and EPA issued a clock-stopping "completeness" finding within minutes. Because it had an opportunity to review the SIP as it was being developed, the agency was able to approve the full plan in less than a week.<sup>576</sup> EPA was confident that the SIP would meet EPA's soon to be finalized "low enhanced" performance standard.<sup>577</sup> Under the plan, only "gross emitters" detected through remote sensing (about 15% of the total population) would be required to use test-only facilities. All remaining autos could be tested at test-and-repair facilities, which would have to use acceleration simulation mode (ASM) equipment that was less costly and less effective than IM-240, but more effective than idle mode testing.<sup>578</sup> In approving the SIP, EPA did not have to resolve the issue of the extent to which emissions reductions would have to be discounted, because California's 15% reduction demonstration was not due until sometime prior to November 15, 1996. In his cover letter to Administrator Browner, however, CalEPA head Strock offered: "Frankly, it is inconceivable that U.S. EPA will simply not give us credit for the emissions reduction our program is required to produce."<sup>579</sup> An EPA spokesman held open the possibility that the new program could get full credit.<sup>580</sup> In the end, EPA was forced to do what three years earlier it had hoped not to do: "close our eyes and hold our nose and say the program meets the requirements," when in fact the agency staff knew full-well that the program would not work.<sup>581</sup>

## 2. *Effect of EPA's Retrenchment in Texas*

By the time that EPA announced on December 6, 1994, that it would allow states to implement California's "hybrid" program instead of centralized test-only I/M, Tejas Testing had spent over \$100 million constructing a network of fifty-five multi-lane state-of-the-art IM-240 test-only stations and ten referee stations in Houston, Dallas, and Beaumont/Port Arthur.<sup>582</sup> Tejas contracted with forty-three franchisees (70% of which were women or members of minority groups) to run the stations. For example, Claudia Wilson, a pediatric nurse who was actively involved in programs to prevent lead poisoning in children, invested

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576. *Id.*

577. *Id.*

578. *Id.*

579. *State's Reworked I/M Plan Submitted to EPA; Test-Only Facilities Sought in Some Localities*, 26 *Env't Rep. (BNA) No. 10*, at 535 (July 7, 1995).

580. *Hybrid Inspection/Maintenance Program*, *supra* note 575, at 570.

581. *See* Mayer, *supra* note 470, at A1.

582. David Plesa, *EPA to Give States More Leeway on Emission Tests*, *HOUSTON POST*, Dec. 10, 1994, at A1 [hereinafter Plesa, *EPA to Give States More Leeway*]; *Texas Governor Expected to OK I/M Delay*, 25 *Env't Rep. (BNA) No. 39*, at 1885 (Feb. 3, 1995). Twenty-seven of the stations were located in the Houston area. David Plesa, *Wheels in Motion Today for Emission Test Trial Run*, *HOUSTON POST*, Dec. 12, 1994, at A1 [hereinafter Plesa, *Wheels in Motion Today for Emission Test Trial Run*].

\$7000 of her savings and arranged for a \$32,000 bank loan to purchase a franchise because “[i]t looked like a fantastic opportunity to marry environmental issues, lead reduction and business.”<sup>583</sup>

As Texas environmental officials pondered how to react to EPA’s cave-in, Tejas Testing began offering “early-bird” tests in the Houston and Dallas areas free of charge on December 12, 1994.<sup>584</sup> TNRCC purchased billboards and advertising time on TV and radio in an attempt to educate the public about how the system would work.<sup>585</sup> The locations of all of the testing facilities were given prominent play in local newspapers.<sup>586</sup> Environmentalists were also supportive of the centralized program. A Sierra Club representative noted that “[i]t is one more thing to deal with and it will cost some money, but it means cleaner air for everybody.”<sup>587</sup>

The head of TNRCC, John Hall, announced on January 1, 1995, that EPA’s action would not affect the implementation of the program.<sup>588</sup> Noting that the Houston area still had to come up with a 15% reduction in VOC emissions by the end of 1996, Hall opined that it was “inconceivable [that] Houston can meet the standards without getting the maximum levels of emissions reductions from cars, trucks, and buses.”<sup>589</sup> The state agency would soon change its tune. Indeed, state officials were already considering a “hybrid” system like California’s as an option to recommend to the Texas Legislature when it convened in January, 1995. When reminded that Tejas Testing’s contract with the State of Texas guaranteed it an adequate return on its investment, Hall suggested that TNRCC would look into legal mechanisms for making the federal government pay Tejas’s losses.<sup>590</sup>

The local press rapidly picked up on early complaints about the program and Hall’s suggestion that things could be changed.<sup>591</sup> Perhaps more importantly, local talk-radio hosts began to stir up public opposition to the program even before it had been given a chance function in the real world.<sup>592</sup>

Not surprisingly, the first day of trial tests did not go as smoothly as planned. In Beaumont/Port Arthur, the “early bird” program was so well advertised that hundreds of customers turned out on the first day, and lines grew to two hours in

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583. Sylvia Moreno, *Emission-Test Firm Fears Program Delay Company May Face Ruin, Lawmakers Told*, DALLAS MORNING NEWS, Jan. 25, 1995, at A22.

584. Plesa, *Wheels in Motion Today for Emission Test Trial Run*, *supra* note 582, at A1.

585. *Id.*

586. *Id.*

587. *Id.*

588. Plesa, *EPA to Give States More Leeway*, *supra* note 582, at A1.

589. *Id.*

590. *Id.*

591. Bill Dawson, *Emissions Test Mess; State is Right to Begin Anti-Air Pollution Program*, HOUSTON POST, Dec. 31, 1994, at A22 (editorial referring to the “chaos surrounding the start of program” and TNRCC’s proposed changes, but urging TNRCC not to delay implementation).

592. Clay Robison, *Political Pollution Could Choke Us All*, HOUSTON CHRON., Sept. 3, 1995, at O2.

length.<sup>593</sup> In Houston, the system became overloaded when the central computer allowed only 500 of the 800 inspectors to log on.<sup>594</sup> Hour-long waits were not uncommon at a station near the Astrodome.<sup>595</sup> One customer who became annoyed with the length of the wait expressed his view that air pollution in Houston "is more of a chemical industry problem than it is automobiles."<sup>596</sup> Once the computer error was eliminated, however, only a handful of facilities reported delays.<sup>597</sup> At the facilities where waits were reported, TNRCC discovered that much of the delay was caused by lengthy conversations between curious customers and station employees about how the tests worked and how the program would be conducted in the future.<sup>598</sup> TNRCC also speculated that the absence of a fee for the early bird tests probably created an artificially high demand on the first few days.<sup>599</sup> Tejas attributed some of the longer-than-expected waits to the understandable inability of first-time technicians to coordinate with one another.<sup>600</sup> A Tejas spokesman noted that "[t]here is a big learning curve here. You have to expect some glitches."<sup>601</sup>

Overall, 25% of the 16,500 vehicles checked during the first trial week failed in Houston,<sup>602</sup> somewhat higher than the 20% predicted failure rate, but only 18% failed in Dallas.<sup>603</sup> Most of the failures were caused by engine misfiring and required only minor repairs.<sup>604</sup> Finally, a few motorists complained that the testing process had damaged their hoods, dirtied their seat covers, or had otherwise caused their cars not to function properly.<sup>605</sup> While acknowledging the need to

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593. Bill Dawson, *Waits Choke Some Drivers As State's Smog-Checks Get In Gear*, HOUSTON CHRON., Dec. 13, 1994, at A17 [hereinafter Dawson, *Waits Choke Some Drivers As State's Smog-Checks Get In Gear*].

594. *Id.*

595. David Plesa, *Emissions Tests Start Up Slowly at Some Centers*, HOUSTON POST, Dec. 13, 1994, at A1 [hereinafter Plesa, *Emissions Tests Start Up Slowly at Some Centers*].

596. Dawson, *Waits Choke Some Drivers As State's Smog-Checks Get In Gear*, *supra* note 593, at A17.

597. Plesa, *Emissions Tests Start Up Slowly at Some Centers*, *supra* note 595, at A1.

598. Lydia Cum, *Improvements Expected Once Emissions Tests Begin for Real*, HOUSTON CHRON., Dec. 31, 1994, at A26.

599. *Id.*

600. Dawson, *Waits Choke Some Drivers As State's Smog-Checks Get In Gear*, *supra* note 593, at A17.

601. Plesa, *Emissions Tests Start Up Slowly at Some Centers*, *supra* note 595, at A1.

602. Plesa, *Wheels in Motion Today for Emission Test Trial Run*, *supra* note 582, at A1; John J. Sanko, *25 Percent of Cars Failed Their Emission Tests*, HOUSTON POST, Dec. 18, 1994, at A53.

603. John Williams & John Makeig, *Whitmire Seeks To Void Emissions-Test Contract*, HOUSTON CHRON., Dec. 21, 1994, at A1.

604. David Plesa, *First Day of Emissions Testing: Sees 22 Percent of Vehicles Fail*, HOUSTON POST, Dec. 14, 1994, at A1.

605. Michael Saul, *Auto Firm Accused of Damages; 52 Claims Filed Over Emission Tests*, DALLAS MORNING NEWS, Dec. 31, 1994, at A23. By the end of December, after more than 60,000 autos had been tested at Tejas facilities, the company had received 52 insurance complaints from drivers who claimed that the testing process had damaged their vehicles. A spokesman for Tejas Testing was not alarmed by the number of claims and promised to pay for any damage caused by the testing process. A TNRCC spokesperson agreed that the number of claims was not surprising. *Id.*

reduce delays and prevent damage to tested vehicles, Tejas executives and TNRCC officials were generally pleased with the results.<sup>606</sup>

Despite the relatively successful first week, the talk radio hosts were beginning to have an impact. The Republican sweep of the governor's office and considerable conservative gains in the legislature in the November 1994 elections provided a receptive audience to complaints from Houstonians who did not want to go to the trouble of having their automobiles tested. Political pressure began to mount on TNRCC to abandon the centralized test-only regime.<sup>607</sup> A spokesman for TNRCC noted that EPA's capitulation put his agency in a "very precarious position" when it came to defending the existing program.<sup>608</sup> Chairman Hall complained: "You do exactly what the federal government tells you to do and then you wake up one morning and find they have changed their minds."<sup>609</sup>

On December 20, 1994, only eight days after the "early bird" program was initiated, a TNRCC spokesman announced that the agency was busily formulating plans for an alternative I/M system that would be "less hostile to the public."<sup>610</sup> Among other options, the agency was considering a proposal to exempt from mandatory testing all vehicles less than six years old.<sup>611</sup> Since Tejas's contract still guaranteed an adequate return on its investment, however, owners of every automobile would have to pay a biennial fee whether or not the vehicle was tested.<sup>612</sup>

On December 21, 1994, state senator John Whitmire of Houston demanded a complete repeal of the centralized test-only program,<sup>613</sup> and he urged motorists to boycott the Tejas facilities.<sup>614</sup> Whitmire claimed that TNRCC should not concern itself with making Tejas whole, because the State could simply cancel the Tejas contract for poor performance by the testing company. Citing no evidence to support this surprising conclusion, he announced that the State should not worry about fairness to Tejas, because it was merely "a group of speculators that came to Texas to make millions of dollars from an ill-conceived, unreasonable and abusive testing program."<sup>615</sup> Securing the required 15% reduction in emissions required by the Clean Air Act should not detain the state, because Congress

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606. Dawson, *Waits Choke Some Drivers As State's Smog-Checks Get In Gear*, *supra* note 591, at A17; Plesa, *Emissions Tests Start Up Slowly at Some Centers*, *supra* note 595, at A1.

607. David Plesa, *State Eyes Change in Auto Tests*, HOUSTON POST, Dec. 20, 1994, at A1 [hereinafter Plesa, *State Eyes Change in Auto Tests*].

608. Ralph K.M. Haurwitz, *Governor-Elect Bush Views Options to Ease Vehicle Testing*, AUSTIN AMERICAN-STATESMAN, Dec. 22, 1994, at B1.

609. David Plesa, *Doubt Clouds Emission Test Plan's Future; It Looked Solid on Paper, But Reality Unkind*, HOUSTON POST, Dec. 25, 1994, at A1 [hereinafter Plesa, *Doubt Clouds Emission Test Plan's Future*].

610. Plesa, *State Eyes Change in Auto Tests*, *supra* note 607, at A1.

611. *Id.* .

612. *Id.*

613. Williams & Makeig, *supra* note 603, at A1.

614. David Plesa, *Bush Sees 'Chaos' in Auto Tests*, HOUSTON POST, Dec. 21, 1994, at A1.

615. Williams & Makeig, *supra* note 603, at A1.

was sure to amend the Clean Air Act within the next two years to relieve the states of that obligation.<sup>616</sup>

Governor-elect George Bush, Jr. lent his support to the opponents of the centralized system, claiming (without any supporting evidence) that the system was "too onerous and will not work."<sup>617</sup> At a local Chamber of Commerce luncheon, Bush claimed that the centralized system would "create chaos in Texas," and he announced that he supported efforts by Houston Representative Tom DeLay to amend the Clean Air Act to eliminate all mandatory I/M requirements.<sup>618</sup> Echoing California officials, Bush argued that because 70% of auto emissions came from older autos, the I/M program should be directed exclusively to those problem cars.<sup>619</sup> Even moderate legislators who supported a testing program suggested that a test-and-repair program would be equally effective.<sup>620</sup> Lieutenant Governor Bob Bullock, a democrat, claimed that centralized I/M was "too onerous."<sup>621</sup> A spokesman for TNRCC, which made no effort to challenge the perceptions generated in the local media, offered that "we are gathering directions from the incoming leadership and elected officials to formulate the type of program they want in the State of Texas."<sup>622</sup>

Tejas Testing provided the only hard data on consumer acceptance of the program when it announced that the people who had actually used the system during the first week had filled out comment cards that were generally favorable.<sup>623</sup> During the first two weeks in which more than 40,000 autos were tested, Tejas received only 500 complaints.<sup>624</sup> During that time there were a few delays of more than one hour, but the average waiting time for all autos was ten minutes.<sup>625</sup> For Houstonians, who think nothing of spending two hours per day in bumper-to-bumper traffic, this was not an extensive wait. Tejas said that it was willing to work with TNRCC to make any necessary improvements.<sup>626</sup> But it pointed out that if the state abandoned centralized I/M, it would have to come up with equivalent emissions reductions from other polluters, presumably stationary

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616. *Id.*

617. *Id.*

618. Plesa, *Bush Sees 'Chaos' in Auto Tests*, *supra* note 614, at A1; Williams & Makeig, *supra* note 603, at A1.

619. Williams & Makeig, *supra* note 603, at A1.

620. *Id.*

621. Plesa, *Bush Sees 'Chaos' in Auto Tests*, *supra* note 614, at A1.

622. *Id.*

623. *Id.*

624. Victoria Loe, *Testing Firm Backs Plan on Emissions*, DALLAS MORNING NEWS, Dec. 28, 1994, at A23.

625. *Id.*; see Mary Lenz, *Tailpipe Test Firm Warns Against Delays*, HOUSTON POST, Dec. 28, 1994, at A1.

626. Plesa, *Bush Sees 'Chaos' in Auto Tests*, *supra* note 614, at A1.

sources.<sup>627</sup> And it warned: "We lived up to our end of the bargain. We would hope the Legislature would live up to their end, if it comes to that."<sup>628</sup>

The local companies that had contracted with Tejas to run individual testing facilities were barely heard in the cacophony. The operator of the Pasadena facility, M.S. Safadi, reported that his employees were already beginning to jump ship for fear that their jobs would be eliminated by the legislature.<sup>629</sup> The local facility operators recognized a few problems with the early operation of the program, but witnessed nothing to inspire the vilification that was beginning to flow from the talk show hosts and local politicians.<sup>630</sup>

A representative of the Sierra Club characterized the sudden and unexpected outpouring from state elected officials as "cheap political pandering."<sup>631</sup> Because the governor-elect had not been involved in the extensive planning and preparation for the centralized program, "he can't really be expected to know how important this program is."<sup>632</sup> To the Sierra Club, however, it was clear that absent an effective I/M program, Houston would never achieve the NAAQS for ozone.<sup>633</sup>

Governor Bush met with officials from TNRCC on December 22, 1994 to explore options for making the system "less of a hassle for the public."<sup>634</sup> An EPA regional official assured the state that although EPA preferred a centralized system like the one that was already in place, "we are also willing to work with the state on any possible changes to the program."<sup>635</sup> Meanwhile, Texas Senator Kay Bailey Hutchison demanded that EPA give the state a six-month grace period to decide whether to replace the centralized program with an alternative acceptable to EPA.<sup>636</sup>

On December 27, 1994, TNRCC announced that it had decided to let the program go forward for the time being, but it would attempt to implement some changes to make it "more convenient."<sup>637</sup> The agency announced that for the first two years, it would reduce the maximum required repair from \$450 to \$150.<sup>638</sup>

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627. Loe, *supra* note 624, at A23.

628. Ross Ramsey, *Emissions Test Alterations Costly*, HOUSTON CHRON., Dec. 28, 1994, at A17.

629. Leigh Hopper, *Auto Emissions Flap Worries Contractos*, HOUSTON POST, Dec. 24, 1994, at A20.

630. *Id.*

631. *Id.*

632. *Id.*

633. Dan Feldstein, *Car Emission Tests to Start on Time*, HOUSTON POST, Dec. 29, 1994, at A1.

634. Haurwitz, *supra* note 608, at B1.

635. Plesa, *Doubt Clouds Emission Test Plan's Future*, *supra* note 609, at A1.

636. *Id.*

637. Victoria Loe, *Changes Announced in Emissions Testing*, DALLAS MORNING NEWS, Dec. 30, 1994, at A1 [hereinafter Loe, *Changes Announced in Emissions Testing*].

638. Ken Herman, *State Lowers Repair Limit on Emissions Test to \$150*, HOUSTON POST, Dec. 30, 1994, at A1; Loe, *Changes Announced in Emissions Testing*, *supra* note 637, at A1; Mark Smith, *Car Owners Given Some Slack*, HOUSTON CHRON., Dec. 30, 1994, at A1. This change represented a clear violation of the Clean Air Act for serious and above nonattainment areas like Houston. 42 U.S.C.A. § 7511a(c)(3)(C)(iii) (West 1995).

The required pressure tests of the fuel lines and purge canister would be accomplished without opening the hoods, thereby reducing the risk of damage to the automobiles.<sup>639</sup> The agency also promised to conduct daily on-site inspections to ensure that everything was running smoothly.<sup>640</sup> But it warned that some form of I/M would have to be implemented, because it was “not technically or economically feasible to shift to industry those reductions we are slated to get from emissions testing.”<sup>641</sup> The agency pointed out that centralized I/M would cost only about \$1500 per ton of VOCs removed as compared to \$10,000 per ton for some industrial sources.<sup>642</sup>

The TNRCC concessions did not satisfy Texas politicians. Senator Hutchison maintained that “[t]hese last-minute changes only show how wrong it is to try to start a new federally mandated program by Jan[uary] 1.”<sup>643</sup> Governor-elect Bush agreed with Senator Hutchison that more sweeping changes were desirable.<sup>644</sup> State Senator Whitmire echoed these sentiments, proclaiming that the last minute changes “show how arbitrary and ridiculous the whole thing was in the first place.”<sup>645</sup> He promised to introduce emergency legislation on the first day of the upcoming legislative session to suspend all I/M testing for two years.<sup>646</sup>

When the Tejas stations opened for official business on January 2, 1995, cold weather and the end of free testing kept the customers away.<sup>647</sup> During the first eight days, 89.5% of the inspected autos passed the inspection, much better than the 20% failure rate TNRCC expected.<sup>648</sup> Despite the absence of any lines, some motorists still claimed that the tests were unnecessary.<sup>649</sup> Others complained that if TNRCC allowed the waiver cutoff to go below \$450, the most egregious violators would still be on the road and the program would be a waste.<sup>650</sup> Pastor Aubrey Vaughan, minister of Grace Baptist Church, led a sparsely attended protest march on city hall claiming that the program’s supporters were “just elite people talking about ecology, and they’re getting rich off it.”<sup>651</sup> Vaughan, who was convinced that air pollution control should be left up to God,<sup>652</sup> later formed

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639. Herman, *supra* note 638, at A1; Smith, *supra* note 638, at A1.

640. Loe, *Changes Announced in Emissions Testing*, *supra* note 637, at A1.

641. *Id.*

642. *Id.*

643. *Id.*

644. Herman, *supra* note 638, at A1.

645. Smith, *supra* note 638, at A1.

646. *Id.*

647. Dana Willhoit, *Cold, Holiday Get Tailpipe Testing Off to a Slow Start*, HOUSTON POST, Jan. 3, 1995, at A1.

648. David Plesa, *Tailpipe Test Officials Warn Long Lines Ahead*, HOUSTON POST, Jan. 12, 1995, at A1.

649. Willhoit, *supra* note 647, at A1.

650. *Id.*

651. *Id.* Twenty people showed up for the march. *Id.*

652. John Williams, *Emissions Draft Backs Annual Test*, HOUSTON CHRON., Apr. 1, 1995, at A25.

a group called “Houston for a Healthy Society” to protest the centralized I/M program.<sup>653</sup> No long lines developed during the next three weeks.<sup>654</sup>

Despite the fact that the testing facilities were working well, Senator Whitmire was determined to put an end to mandatory I/M. In a fire-breathing editorial published in the major Dallas and Houston newspapers, he castigated the I/M program as an “unnecessary, inefficient and ill-conceived bureaucratic nuisance.”<sup>655</sup> He noted that in light of EPA’s promised flexibility on I/M, several states had decided to terminate centralized I/M programs.<sup>656</sup> Senator Whitmire painted Tejas Testing as the villain, observing that it stood to make millions on the program and that it had hired prominent attorneys and lobbyists in Austin to defend the centralized I/M program.<sup>657</sup> Ignoring the fact that the Tejas facility was built to meet EPA’s guidelines for IM-240 test-only facilities, Whitmire claimed that the Tejas operators, most of whom were small locally owned businesses, were “speculators that came up with a bad program and they don’t deserve to be rewarded.”<sup>658</sup> According to Whitmire, industrial sources had no need to fear that they would be forced to come up with further emissions reductions because EPA would no doubt be flexible with them as well.<sup>659</sup> In any event, several important members of the incoming Congress were committed to amending the Clean Air Act to eliminate stringent requirements on both individuals and industry.<sup>660</sup> Senator Whitmire, however, assured his readers that the public health would not suffer as a result. Finally, the Senator was confident that the state could not possibly be held liable for damages to Tejas stemming from the cancellation of its contract.<sup>661</sup>

On January 10, 1995, the first day of the new legislative session, Senator Whitmire introduced the promised bill to suspend mandatory I/M for two years.<sup>662</sup> The Legislature obligingly made Senator Whitmire’s bill one of its first orders of business.<sup>663</sup> Lieutenant Governor Bob Bullock, who was responsible for

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653. David Plesa, *Tailpipe Quiz: Guess Who Pays?*, HOUSTON POST, Jan. 16, 1995, at A1.

654. One old pickup truck that underwent testing emitted so much carbon monoxide that the testing facility had to be evacuated. The owner decided that it might be time to buy a new truck. Stefanie Asin, *Uncertainty of Emissions Tests Not Deterring Car Owners*, HOUSTON CHRON., Jan. 4, 1995, at A13.

655. John Whitmire, *Auto Emission Testing Program; Makes Profits, Doesn’t Clean Air*, HOUSTON POST, Jan. 9, 1995, at A13; John Whitmire, *Hold Up On Emissions Testing*, HOUSTON CHRON., Jan. 8, 1995, at O1 [hereinafter Whitmire, *Hold Up On Emissions Testing*]; John Whitmire, *Let’s Delay Emissions Tests*, DALLAS MORNING NEWS, Jan. 15, 1995, at J6.

656. Whitmire, *Hold Up On Emissions Testing*, *supra* note 655, at O1.

657. *Id.*

658. Terrence Stutz, *Senate Panel OKs Delay in Emissions Tests*, DALLAS MORNING NEWS, Jan. 12, 1995, at A29 [hereinafter Stutz, *Senate Panel OKs Delay in Emissions Tests*].

659. Whitmire, *Hold Up On Emissions Testing*, *supra* note 655, at O1.

660. *Id.*

661. *Id.*

662. Mary Lenz, *Emissions Test Up To Legislature*, HOUSTON POST, Jan. 11, 1995, at A19; Sylvia Moreno & Terrence Stutz, *New Legislature Convenes*, DALLAS MORNING NEWS, Jan. 11, 1995, at A1.

663. Moreno & Stutz, *supra* note 662, at A1.



governing the flow of legislation through the Texas Senate, agreed to support a bill that would declare a three-month moratorium on centralized I/M, and he promised a vote on the bill within a week.<sup>664</sup> He announced that a three-month delay would in no way imperil the State's receipt of highway funds.<sup>665</sup> Most of the members of the Senate signed on as co-sponsors to a three-month moratorium sponsored by Senator Whitmire.<sup>666</sup> Whitmire reported that U.S. Senator Kay Bailey Hutchison had assured him in a recent telephone conversation that a three-month delay would allow Congress to provide relief from centralized I/M on a national level.<sup>667</sup> According to Whitmire: "We are all for clean air . . . but this is about getting government off the backs of the people of Texas."<sup>668</sup>

With only the briefest of hearings and with virtually no deliberation, the Senate Natural Resources Committee favorably reported the Whitmire bill the day after it was introduced.<sup>669</sup> At the truncated hearings, a Tejas representative pointed out that Tejas had "financing agreements of \$100 million which we would be in default of if we cannot generate sufficient revenue to make payments."<sup>670</sup> Reading the writing on the political wall, Tejas expressed a willingness to "work with the state to reshape the program," but it urged that "any changes should be made over time."<sup>671</sup> Demonstrating a keen sense for the direction of the political winds, TNRCC head John Hall testified in support of the Whitmire bill, "because it will give the state of Texas time to determine what substantive changes the new Congress may make in the provisions of the Clean Air Act, particularly with regard to emissions testing."<sup>672</sup> Senate Finance Committee Chairman John Montford, however, warned that if Tejas sued, "we're looking down the barrel of some pretty hefty damages."<sup>673</sup> Montford urged his fellow senators not to take the state's contractual obligations lightly.<sup>674</sup> Whitmire replied, erroneously, that the state could not be sued unless the legislature agreed to allow the suit.<sup>675</sup> The state's Legislative Budget Board apparently accepted this assessment when it concluded that the Whitmire bill would not cost the state a penny.<sup>676</sup>

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664. *Id.*

665. *Id.*; Lenz, *supra* note 662, at A19.

666. Moreno & Stutz, *supra* note 662, at A1.

667. *Id.*; Lenz, *supra* note 662, at A19.

668. Terrence Stutz, *Texas Senate OKs 3-Month Delay on Emissions Tests*, DALLAS MORNING NEWS, Jan. 17, 1995, at A19 [hereinafter Stutz, *Texas Senate OKs 3-Month Delay on Emissions Tests*].

669. Stutz, *Senate Panel OKs Delay in Emissions Tests*, *supra* note 658, at A29.

670. *Id.*

671. *Id.*

672. *Id.*

673. Mary Lenz, *Senate Panel Votes to Delay Emission Tests*, HOUSTON POST, Jan. 12, 1995, at A23.

674. Ben Wear, *Possible Liability Has Senators Re-Examining Auto*, AUSTIN AMERICAN-STATESMAN, Jan. 14, 1995, at B1.

675. *Id.*

676. *Id.*

While the bill was pending, Senator Hutchison announced that she had asked EPA to grant a six-month delay in all I/M requirements while it came up with a new program.<sup>677</sup> She noted, inaccurately, that EPA had just given California a two-year reprieve from the enhanced I/M requirements.<sup>678</sup> EPA had in fact approved a "hybrid" enhanced I/M program for California, but it had not granted a total waiver. Texas was in fact asking for a period of six months with no I/M program beyond the very modest pollution checks that had historically been undertaken during the state-required safety inspections. Senator Hutchison maintained, accurately, that it would be very difficult for EPA to deny Texas's request for an extension after having demonstrated considerable flexibility with California.<sup>679</sup> Just in case EPA proved difficult, Senator Hutchison introduced a bill to grant all states a six-month moratorium from enhanced I/M requirements.<sup>680</sup> Senator Hutchison recognized, however, that the State might have some obligation to compensate Tejas Testing for its predictable losses.<sup>681</sup>

In a rare editorial response to the barrage of criticism from elected officials, the owner of one of the Houston testing facilities maintained that the attacks were a "pure smoke screen."<sup>682</sup> He argued that the IM-240 tests employed in Texas were, according to EPA, the most accurate in existence.<sup>683</sup> To the charge that centralized I/M caused unnecessary delays, he pointed out that the average testing time at a centralized facility was one-half the time that the State allowed for annual safety tests.<sup>684</sup> To the charge that the program was suddenly foisted on an unaware public, he noted that TNRCC had conducted extensive hearings to elicit the input of members of the public and elected officials before initiating the program: "Any politician acting like this is a new and unexpected issue is being disingenuous."<sup>685</sup>

With the state's major newspapers editorializing in favor of a 90-day moratorium,<sup>686</sup> the Whitmire bill unanimously passed the Texas Senate on the next day of the session.<sup>687</sup> Senator Whitmire proclaimed: "The people of Texas want

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677. Stutz, *Texas Senate OKs 3-Month Delay on Emissions Tests*, *supra* note 668, at A29.

678. *Id.*

679. *Id.*

680. Mary Lenz, *Senate Backs 90-Day Delay of Tailpipe Test*, HOUSTON POST, Jan. 17, 1995, at A1 [hereinafter Lenz, *Senate Backs 90-Day Delay of Tailpipe Test*]; Stutz, *Texas Senate OKs 3-Month Delay on Emissions Tests*, *supra* note 668, at A29.

681. Ben Wear, *Officials Differ on State's Costs from Emissions*, AUSTIN AMERICAN-STATESMAN, Jan. 17, 1995, at B3.

682. Rick Sharbrough, *Smell of Politics in Opposition to Emission Tests*, HOUSTON CHRON., Jan. 17, 1995, at A19.

683. *Id.*

684. *Id.*

685. *Id.*

686. *Postponement Until the Fog Clears Is Warranted*, HOUSTON CHRON., Jan. 13, 1995, at A28.

687. Lenz, *Senate Backs 90-Day Delay of Tailpipe Test*, *supra* note 680, at A1; Stutz, *Texas Senate OKs 3-Month Delay on Emissions Tests*, *supra* note 668, at A19; Wear, *supra* note 681, at B3.

government off their backs. That's what this vote is all about."<sup>688</sup> Joined by several other Senators, Whitmire then hopped on a plane for Washington to urge the Texas delegation to pressure EPA into foregoing any sanctions.<sup>689</sup> TNRCC announced that it was working on a backup proposal in the event that the Whitmire bill was not enacted in the House prior to January 31.<sup>690</sup> It took the House a little longer to consider the bill, because it had not even appointed the relevant committees by the time that the Senate had rushed through the legislation.<sup>691</sup>

On January 19, Whitmire's delegation met with Senator Hutchison, EPA representatives and House Majority Whip Tom Delay of Houston in DeLay's new office. After a "cooperative dialogue," Administrator Browner agreed not to enforce the centralized test-only regime provided for in the Texas SIP for ninety days while the state legislature attempted to come up with a more "user friendly" testing regime.<sup>692</sup> Browner cautioned, however, that this action did not presage any relaxation of the ambient air quality standards.<sup>693</sup> It did mean, however, that as far as EPA was concerned, the state could violate its SIP. According to Whitmire, EPA's action allowed the state to go "back to the drawing board" and come up with a new I/M program for Houston and Dallas.<sup>694</sup> Senator Hutchison announced that she would still introduce legislation making enhanced I/M a voluntary program,<sup>695</sup> and Representative DeLay promised to insert a rider in EPA's appropriations bill preventing EPA from enforcing any SIP requirements calling for centralized I/M.<sup>696</sup> Governor Bush also applauded Browner's decision and promised that the state would deal with Tejas in a "fair fashion."<sup>697</sup>

The Speaker of the Texas House of Representatives placed the moratorium bill on a fast track.<sup>698</sup> He assigned the bill to a special committee, which held a 7.5 hour hearing on the state's potential liability to Tejas Testing and other relevant issues.<sup>699</sup> Although the Sierra Club and a few representatives complained that the

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688. Lenz, *Senate Backs 90-Day Delay of Tailpipe Test*, *supra* note 680, at A1.

689. *Id.*; Wear, *supra* note 681, at B3.

690. Terrence Stutz, *Agency Crafting Emissions-Test Plan*, DALLAS MORNING NEWS, Jan. 18, 1995, at A26.

691. Lenz, *Senate Backs 90-Day Delay of Tailpipe Test*, *supra* note 680, at A1.

692. William E. Clayton Jr. & John Williams, *State Allowed to Devise New Emissions Plan*, HOUSTON CHRON., Jan. 20, 1995, at A1; Rosalind Jackler, *EPA Giving State A Break on Emissions*, HOUSTON POST, Jan. 20, 1995, at A1; Texas Gets Time To Modify Emissions Testing, 25 Env't Rep. (BNA) No. 38, at 1850 (Jan. 27, 1995).

693. Clayton & Williams, *supra* note 692, at A1.

694. *Id.*

695. *Id.*

696. Jackler, *supra* note 692, at A1.

697. Clayton & Williams, *supra* note 692, at A1.

698. John Williams, *Emissions Test Bill Put on Fast Track*, HOUSTON CHRON., Jan. 21, 1995, at A27 [hereinafter Williams, *Emissions Test Bill Put on Fast Track*].

699. John Williams, *Emissions Delay Clears House Panel*, HOUSTON CHRON., Jan. 25, 1995, at A18; Williams, *Emissions Test Bill Put on Fast Track*, *supra* note 698.

state was taking precipitous action with potentially grave financial consequences,<sup>700</sup> the House passed the ninety day moratorium bill on January 26, 1995, by a lopsided vote of 132-10.<sup>701</sup> The fact that Tejas received its financing not from local banks, but from the Bank of Montreal, Credit Suisse, and Fuji Bank Ltd., was prominently featured in the House debates.<sup>702</sup> If Tejas suffered bankruptcy as a result of the state's breach of its contractual obligations, it would not impact adversely on the state's banking industry.

On January 31, 1995, Governor Bush signed the legislation.<sup>703</sup> The governor stated that his main concern was that "Texas be treated like California or any other state, that we be granted maximum flexibility on how we are judged."<sup>704</sup> Like all of the other politicians who engineered the moratorium, Bush declared that "we can achieve clean air standards," but he was quite sure that "[w]e do not want a rigid system that penalizes Texas and Texas car owners."<sup>705</sup> The governor did not suggest where the state would find the emissions reductions required to meet the clean air standards in the absence of a centralized I/M program. That was a matter for another, no doubt less triumphant, day.

In addition to placing a ninety day moratorium on all I/M testing, the legislature graciously provided an \$8.8 million fund to make loans to Tejas so that it could repay some of its nearly \$100 million in outstanding debts to suppliers and other creditors, and so that its franchisees could avoid bankruptcy for the next three months. Tejas promised to use the respite to work with TNRCC to come up with a more "user friendly" system for conducting high tech I/M testing.<sup>706</sup> In the hope that some sort of centralized program would emerge from its negotiations with the State, Tejas Testing retained a skeleton staff and kept a few testing facilities open in Houston and Dallas.<sup>707</sup> Senator Whitmire was not

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700. Mary Lenz, *Panel Votes to Suspend Emissions Test*, HOUSTON POST, Jan. 25, 1995, at A17; Sylvia Moreno & Charlette-Anne Lalas, *Emission-Test Firm Fears Program Delay Company May Face Ruin, Lawmakers Told*, DALLAS MORNING NEWS, Jan. 25, 1995, at A22. Several state representatives were concerned that if the state reneged on its contract with Tejas, the state would acquire a bad reputation in the business community and might even suffer a reduction in the ratings for its bonds. Sylvia Moreno, *Bill to Delay Emissions Tests Hits Snag in House*, DALLAS MORNING NEWS, Jan. 26, 1995, at A23; John Williams, *Three Move To Save Emissions Test Firm*, HOUSTON CHRON., Jan. 26, 1995, at A23.

701. Sylvia Moreno, *House Votes To Delay Tests for Emissions*, DALLAS MORNING NEWS, Jan. 27, 1995, at A1; Kathy Wait, *Auto-Test Moratorium Advances*, HOUSTON CHRON., Jan. 27, 1995, at A1; *Texas Governor Expected to OK I/M Delay*, 25 Env't Rep. (BNA) No. 39, at 1885 (Feb. 3, 1995).

702. David Plesa & Mary Lenz, *House Votes On Tailpipe Test Amid Warnings*, HOUSTON POST, Jan. 26, 1995, at A1.

703. Terrence Stutz, *Bush Signs Bill to Delay Emissions Tests 3 Months*, DALLAS MORNING NEWS, Feb. 1, 1995, at A1 [hereinafter Stutz, *Bush Signs Bill to Delay Emissions Tests 3 Months*]; John Williams, *Emissions Test Put Off 91 Days While State Revamps Program*, HOUSTON CHRON., Feb. 1, 1995, at A1.

704. Stutz, *Bush Signs Bill to Delay Emissions Tests 3 Months*, *supra* note 703, at A1.

705. *Id.*

706. *Id.*

707. David Plesa, *Most Emissions Test Sites to Close for Moratorium*, HOUSTON POST, Feb. 3, 1995, at A1.

certain that the legislature could come up with an acceptable I/M program within the ninety day moratorium period, but he was confident that as long as the State was proceeding in "good faith" EPA or Congress would grant additional extensions.<sup>708</sup> In particular, Whitmire was determined to destroy Tejas's monopoly over I/M testing in the Houston and Dallas areas.<sup>709</sup>

As the Legislature set about the task of coming up with an alternative enhanced I/M program, an attorney for many industrial sources of VOCs in the Houston area cautioned that an I/M program could not be avoided if air quality in that city was ever going to achieve the NAAQS. It was therefore "totally irresponsible to say you ought not to test my car."<sup>710</sup> A spokesman for the Texas Automobile Dealers Association suggested that auto dealers and service stations could probably add 150 testing facilities to the twenty-seven cities in Houston if a less expensive, low-tech testing technologies were allowed.<sup>711</sup> In early April, a new organization called the Texas State Inspection Association, composed primarily of service station owners, presented to the Governor a petition signed by 40,000 people demanding a test-and-repair I/M program using local service stations.<sup>712</sup>

Lieutenant Governor Bullock appointed a Special Committee on Emissions and Clean Air in the Senate to come up with a "user friendly" I/M program.<sup>713</sup> The Special Committee reported out a bill that would provide for annual testing for all vehicles more than three years old at decentralized test-and-repair facilities. Autos three years old and younger would not have to be tested, but purchasers of new autos would have to pay a fee of twenty dollars that would go toward paying for tests for low income owners. State owned vehicles and fleets of commercial vehicles would have to be tested at centralized facilities. The plan would reduce the number of counties surrounding Dallas that would be subject to I/M requirements also.<sup>714</sup> Senator David Cain, a member of the Special Committee, assured the public that "we are not backing off from our goal of making sure we have the clean air that all our citizens deserve."<sup>715</sup> He did not indicate how the emissions reductions lost by moving to a less effective system would be achieved.

A House committee came up with an alternative plan, sponsored by Representative Warren Chisum, a democrat from the unpolluted Texas Panhandle, that

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708. Stutz, *Bush Signs Bill to Delay Emissions Tests 3 Months*, *supra* note 703, at A1.

709. *Id.*

710. Mary Lenz, *Drivers Can't Dodge Emissions Tests Forever*, HOUSTON POST, Feb. 6, 1995, at A13.

711. Mary Lenz, *Texas Lawmakers Schedule Meeting on Emissions*, HOUSTON POST, Jan. 19, 1995, at A19.

712. Terrence Stutz, *One-Stop Emission, Safety Checks Urged Dallas-Area Senators Pushing "User-Friendly" Procedure*, DALLAS MORNING NEWS, Apr. 5, 1995, at A26 [hereinafter Stutz, *One-Stop Emission, Safety Checks*].

713. *Id.*

714. Terrence Stutz, *Panel OKs Changes in Emissions Testing*, DALLAS MORNING NEWS, Apr. 11, 1995, at A15.

715. Stutz, *One-Stop Emission, Safety Checks*, *supra* note 712, at A27.

was similar to the one that EPA had recently approved for California. The Chisum bill would have required owners of vehicles six years old and older to be tested at centralized test-only facilities and allowed owners of vehicles less than six years old to pay a “mitigation fee” of ten dollars or have them tested at decentralized test-and-repair facilities. Remote sensors would be used to identify heavily polluting vehicles that would also have to undergo centralized testing.<sup>716</sup>

In mid-April, EPA Assistant Administrator Mary Nichols wrote Governor Bush to tell him that EPA would approve the House program, but not the Senate program. She warned that if the state submitted the Senate program to EPA for approval, the state would not receive full emissions reduction credit.<sup>717</sup> A furious Senator Whitmire vowed on the Senate floor to “fight EPA harder than ever.”<sup>718</sup> Without citing any evidence, Whitmire maintained that the panel’s program would actually be more effective in reducing emissions than a centralized test-only system. Noting that the Environmental Defense Fund of Texas had testified in favor of his plan,<sup>719</sup> he proclaimed that “[w]e are sick and tired of the federal government trying to control our lives.”<sup>720</sup> Senator Jerry Patterson of Pasadena cheered Whitmire on and compared Whitmire’s attack to the Confederate Army’s first salvo at Fort Sumpter.<sup>721</sup> He also accused Tejas Testing of using its \$8.8 million loan to hire a former Whitmire employee to run a phone bank to generate opposition to the Whitmire plan and to spread rumors about Whitmire’s personal life,<sup>722</sup> charges that Tejas vigorously denied.<sup>723</sup> One long-time observer of the Texas legislature called Whitmire’s ten minute harangue “quite a show of testosterone, adrenaline and perhaps even endorphins—producing the legislative equivalent of runner’s high.”<sup>724</sup>

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716. John Williams, *Emission-Law Changes Faulted by EPA Official*, HOUSTON CHRON., Apr. 12, 1995, at A1 [hereinafter Williams, *Emission-Law Changes Faulted by EPA Official*].

717. *Id.* EPA was not the only governmental entity that was disappointed in Whitmire’s plan. Several cities, counties and school districts complained about being singled out for centralized testing. They pointed out that since many fleet vehicles were too large to fit on the Tejas treadmills, they would have to be tested in idle mode, and those tests could be more conveniently performed at fleet repair shops. Eric Hanson, *Government Groups Want to Test Own Fleets*, HOUSTON CHRON., Apr. 14, 1995, at A25.

718. Williams, *Emission-Law Changes Faulted by EPA Official*, *supra* note 716, at A1.

719. *Id.*

720. Mary Lenz, *Bush to EPA: Don’t Tell Us What to Do*, HOUSTON POST, Apr. 13, 1995, at A27 [hereinafter Lenz, *Bush to EPA: Don’t Tell Us What to Do*]; John Williams, *Bush to EPA: Don’t Meddle In State Affairs*, HOUSTON CHRON., Apr. 13, 1995, at A1 [hereinafter Williams, *Bush to EPA: Don’t Meddle In State Affairs*].

721. Williams, *Bush to EPA: Don’t Meddle In State Affairs*, *supra* note 720, at A1. Senator Rodney Ellis, one of the few African-Americans in the Texas Senate, hoped that if the Civil War was to be fought again, the results would be the same. *Id.*

722. Dave McNeely, *Whitmire, Emissions Testing and Texas Pride*, AUSTIN AMERICAN-STATESMAN, Apr. 13, 1995, at A13; Lenz, *Bush to EPA: Don’t Tell Us What to Do*, *supra* note 720, at A27.

723. Terrence Stutz, *Bush Accuses EPA of Meddling in Emissions Plan*, DALLAS MORNING NEWS, Apr. 13, 1995, at D12. [hereinafter Stutz, *Bush Accuses EPA of Meddling in Emissions Plan*].

724. McNeely, *supra* note 722, at A13.

Governor Bush was also put off by the EPA letter and accused the agency of meddling in Texas's affairs: "I take great, great umbrage at the federal government trying to tell Texans how to run Texas."<sup>725</sup> He warned ominously that "Browner better get a hold of her agency."<sup>726</sup>

Whitmire's fiery speech inspired the Texas Senate to adopt a confrontational stance. On April 18, 1995, the Senate rejected the Special Committee's recommendations and approved a Whitmire-sponsored bill that would have simply postponed all vehicle I/M testing for two years.<sup>727</sup> Whitmire explained: "If the EPA didn't like what we were doing before, it might be a good message to send them that one body of the Legislature has called for a two-year moratorium."<sup>728</sup> One sure result of the bill would be to dash any hopes that Tejas Testing and its franchisees might have had of surviving the legislative onslaught. Noting that "[s]everal other states are doing exactly what we just did," Whitmire predicted that "[i]f the major states get together and speak with one voice, they could dictate to the EPA the terms for implementing this program."<sup>729</sup> One Republican state senator complained that "[t]his idea of sending messages [to the federal government] is kids' stuff,"<sup>730</sup> and he urged the Senate not to "cut off our nose to spite our face."<sup>731</sup> Whitmire admitted that once the House passed a bill, the Senate conferees would probably use the Special Committee's bill as a negotiating vehicle.<sup>732</sup>

On April 25, 1995, Representative Chisum withdrew his bill after numerous objections from his colleagues made it clear that it would not be passed.<sup>733</sup> At this point, Governor Bush intervened and asked his staff to work with representatives from both the House and the Senate to come up with a collaborative plan that would be "good for Texas."<sup>734</sup> The collaborative plan they arrived at failed to incorporate any elements of Representative Chisum's bill.<sup>735</sup> Instead, the bill

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725. Lenz, *Bush to EPA: Don't Tell Us What to Do*, *supra* note 720, at A27; Stutz, *Bush Accuses EPA of Meddling in Emissions Plan*, *supra* note 723, at D12.

726. Williams, *Bush to EPA: Don't Meddle In State Affairs*, *supra* note 720, at A1.

727. Terrence Stutz, *Senate Supports 2-Year Delay for Vehicle Emissions Tests*, DALLAS MORNING NEWS, Apr. 19, 1995, at A1 [hereinafter Stutz, *Senate Supports 2-Year Delay for Vehicle Emissions Tests*]; John Williams, *Senate Sends Message to EPA*, HOUSTON CHRON., Apr. 19, 1995, at A1 [hereinafter Williams, *Senate Sends Message to EPA*]. Whitmire noted that the decentralized test-and-repair I/M program that was in place in Dallas could continue during the moratorium. *Id.* Since Houston did not have an existing I/M program, the moratorium would mean two more years of noncompliance with requirements that had been in place since 1987.

728. Stutz, *Senate Supports 2-Year Delay for Vehicle Emissions Tests*, *supra* note 727, at A1.

729. *Id.*

730. *Id.*

731. Williams, *Senate Sends Message to EPA*, *supra* note 727, at A1.

732. Stutz, *Senate Supports 2-Year Delay for Vehicle Emissions Tests*, *supra* note 727, at A1.

733. John Williams, *Emission-Test Bill Withdrawn*, HOUSTON CHRON., Apr. 25, 1995, at A13.

734. John Williams & R.G. Ratcliffe, *Final Battle Shaping Up Over Tailpipe Inspections*, HOUSTON CHRON., Apr. 27, 1995, at A1.

735. *Id.*

returned things to their pre-1995 status with Dallas vehicles undergoing basic I/M using the old BAR90 technology and Houston vehicles undergoing no testing at all.<sup>736</sup> In a further attempt to be “user friendly,” the bill placed enforcement authority in the hands of the Department of Public Safety rather than in the TNRCC.<sup>737</sup> The bill also gave the Governor discretion to negotiate with EPA should that agency disapprove the resulting amendment to the Texas SIP.<sup>738</sup>

The House and Senate both passed the Governor’s bill and the Governor signed it on May 1, 1995,<sup>739</sup> despite the fact that it unquestionably violated the 1990 Amendments to the Clean Air Act. Senator Whitmire hailed the House action as a “major victory for the people.”<sup>740</sup>

Not everyone was pleased. Representative Garnett Coleman announced that he had voted against the bill “because every time I fly into Houston, I look down and see the haze, [a]nd I think about my son, who has asthma and doesn’t need to breathe air like that.”<sup>741</sup> The American Lung Association confirmed that almost 700,000 children in the Houston area were at increased risk of serious lung disease because of the high levels of air pollution.<sup>742</sup> Senator John Leedom observed that “[w]e’re just going back to a system that already has been declared not satisfactory for cleaning the air.”<sup>743</sup> Noting that the new legislation required Tejas Testing to repay its \$8.8 million loan in ninety days, a spokesman for Tejas declared that the statute “essentially puts Tejas and all of its contractors in Dallas and Houston out of business.”<sup>744</sup>

The Governor’s “user friendly” system did not even meet the “basic I/M” requirements that should have been in place for more than a decade. One EPA official stated categorically that it would not achieve nearly the emissions reductions of the enhanced I/M program that the legislature had abandoned after less than one month.<sup>745</sup> The prospect of attaining the NAAQS in Dallas and of achieving a 15% reduction in VOC emissions in Houston by 1996 became a “tailpipe dream.”<sup>746</sup>

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736. Sylvia Moreno, *Bill Would Reinstate Earlier Tests*, DALLAS MORNING NEWS, Apr. 28, 1995, at A39. Autos in the suburbs surrounding Dallas would not have to undergo even basic I/M testing.

737. *Governor Signs Legislation Modifying State Vehicle Emissions Testing Plan*, 26 Env’t Rep. (BNA) No. 1, at 31 (May 5, 1995) [hereinafter *Governor Signs Legislation*].

738. Moreno, *supra* note 736, at A39. Autos in the suburbs surrounding Dallas would not have to undergo even basic I/M testing.

739. Terrence Stutz, *Emissions Measure Approved*, DALLAS MORNING NEWS, May 2, 1995, at A1 [hereinafter *Stutz, Emissions Measure Approved*]; John Williams, *Texas Law Sidesteps EPA Emission Rules*, HOUSTON CHRON., May 2, 1995, at A1.

740. John Williams & Bill Dawson, *House Backs Bill to Kill Centralized Emissions Testing*, HOUSTON CHRON., Apr. 28, 1995, at A1.

741. *Id.*

742. *Id.*

743. Stutz, *Emissions Measure Approved*, *supra* note 739, at A1.

744. *Id.*

745. *Governor Signs Legislation*, *supra* note 737, at 31.

746. *A Crucial Reprieve*, HOUSTON POST, Feb. 2, 1995, at A22.



Rather than condemning the wholesale retreat as patently unlawful, EPA announced that it was looking forward to further negotiations with Texas and held open the possibility that highway sanctions would not be forthcoming if the negotiations were successful.<sup>747</sup> Senator Whitmire, however, discounted the threat of lost federal highway funds: "I'm convinced Congress is going to make adjustments to the Clean Air Act and we need to take advantage of them."<sup>748</sup> The Senator was confident that President Clinton would not veto any such adjustments: "If he can make a 180-degree turn like he did on affirmative action . . . , EPA regulation isn't anything hard for him to do a back flip on."<sup>749</sup>

After operating a state-of-the-art facility for about one month, Tejas was out of business, its forty-three franchisees were bankrupt, and 1800 newly hired employees were out of work. James Rodriguez, who had worked as an auto mechanic and auto parts salesperson all his life, had purchased one of the franchises with \$4000 of his own money and a \$6300 loan. He had to lay off the eighteen employees that he had fashioned into an effective team to run his facility. One of the laid off employees, Oliver Rodgers, explained: "I really believed we were building something beautiful here. We were cleaning up the air, helping people take care of their cars and giving them a chance to understand why we were all having to do this."<sup>750</sup> Mubarka "Ali" Asharia had resigned from a \$60,000 per year job and invested his life savings in one of the franchises. After the legislature walked away from the contract, Mr. Asharia said that he "couldn't believe a thing like this could happen, not in Texas."<sup>751</sup> Robert Grayson, who quit his job with an engineering consulting firm and invested \$20,000 of his savings in his franchise, "grew up with the image that in Texas, a man's word was his bond."<sup>752</sup> The Texas legislature proved both men wrong. At a hearing in which forty-four franchisees begged the Special Committee not to destroy their businesses, Senator Whitmire responded with the compassion of a long-time Texas politician: "I am sorry about what has happened to you, but that is not my concern. My concern is for my constituents, and they were mad as hell over the way you were doing business."<sup>753</sup>

The day after the Governor signed the bill, Tejas announced that it would sue Texas for at least \$150 million to cover the losses it had entailed as a result of the

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747. Randy L. Loftis, *EPA Ready to Negotiate on Emissions*, DALLAS MORNING NEWS, May 3, 1995, at A29.

748. Mary Lenz, *Senate Panel OKs Retooled Version of Vehicle Emissions Testing Program*, HOUSTON POST, Apr. 11, 1995, at A15.

749. John Williams, *Panel OKs New Test Plan for Emissions*, HOUSTON CHRON., Apr. 11, 1995, at A13.

750. Lori Rodriguez, *No Testing Means No Jobs*, HOUSTON CHRON., Feb. 3, 1995, at A1.

751. Rebecca Howland, *Dreams Vanish into the Ozone*, DALLAS MORNING NEWS, Aug. 5, 1995, at A1.

752. *Id.*

753. Stutz, *Senate Panel OKs Delay in Emissions Tests*, *supra* note 658, at A29.

state's breach of its contract.<sup>754</sup> Later, in August, Tejas presented a formal bill for \$187.5 million to TNRCC.<sup>755</sup> Tejas won an initial victory in September 1995, when a state district court held that the state could not enforce the legislation that called for Tejas to repay its \$8.8 million loan in ninety days. The court held that the legislation violated Tejas's rights under the Texas Constitution, which provides that the state may not enact legislation that impairs contractual obligations.<sup>756</sup> The court explained: "It used to be in Texas that a person's word was their bond."<sup>757</sup> Apparently, the state was not above the law.

The court victory was of only small comfort to Tejas Testing, which filed for bankruptcy on September 12, 1995, listing as its primary asset its contract claims against the State of Texas.<sup>758</sup> Among the creditors listed were the lessors of the land on which the testing facilities were erected, various suppliers, many large companies and car dealerships that had paid for testing in advance, and, of course, the State of Texas for the \$8.8 million loan.<sup>759</sup>

In November 1995, TNRCC proposed amendments to the Texas SIP that would give drivers a choice of annual testing at a decentralized test-and-repair facility using the low-tech BAR90 testing technology or biennial testing at a centralized test-only facility.<sup>760</sup> The agency did not, however, explain why anyone would be willing to build and operate a centralized facility after Tejas's experience. And the head of the Houston Chapter of the Automotive Service Association was not even sure that Houston service stations would be anxious to shell out \$10,000 to \$20,000 for the BAR90 testing technology, given Tejas Testing's recent experience.<sup>761</sup>

In addition, the plan excluded several suburban counties in both the Dallas and Houston areas from the I/M program.<sup>762</sup> Like the California plan, the new

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754. Loftis, *supra* note 747, at A29; John Williams, *Emissions Testing Company Sues State*, HOUSTON CHRON., May 3, 1995, at A25.

755. John Williams, *Emissions Firm Sends State \$187.5 Million Bill*, HOUSTON CHRON., Aug. 8, 1995, at A13.

756. Pauline Arrillaga, *Emissions Test Firm Wins Ruling Against Repaying Loan Now*, AUSTIN AMERICAN-STATESMAN, Sept. 1, 1995, at B8; Clay Robison, *Tejas Testing Wins Ruling on Repayment*, HOUSTON CHRON., Sept. 1, 1995, at A53 [hereinafter Robison, *Tejas Testing Wins Ruling on Repayment*].

757. Walt Borges, *Senate's Debate Trips Up Testing Law*, TEXAS LAW., Sept. 11, 1995, at 4; Robinson, *Tejas Testing Wins Ruling on Repayment*, *supra* note 757, at A53.

758. Richard A. Oppel, Jr., *Emissions Testing Firm Files for Bankruptcy*, DALLAS MORNING NEWS, Sept. 13, 1995, at 1D.

759. *Id.*; Clay Robison, *Emissions Testing Firm Tejas Files Chapter 11*, HOUSTON CHRON., Sept. 13, 1995, at A15.

760. Dan Feldstein, *Emission Plan Gives 3 Choices*, HOUSTON CHRON., Nov. 10, 1995, at A1; Randy L. Loftis, *Bush to Reveal Emissions Plan Today Supporters Hope to Satisfy EPA*, DALLAS MORNING NEWS, Nov. 10, 1995, at A33; Wayne Slater, *State Outlines Compromise Emissions Plan*, DALLAS MORNING NEWS, Sept. 2, 1995, at A1; Terrence Stutz, *State Offers Wider Options for Auto Emissions Testing*, DALLAS MORNING NEWS, Nov. 11, 1995, at A1 [hereinafter Stutz, *State Offers Wider Options for Auto Emissions Testing*].

761. Feldstein, *supra* note 760, at A1.

762. *Id.*; Slater, *supra* note 760, at A1.

Texas plan called for remote sensing.<sup>763</sup> The Texas remote sensing program, however, was a good deal weaker than the California equivalent, because it did not require automobiles identified as gross emitters to undergo centralized testing. Instead, gross polluters would receive a polite request to have their automobiles checked at a test-and-repair facility. Second-timers would be required to have their vehicles checked, but there would be no penalties for violating the requirement. Only after multiple violations would a vehicle's registration be subject to revocation.<sup>764</sup> The plan would also implement a "cash for clunkers" program under which TNRCC would buy up older polluting automobiles and retire them.<sup>765</sup> This proposed "motorists choice" plan pleased both Governor Bush and Senator Whitmire.<sup>766</sup> Governor Bush announced: "The Texas plan now offers the drivers of Dallas, Fort Worth and Houston greater choice and greater convenience, and this plan will result in cleaner air."<sup>767</sup>

Some local officials and environmental groups, however, wondered how the much less effective low-tech testing would achieve the degree of emission reduction needed to meet the statutory 15% VOC reduction requirement by the end of 1996.<sup>768</sup> A TNRCC analysis predicted that the new plan would reduce VOC emissions by twenty-eight tons per day in Dallas and by twenty-four tons per day in Houston,<sup>769</sup> but it would allow about 25% more VOC emissions than the original plan calling for centralized I/M.<sup>770</sup> Environmentalists noted that air quality in the Dallas/Fort Worth nonattainment area was apparently growing worse. The fifteen exceedences that occurred during the summer of 1995 were the greatest number since 1984. Yet, the new plan would allow many more tons of emissions.

Governor Bush effectively conceded this point and argued that meeting the existing EPA air-quality standards would be impossible, "no matter what we do with emissions testing."<sup>771</sup> The governor advocated amending the standards so that a single violation of the NAAQS would not throw an area into nonattainment.<sup>772</sup> The relevance of this solution to Dallas and Houston, both of which had suffered multiple exceedences in every year since the Clean Air Act was enacted, was not immediately apparent.

Senator Whitmire's confident assurance that sovereign immunity would shield the state from Texas's lawsuit was proved wrong in mid-March 1996, when

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763. Feldstein, *supra* note 760, at A1.

764. Stutz, *State Offers Wider Options for Auto Emissions Testing*, *supra* note 760, at A1.

765. Loftis, *supra* note 760, at A33.

766. Bill Dawson, *Local Leaders Are Mixed on Emission Plan*, HOUSTON CHRON., Sept. 6, 1995, at A1.

767. Ross Ramsey, *Pollution Abatement Plan Is Unveiled*, HOUSTON CHRON., Nov. 11, 1995, at A34.

768. Dawson, *Local Leaders Are Mixed on Emission Plan*, *supra* note 766, at A1.

769. Stutz, *State Offers Wider Options for Auto Emissions Testing*, *supra* note 760, at A1.

770. Loftis, *supra* note 760, at A33.

771. Stutz, *State Offers Wider Options for Auto Emissions Testing*, *supra* note 760, at A1.

772. *Id.*

a federal magistrate ruled that the state's insistence on recovering the \$8.8 million loan constituted a waiver of any sovereign immunity from Tejas's counterclaim.<sup>773</sup>

Thus, Texas quickly overtook California in the head-long race to the bottom. All that remains of the state-of-the-art facilities that the now-bankrupt Tejas Testing Corp. constructed in Houston are a \$200 million lawsuit and fifty-five boarded-up monuments to de facto devolution in the 1990s.

## VI. COOPERATIVE FEDERALISM—A CYNICAL VIEW

EPA is a large regulatory agency, but it is not large enough to administer a dozen major environmental programs by itself. Because there will never be a large enough federal environmental police force to ensure that each of the millions of commuters in large urban areas complies with the law, a large degree of voluntary compliance is necessary for the successful implementation of any program of mobile source air pollution controls.<sup>774</sup> In addition, EPA must have the active cooperation of state and local governments if a program that impacts so directly upon the population is to have any chance of succeeding.

The 1970 Amendments to the Clean Air Act reflected the frustration of its supporters with prior state efforts to address the problem of air pollution. After twenty years of failed state programs, Congress took the bull by the horns and created a federal program in which the states played a critical, but distinctly subservient role. The buzzword of the time was "cooperative federalism," and the vision was of a highly trained cadre of experts at the federal level setting ambient air quality standards to be achieved by statutory deadlines through state implementation plans drafted by officials knowledgeable about local matters. The model had the potential for considerable tension between states and the federal government, and that potential has been fully realized over the years. In 1977, Professors Krier and Ursin characterized the relationship as "distinctly uncooperative,"<sup>775</sup> and it has only gotten worse in the ensuing twenty years.<sup>776</sup>

### A. EPA's Inability to Commandeer State Resources

At first, the federal agency to which Congress delegated implementation responsibilities initially attempted to secure state cooperation by requisitioning

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773. T.J. Milling, *State Loses Immunity to Lawsuit*, HOUSTON CHRON., Mar. 16, 1996, at A30; Richard A. Oppel, Jr., *Emissions-Testing Firm Wins Right to Bring State of Texas to Trial*, DALLAS MORNING NEWS, Mar. 16, 1996, at F11.

774. See, e.g., DAVIES, *supra* note 1, at 91 ("Pollution laws, like all other laws, require a high degree of voluntary compliance for their success.").

775. KRIER & URSIN, *supra* note 81, at 297.

776. See generally Ora F. Harris, Jr., *The Automobile Emissions Control Inspection and Maintenance Program: Making It More Palatable to "Coerced" Participants*, 49 LA. L. REV. 1315 (1989).

it. EPA simply commanded the states to establish various programs and threatened civil and criminal sanctions if the states refused. This short-sighted approach served only to raise state hackles and to interject emotional arguments about state sovereignty into the debate over how to clean up the environment.<sup>777</sup> It was ultimately a battle that EPA could not win, and it lost both in court and in Congress.

EPA cannot simply commandeer state resources and force state legislatures and executive officials to take affirmative steps to implement federal policies. EPA was foolhardy to take the position initially that it could simply order the states to enact, implement, and enforce regulatory programs dictated by a federal bureaucracy. This extreme stance, which rested on the rather weak argument that a state's highways were indirect sources of automobile pollutants, undermined fledgling state agencies, alienated the courts, armed anti-regulatory politicians with horror stories, and ultimately caused even the agency's allies to run for cover. The Fourth Circuit Court of Appeals called EPA's position "astonishing,"<sup>778</sup> other observers were less circumspect.

#### *B. Unwillingness of the States to Undertake Adequate Implementation Efforts*

The history of federal I/M programs plainly demonstrates that the states are entirely unwilling to implement such programs voluntarily. The states often couch resistance to implementing federal programs in the rhetoric of state sovereignty, and it is no doubt true that federal officials have at times paid insufficient attention to legitimate state concerns about the usurpation of their jealously guarded powers.<sup>779</sup> It is also true that some states have occasionally gone out of their way to assert their independence, even when cooperation would not sacrifice any important state interests. For example, during the late 1993 face-off between California and EPA over whether a centralized test-only enhanced I/M program would go into effect in Los Angeles, a California lobbyist reported that: "Some legislators are just itching for a fight with the EPA, saying: 'We dare you to impose sanctions.'"<sup>780</sup>

The fierce resistance in many states, however, is more complex than simplistic appeals to "states rights." Left to their own devices, the states would have achieved very little of the substantial progress that the country has made toward attaining health-based goals for urban air quality. And, it is painfully clear

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777. See KRIER & URSIN, *supra* note 81, at 298 ("The sovereign states so honored (less and less with time, but still honored) in the past were suddenly stripped of their royal robes; they became commoners subject to enlistment in the war to save the environment.").

778. *Maryland v. EPA*, 530 F.2d 215, 224 (4th Cir. 1975).

779. Harris, *supra* note 776, at 1317.

780. Cone & Healy, *supra* note 432, at A3 (internal quotation marks omitted).

that if the states are again given primary responsibility for reaching those goals, they will never be achieved, and air quality in most urban areas will decline. There are several explanations for state resistance that go beyond simple "turf consciousness," including disagreement with basic implementation goals, lack of political will at the state level to accomplish environmental goals, competitive pressures among states, and local demagoguery.

### C. Disagreement with Basic Implementation Goals

In the early days, some states took the position that photochemical oxidant and carbon monoxide pollution did not pose significant health risks to the general public and were therefore reluctant to force important economic actors to reduce emissions and to require members of the general public to go out of their way to clean up pollution. Although fundamental disagreement with the goals underlying the NAAQS virtually disappeared after the mid-1970s, it has resurfaced again in the wake of the 1994 elections. Commissioner R.B. Marquez of the Texas Natural Resource Conservation Commission recently testified that it was not worthwhile to force companies and commuters to take additional steps merely to reduce ambient levels of a "relatively benign" pollutant that affects only a very few sensitive persons.<sup>781</sup> If the process of establishing ambient air quality standards is returned to the states, pollution-sensitive individuals had best view Houston through the rearview mirror, and the rest of its residents had better get used to a little discomfort once in awhile.

States have also expressed disagreement with the role that reactive hydrocarbon emissions and NO<sub>x</sub> play in forming photochemical oxidants. In the early 1970s, for example, the State of Texas took the position that industrial sources accounted for the bulk of reactive hydrocarbons in the Houston area and assured EPA that the primary standard for ozone (which was at that time 0.08 ppm) could be met by 1977 without any limitations on commuter traffic. In 1990, after the state's stationary source controls have been fully implemented (and even tightened in some instances), ambient ozone levels in Houston exceeded 0.2 ppm on eight days and exceeded the amended primary standard (now 0.12 ppm) on forty-eight days.<sup>782</sup> It is by now fair to conclude that the state's optimistic model was driven much more by politics than science. If such modeling exercises are

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781. *Hearings on Clean Air Act Oversight Before the Subcomm. on Oversight and Investigation and the Subcomm. on Health and Environment of the House Comm. on Commerce*, 104th Cong. 13 (1995) (statement of R.B. Marquez, Commissioner, Texas Natural Resource and Conservation Commission) [hereinafter *Hearings on Clean Air Act Oversight: Statement of R.B. Marquez*]. Other state officials have supported more modest changes, such as amending the primary NAAQS for photochemical oxidants to allow eight-hour averaging so that violations are less likely to be caused by unique incidences of especially hot weather. See *Hearings on Clean Air Act Oversight: Statement of Dennis Drake*, *supra* note 370, at 19.

782. 1991 EMISSIONS TRENDS REPORT, *supra* note 3, at fig.4-2.

once again delegated to the states, local politics will once again be in the driver's seat.

*D. Lack of Political Will*

State and local governments are exceedingly reluctant to implement programs that may cause important industries to relocate or may hinder their efforts to attract new industries.<sup>783</sup> Thus, prior to the enactment of the 1970 amendments, the states had adopted what Professors Krier and Ursin called the "policy of least steps"—take the path of least resistance designed to disrupt the status quo as little as possible.<sup>784</sup> Thus, while it was politically feasible for California officials to insist that auto manufacturers from Tokyo and Detroit install stringent pollution reduction technologies, it was beyond the pale to require California citizens to install retrofit technologies in existing automobiles or to suffer the additional time and expense of centralized I/M.

State agencies have generally demonstrated a great reluctance to take steps that could alienate important economic interests or that could arouse the general public.<sup>785</sup> Many state officials in fact freely acknowledge that if it were not for the federal presence in the area of air pollution, state regulation would not be nearly as stringent as it is.<sup>786</sup> As one official at the Texas Natural Resource Conservation Commission explained: "The agency staff needs to have EPA as the 'gorilla in the closet' if it is to have any credibility with industry and local officials."<sup>787</sup>

State officials often express frustration with the intrusiveness of federal programs. They resent being treated like junior partners in the relationship, and they react negatively to the threat of federal sanctions, even when those sanctions are merely refusals to provide federal dollars to fund state programs. Governor Engler of Michigan, for example, argues that "[s]tates should comply because it's the right thing to do, not because they are forced to comply by sanctions."<sup>788</sup> Unfortunately, what the states regard as the "right thing to do" is often inconsistent with cleaning up the air in a reasonable period of time. The Texas experience, and the similar experiences in other states that rapidly retreated from centralized I/M programs, amply demonstrate that when the "right thing to do"

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783. DAVIES, *supra* note 1, at 134-35.

784. KRIER & URSIN, *supra* note 81, at 252.

785. OTA OZONE REPORT, *supra* note 4, at 35.

786. *Hearings on Implementation of the Clean Air Act Amendments of 1970—Part 1 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong. 184 (1972) (statement of Frank Josselson, Assistant Attorney General, State of Ohio) ("More often than not, it was federal law and the federal regulations promulgated by the administrator of EPA that defined and decisively reinforced our furthest fall back positions.").

787. The official requested that the quoted remarks remain anonymous.

788. *Hearings on Clean Air Act Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 134 (1995) (statement of Governor John Engler, State of Michigan).

is determined by manipulable state legislatures, the national interest in protecting the citizenry from air pollution plays second fiddle.

*E. Race-to-the-Bottom*

One of the primary rationales for a national Clean Air Act is the fear that states will quite consciously compete with one another to attract new industry and to avoid losing existing industry. The fear of a “race-to-the-bottom,” for example, helped to justify national ambient air quality standards, national emissions standards for new stationary sources, and national emissions standards for hazardous air pollutants.<sup>789</sup> The retreat from centralized enhanced I/M provides powerful evidence of another kind of pressure toward the lowest common denominator. States are very conscious of how their sister states are treated and will demand to be allowed the same degree of “flexibility.” In this context, as in most pollution control contexts, the term “flexible” should be read to mean “less protective.” If EPA administers a national program in a way that gives one state special treatment, it will never be able to resist the inevitable political pressure to treat every other state the same way. As the pressure toward flexibility grows, the national program rapidly disintegrates. The ultimate result is that national pollution reduction and media quality goals are not achieved. This is exactly what happened with EPA’s enhanced I/M program.

When California proved recalcitrant and adamantly refused to implement an enhanced I/M program meeting the requirements that EPA had painstakingly promulgated and had successfully defended in the D.C. Circuit, the agency initially decided to hold the line. EPA officials promised in no uncertain terms that if the state did not put an adequate program into place, the federal government would lower the boom and the state would lose hundreds of millions of dollars in highway funds and would be subject to even greater restrictions on growth. California decided to call EPA’s bluff; there was a brief standoff in which each party attempted to stare the other down; and EPA finally blinked. With that fateful decision, EPA’s carefully crafted I/M program was doomed. Within days, other states that had also delayed implementing centralized I/M demanded the same degree of “flexibility” to ignore the federal law. EPA had no choice but to allow additional state “hybrid” programs that, the politicians’ protestations to the contrary notwithstanding, everyone knew would not be as effective. Even programs, like the Texas centralized I/M regime, that were in place and operational, rapidly collapsed as states vigorously fought to ensure that their drivers were no more inconvenienced than drivers in California. When he signed the bill that destroyed the existing state-of-the-art enhanced I/M program

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789. *Hearings on Clean Air Oversight*; Statement of Carol M. Browner, *supra* note 378, at 20 (“National standards are essential in order to prevent the emergence of ‘pollution havens’ after a ‘race to the bottom’: that is, the use of environmental standards as a weapon in the economic competition among states.”).



in Texas, Governor Bush said that his main concern was that "Texas be treated like California or any other state, that we be granted maximum flexibility on how we are judged."<sup>790</sup>

From the midst of the ruins, EPA steadfastly declared that the states would have to come up with alternative sources of enforceable emissions reductions to replace those lost with the abandonment of centralized I/M. But it was far too late in the day for this bluster to have any impact. Everyone knew that when the chips were down, EPA would back away from the statutory 15% VOC reduction requirement, or failing that, Congress would come to the rescue and grant further delays or abandon the 15% target altogether. In short, everyone knew that the air in America's major cities would remain at dangerously unhealthy levels because no state was willing to burden its car-owning citizens to any greater degree than its sister states.

#### *F. Local Demagoguery*

The enhanced I/M program came along at the perfect moment for opportunistic local politicians looking for any reason to attract public attention by attacking the federal government. State Senator Whitmire of Houston timed his entry into the enhanced I/M debate perfectly. Although he voted for the state statute that provided for the implementation of enhanced I/M by January 1, 1995, when the initial free tests of the Tejas Testing system yielded some complaints, Senator Whitmire seized the spotlight with strident, but wholly uninformed criticisms of the state bureaucracies charged with implementing the program that he had supported. He deflected criticism of his own demagoguery by painting Tejas Testing as a front for sharp dealing California speculators and foreign bankers who had perpetrated a "bad program" with the sole intent of sucking profits out of the 80% of car owners who passed the biennial tests. The "bad program" that he attributed to Tejas Testing was in fact the program recommended and for a time insisted upon by EPA. By shifting the focus of the debate from clean air to the inconvenience of undergoing biennial testing, Whitmire was able to take an aggressively anti-environmental stance without appearing to oppose clean air: "We are all for clean air . . . but this is about getting government off the backs of the people of Texas."<sup>791</sup>

State Representative Jim Horn of Texas testified in March 1995 that EPA's policy of allowing only 50% credit for decentralized test-and-repair programs would "penalize Texas, a state which has done everything in its power to improve

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790. Stutz, *Bush Signs Bill to Delay Emissions Tests 3 Months*, *supra* note 703, at A1.

791. Stutz, *Texas Senate OKs 3-Month Delay on Emissions Tests*, *supra* note 668, at A19. Similarly, Senator Kay Bailey Hutchison, who took an equally aggressive anti-environmental stance in the United States Senate, maintained: "I do not want to stop cleaning up the air. I just want to do it in a common-sense way." Lenz, *Senate Backs 90-Day Delay of Tailpipe Test*, *supra* note 680, at A1.

air quality, for not going along with exactly what the agency wants.”<sup>792</sup> To characterize a state program that steadfastly refused to implement even basic I/M for fifteen years in the second most heavily polluted airshed in the country as having “done everything in its power to improve air quality” was a mighty act of self-deception, even for a Texas politician. But Representative Horn’s complaint was characteristic of the kind of logic that dominated the political debate in the states over enhanced I/M.

## VII. CONCLUSION: UNCOOPERATIVE FEDERALISM AND THE ABSENCE OF CONSEQUENCES

Perhaps the clearest lesson of the history of state implementation of I/M programs is that there are generally no adverse consequences for states that thumb their noses at EPA and refuse to take the appropriate implementation steps. One California legislator noted during the collapse of the 1977 regulatory regime that EPA’s sanctions lacked credibility because EPA almost never invoked them.<sup>793</sup> Almost two decades later, a Texas legislator complained: “Citizens in Texas see that other states are not being punished for not following along with the EPA and they write to my office saying that, in actuality, Texans are being punished more for doing what they were supposed to do.”<sup>794</sup>

When EPA asserted the power to compel state officials to take affirmative implementation steps under threat of civil and criminal penalties, Congress intervened even before the courts held that EPA lacked that power. The states that refused to put I/M programs into effect suffered no adverse consequences, and the states that in good faith attempted to write plans that at least set things moving in the right direction wound up stuck with exceedingly ambitious plans for the next two decades.

When Congress in the 1977 Amendments adopted the “modified carrot” approach and merely promised to take away highway funds and to impose a construction moratorium on states that did not request an extension until 1987, the states that were the most recalcitrant and refused even to request extensions suffered absolutely no adverse consequences. Congress dutifully provided appropriations riders prohibiting EPA from imposing the threatened sanctions. Later, when the extended 1987 deadline for attainment of the carbon monoxide and photochemical oxidant standards came and went, Congress once again obligingly placed a hold on the sanctions.

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792. *Hearings on Clean Air Act Oversight*: Statement of Jim Horn, *supra* note 523, at 299.

793. According to this legislator: “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.” Harris, *supra* note 776, at 1321 n.34.

794. *Hearings on Clean Air Act Oversight*: Statement of Jim Horn, *supra* note 523, at 304.

Administrator Browner in early 1995 assured Congress that “the development of . . . state-based approaches will allow states like Colorado and Arizona to get the full environmental credit they deserve for moving forward with strong I/M programs, and will provide the flexibility needed by other states to ultimately achieve the emissions reductions necessary for clean air.”<sup>795</sup> But the agency, by yielding every time to state recalcitrance, sent precisely the opposite message to the states that went to the effort and expense of implementing a centralized high-tech program. As the Texas program was collapsing in the state legislature, one legislator who was an active participant in the state legislative debates testified to Congress that “EPA’s unequal treatment of the states has led to the massive public outcry against the IM-240 testing program implemented in Texas, and I for one cannot disagree with a single voice out there who refuses to take such treatment from the federal government.”<sup>796</sup>

When EPA finally draws the line, Congress invariably steps in and takes recalcitrant states off the hook. Just as it did not escape the attention of drivers in Houston that drivers in California were able to avoid centralized I/M, it cannot escape the attention of drivers in Denver and Phoenix that drivers in Houston still do not have to undergo the basic I/M that was absolutely required by the 1977 Amendments and that Houston has not suffered a single sanction for its continued failure to implement an adequate I/M regime. At the end of the day, states like Colorado and Arizona did *not* get the credit they deserved for implementing effective I/M programs, and states like California and Texas got credit they did not deserve.

The lessons seem reasonably clear. It is almost impossible for the federal government to induce the states to press local populations to take action aimed at reducing pollution when there is no price to be paid for failure to engage in cooperative federalism. It is not clear that some state pollution control officials seriously believe that attaining the National Ambient Air Quality Standards is a desirable goal. Texas Natural Resource Conservation Commissioner, Ralph Marquez, for example, testified to Congress that, in his opinion, the game was not worth the candle.<sup>797</sup> Yet in the face of active resistance by state officials who question the value of the entire federal enterprise, EPA has steadfastly refused to use the one tool that it does possess—the power to write a Federal Implementation Plan for the state.

It may be that the only credible way for EPA to send a message to recalcitrant states that the federal Clean Air Act cannot be ignored is to take over the air quality planning process for a major metropolitan area. For example, EPA, not the state, could write the contracts with centralized I/M companies and send a strike force of federal officials to the area to exercise the federal government’s

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795. *Hearings on Clean Air Act Oversight*: Statement of Carol M. Browner, *supra* note 378, at 19.

796. *Hearings on Clean Air Act Oversight*: Statement of Jim Horn, *supra* note 523, at 304.

797. *Hearings on Clean Air Act Oversight*: Statement of R.B. Marquez, *supra* note 781, at 11.

authority to write field citations of up to \$5000 to individual drivers who do not demonstrate proof of having successfully passed a biennial I/M test.<sup>798</sup> The federal government will, of course, encounter resistance at the local level, as it did when it attempted to implement the federal civil rights laws in the 1960s. But most people will comply with the law, even at the cost of some personal inconvenience, if they are convinced that the law is being administered evenly in all states.

An aggressive show of federal determination to implement the federal law in a major urban area will no doubt precipitate attempts to amend the Clean Air Act to take away the power to write FIPs or to remove the centralized I/M requirement for heavily polluted areas. A renewed national debate on the need for effective I/M programs or on the desirability of a strong federal implementation role is not, as some EPA officials apparently believe, something to be avoided at all costs. The timing of that debate is, of course, important. EPA Administrator Browner may have wisely concluded that the first few months of the 104th Congress was not the most propitious time to precipitate a congressional debate on the Clean Air Act. The history of radical regulatory reform efforts in Congress demonstrates, however, that the public does not support a wholesale retreat from national environmental goals. The first session of the 105th Congress may be an especially appropriate time to reconsider some aspects of Clean Air Act implementation.<sup>799</sup> In any event, if EPA fails to take vigorous steps to implement the clear requirements of the existing statute, it will have amended it *de facto* without the national debate that should attend such important changes in the national law.

If EPA fails to adopt an aggressive stance, it is safe to predict that states containing many of the nation's most heavily polluted urban areas will fail to make the demonstrations of hydrocarbon emissions reductions (6% by 1996 and 3% per year after that) and the "reasonable further progress" demonstrations required by the statute at the end of 1996. It is also safe to predict that those states will suffer no adverse consequences. The statutory consequences are plain, but in the real world they will never happen. EPA will first struggle to come up with innovative interpretations of the statute that provide sufficient wiggle room to let states off the hook or Congress will, as it has in the past, amend the statute in slight, behind-the-scenes ways to cushion or eliminate the impact of the required sanctions. This is not an especially comforting prospect from the perspective of the citizens who continue to breath polluted air. It is, unfortunately, a realistic one.

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798. 42 U.S.C.A. § 7413(d)(3) (West 1995).

799. Operating on this assumption, EPA and several private organizations, including the Center for Strategic and International Studies, the National Academy of Public Administration and the Keystone Center, have assembled four groups of representatives of industry, environmental groups, state and local officials and academics to consider recommendations to broad changes in the environmental laws. This large effort, called Enterprise for the Environment, plans to arrive at consensus recommendations at the outset of the 105th Congress.

