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Pennsylvania's Cancellation of its Federal Clean Air Act Automobile Emissions Inspection Program: Can Pennsylvanians Now Breathe Easier?

"[T]he state coughed up \$145 million and got nothing. . . . It's a huge state joke, and we're not one step closer to cleaner air."

—Peter Kostmayer¹

INTRODUCTION

Most Pennsylvanians, if asked if they would support legislation that would mandate cleaner air at no cost to them, would undoubtedly voice their support for the legislation. If asked the same question rephrased to add the condition that the legislation would impose a minor cost and inconvenience on them, most would probably still voice their support. However, if told that any inconvenience could possibly affect the operation of their automobiles or their driving habits, the response would likely be much different. There is a mysterious connection that people have with their automobiles that generates opposition to any regulation or change of peoples' driving habits. This mysterious connection has led, it superficially appears, Pennsylvanians to resist emission inspection programs mandated by the federal government.

Pennsylvania has had a poor track record in dealing with federal automobile emissions inspection mandates. The Pennsylvania General Assembly (the "Assembly") refused to comply with the automobile emissions inspection requirements of the Federal Clean Air Act and its 1970 and 1977 amendments (the "1970 Amendments" and the "1977 Amendments").² The Assembly re-

1. Don Hopey, *New Green Group for Keystone State*, PITTSBURGH POST-GAZETTE, Jan. 1, 1996, at A9. Kostmayer is the former Federal Environmental Protection Agency Regional Administrator for Region Three, which includes Delaware, the District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia. See Adrienne Redd, *EPA Official Defends Clean Air Amendments*, E. PA. BUS. J., Mar. 20, 1995, at 5.

2. See Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676;

cently refused to comply with more stringent automobile emissions inspection mandates under the 1990 amendments to the Clean Air Act (the "1990 Amendments").³ The Assembly's reluctance to comply with the mandates indicates a response to public opposition to such programs that was prompted in part by a growing dissatisfaction among state governments and state citizens with federal mandates. The Assembly's actions were designed to assert Pennsylvania's sovereignty and the Assembly's distaste for the current state of expansive federalism.

Section I of this comment outlines the history of the Clean Air Act and its amendments. Section II traces Pennsylvania's struggle with implementing emissions inspection programs under the 1970 and 1977 Amendments and the 1990 Amendments. Section III examines the underlying reasons that the Assembly has resisted attempts at federally mandated automobile emissions inspection programs.

I. THE FEDERAL CLEAN AIR ACT AND ITS AMENDMENTS

A. *The Historical Development of the Clean Air Act*⁴

The Clean Air Act was first enacted by Congress in 1955.⁵ The original act did not regulate automobile emissions because the general belief was that automobiles were not a factor in air pollution.⁶ As suburban living became more commonplace, the number of automobiles increased and the federal government, responding to the increased demand for improved highways, enacted the Federal-Aid Highway Acts of 1944⁷ and 1956.⁸

Once it became evident that automobiles did in fact contribute to some of the urban pollution problems of the 1940's and 1950's,

Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

3. See Clean Air Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

4. For a brief discussion of the history of the Clean Air Act, see *Motor Vehicle Mfr. Ass'n v. New York Dep't of Env'tl. Conservation*, 17 F.3d 521, 524-25 (2d Cir. 1994).

5. See Air Pollution Control-Research and Technical Assistance Act of 1955, Pub. L. No. 159, 69 Stat. 322.

6. See Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. ENVTL. L.J. 156, 159 (1994). Efforts were instead made to reduce pollution from stationary industrial sources. *Id.*

7. Pub. L. No. 78-521, 59 Stat. 838.

8. Mintz, *supra* note 6, at 159. See The Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374. The number of automobiles in the United States also increased because large automobile manufacturers and oil companies bought electric rail transportation networks and dismantled them. Mintz, *supra* note 6, at 158-59.

several individual states, including California, adopted automobile emissions standards.⁹ In an attempt to create uniformity among the states, Congress enacted the Motor Vehicle Air Pollution Control Act of 1965 (the "1965 Act").¹⁰

However, the 1965 Act did not achieve the desired uniformity so Congress enacted the Air Quality Act of 1967 (the "1967 Act").¹¹ The 1967 Act required states to submit plans to the federal government to achieve certain air quality standards.¹² However, by 1970, only twenty-one states submitted plans and none was approved by the federal government.¹³

B. The 1970 and 1977 Amendments to the Clean Air Act

By 1970, Americans had become more cognizant of the result of decades of industrial use and abuse of the environment. The first Earth Day, which greatly enhanced the public's awareness of environmental issues, was held on April 22, 1970.¹⁴ Also, Americans were becoming increasingly cognizant of abuse by automakers.¹⁵ In 1969, the United States Department of Justice obtained a consent decree signed by the major U.S. automobile manufacturers as a result of a lawsuit filed by the Justice Department which alleged that the manufacturers had conspired to thwart development of motor vehicle emissions control equipment required by the 1965 Act.¹⁶

On the heels of heightened public awareness concerning the

9. *See Motor Vehicle Mfr. Ass'n*, 17 F.3d at 524.

10. Pub. L. No. 89-272, § 202(a), 79 Stat. 992.

11. *Motor Vehicle Mfr. Ass'n*, 71 F.3d at 525. *See* Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485. Congress permitted California to maintain its own automobile emissions standards. *See id.* § 208(b).

12. § 108(c)(1), 81 Stat. at 492.

13. Mintz, *supra* note 6, at 163 (citing Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1590 (1991)).

14. *Id.* (citations omitted).

15. *See id.* at 163-64. General Motors faced great embarrassment and public disdain over the way it handled criticisms leveled by consumer advocate Ralph Nader. *Id.* *See* RALPH NADER, UNSAFE AT ANY SPEED (1965). Nader criticized alleged practices by General Motors that placed profits ahead of safety. *Id.* at 40-41. Nader specifically targeted the Chevrolet Corvair, which he alleged to have inherent handling defects that made it unsafe. *Id.* at 3-41. General Motors hired investigators to obtain details on Nader's private life that could be used to discredit him. Mintz, *supra* note 6, at 164 (citations omitted).

16. Mintz, *supra* note 6, at 164 (citing Eileen Shanahan, *U.S. Charges Auto Makers Plot to Delay Fume Curbs*, N.Y. TIMES, Jan. 11, 1969, at A1). The defendants in the lawsuit were General Motors Corporation, Ford Motor Corporation, Chrysler Corporation, American Motors Corporation, and the Automobile Manufacturers Association, Inc. *Id.*

environment and the American public's dissatisfaction with automakers, Congress enacted comprehensive amendments to the Clean Air Act in 1970.¹⁷ Under the 1970 Amendments, the federal government set national ambient air quality standards ("NAAQS").¹⁸ The 1970 Amendments also provided that states could include emissions inspection programs in state implementation plans ("SIP's"), which were required to be submitted by each state to the federal government.¹⁹ Congress further amended the Clean Air Act in 1977.²⁰ The 1977 Amendments required states which had not achieved the required NAAQS to submit revised SIP's with vehicle emissions inspection and maintenance programs ("I/M programs").²¹

C. *The 1990 Amendments to the Clean Air Act*

The total number of vehicle miles driven increased dramatically in the two decades following the 1970 Amendments,²² so attempts at reducing air pollution caused by automobile emissions made no significant improvements in air quality.²³ Congress thus enacted the Clean Air Amendments of 1990.²⁴ The 1990 Amendments provide for stricter vehicle emissions standards,²⁵ because reducing air pollution by the reduction of vehicle tailpipe emissions is generally regarded as cheaper and more efficient than a similar reduction of air pollution by reducing emissions from stationary industrial sources.²⁶

17. *Id.* See Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

18. § 109, 84 Stat. at 1679.

19. *Id.* § 110(a)(2)(G). Section 110(a)(2)(G) stated: "The Administrator shall approve . . . [a] plan . . . that . . . provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards . . ." *Id.*

20. See Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

21. *Id.* § 172. Areas that do not achieve the required NAAQS are termed "nonattainment areas." *Id.* § 171(2). Section 172(b)(11)(B) of the 1977 Amendments provided that states had to "establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program" for nonattainment areas. *Id.* § 172(b)(11)(B).

22. Mintz, *supra* note 6, at 166. Americans drove a total of 916.7 billion miles in 1970 and 1,533.7 billion miles in 1991. *Id.*

23. *Id.* at 167.

24. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

25. See 42 U.S.C. § 7521 (Supp. V 1993).

26. The Environmental Protection Agency estimates that 30% of all hydrocarbon emissions, 90% of all carbon monoxide emissions, and 30% of all nitrous oxide emissions are produced by automobiles. *Are More Stringent Auto Emissions Standards Coming? (Could be Wicked Good News)*, PA. INDUSTRY ENVTL. ADVISOR, Sept. 1, 1992, available in Westlaw, 1992 WL 2685638. It is estimated that the cost of removing a ton of hydrocarbons from the air using an automobile emissions inspection

The 1990 Amendments directed the Environmental Protection Agency (the "EPA") to require states to adopt either a basic I/M program or an enhanced I/M program for nonattainment areas depending on the severity of nonattainment.²⁷ The basic emissions inspection test requires testing with the automobile idling,²⁸ and the enhanced emissions inspection test further requires transient testing of late model vehicles.²⁹ Inspections of vehicles must be performed annually³⁰ at centralized emissions testing centers³¹ under both the enhanced and basic inspection testing programs. If a vehicle fails the enhanced emissions inspection test, the vehicle owner is required to expend at least \$450 to correct the problem.³²

program is \$500 and the cost of removing a ton of hydrocarbons from the air by regulating stationary industrial sources is between \$5,000 and \$20,000. Sharon Voas, *Clearing the Air on Emission Tests—Answers to the Most Often Asked Questions of Automobile Owners*, PITTSBURGH POST-GAZETTE, Sept. 25, 1994, at B1. However, a study conducted by Carnegie Mellon University engineering students concluded that "reducing pollution from cars would cost 10 to 15 times as much per ton as cutting pollution from industries." Sharon Voas, *Emissions Program Full of Failures, CMU Research Claims*, PITTSBURGH POST-GAZETTE, June 5, 1995, at A6. An Environmental Protection Agency official strongly disagreed with the study, citing its lack of "real world" data. *Id.*

27. See 42 U.S.C. § 7511a (Supp. V 1993). Nonattainment areas are classified as either marginal, moderate, serious, severe, or extreme. *Id.* § 7511(a)(1). Basic emissions inspection programs are generally sufficient for marginal and moderate nonattainment areas. See *id.* § 7511a(a)(2)(B), (b)(4). Enhanced emissions inspection programs are generally required for serious, severe, and extreme nonattainment areas. See *id.* § 7411a(c)(3), (d), (e). The choice of emissions inspection programs also depends on the population of the nonattainment area. See 40 C.F.R. § 51.350 (1995). Conventional gas burning vehicles having a gross vehicle weight under 8,500 pounds must undergo such inspections. *Id.* § 51.356. About 5.9 million vehicles would have to be inspected in Pennsylvania. Adrienne Redd, *Emissions Test Program has People Fuming*, E. PA. BUS. J., June 20, 1994, at 1.

28. 40 C.F.R. § 51.352(a)(6) (1995).

29. *Id.* § 51.351(a)(6). Under enhanced I/M programs, 1986 and later models are required to submit to a driving cycle test. *Id.* 1981-1985 model year vehicles are required to submit to a two speed idle test, and pre-1981 vehicles are required to submit to an idle test. *Id.* Only 1968 and later model year vehicles are required to submit to emissions testing. *Id.* § 51.356. The transient driving cycle test is referred to as the "Inspection and Maintenance 240 Second Test" (the "I/M 240 test"). Sharon Voas, *Clean-air Studies Muddy the Waters—Sorting Out Facts in Emissions Tests can be Exhausting*, PITTSBURGH POST-GAZETTE, Sept. 18, 1994, at E1.

30. 40 C.F.R. §§ 51.351(a)(3), .352(a)(3) (1995). SIP's can specify other than annual testing frequency with the approval of the EPA. *Id.* § 51.355(a).

31. *Id.* §§ 51.351(a)(1), .352(a)(2). The EPA cited the reduction of fraud arising from conflicts of interest as the principal reason for mandating a centralized testing scheme. See 57 Fed. Reg. 52,950, 52,958 (1992).

32. 40 C.F.R. § 51.360(a)(7) (1995). The amount is adjusted each year based on the Consumer Price Index. *Id.* For vehicles that fail the basic emissions inspection test, the vehicle owner is required to expend at least \$75 for pre-1981 model year vehicles and at least \$200 for post-1981 model year vehicles to correct the problem. *Id.* § 51.360(a)(6).

Pursuant to the 1990 Amendments, the EPA may impose penalties against noncomplying states. The EPA may require the withholding of highway funds.³³ The EPA may also impose stricter emissions reduction requirements for stationary industrial sources.³⁴ Thus, although the states implement emissions inspection programs, the federal government retained the punitive authority to ensure that states comply with the mandates of the 1990 Amendments.

II. THE PENNSYLVANIA GENERAL ASSEMBLY'S REFUSALS TO FACILITATE AUTOMOBILE EMISSIONS INSPECTION PROGRAMS

The Pennsylvania General Assembly has been vigilant in its opposition to federally-mandated vehicle emissions control programs. The Assembly complied with the I/M implementation provisions of the 1970 and 1977 Amendments only after a federal court order forced the withholding of hundreds of millions of dollars in federal highway funds. However, this early battle was only a precursor to the Assembly's and the Governor's refusal to implement an I/M program under the 1990 Amendments. This latter debacle culminated in the settlement of a multi-hundred-million dollar breach of contract action brought against the Commonwealth.

A. Pennsylvania's Noncompliance under the 1970 and 1977 Amendments

On January 27, 1972, Pennsylvania submitted a SIP to the EPA as required by the 1970 Amendments.³⁵ On November 28, 1973, the EPA promulgated a revised plan which required Pennsylvania to implement an I/M program in the Philadelphia and Pittsburgh areas by May 1, 1975.³⁶ The Commonwealth did not implement the I/M program and the Delaware Valley Citizens' Council for Clean Air and the EPA filed suit in the United States District Court for the Eastern District of Pennsylvania to force the implementation of the I/M program as required by the promulgated SIP.³⁷

33. 42 U.S.C. § 7509(b)(1) (Supp. V 1993).

34. *Id.* § 7509(b)(2).

35. Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 533 F. Supp. 869, 872 (E.D. Pa. 1982), *aff'd*, 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982).

36. Delaware Valley Citizens' Council, 533 F. Supp. at 872-73.

37. *Id.* at 873. 42 U.S.C. § 7604 (Supp. V 1993) permits citizens to sue to enforce state compliance under the Clean Air Act. 42 U.S.C. § 7604. 42 U.S.C. § 7413(b) permits the federal government to institute suit to enforce state compli-

After discovery and negotiations, the Commonwealth, the Pennsylvania Department of Transportation ("PennDOT"), and the Pennsylvania Department of Environmental Resources (the "DER") agreed to a consent decree which terminated the litigation.³⁸ Pursuant to the consent decree, the Commonwealth agreed to implement an I/M program in the Pittsburgh and Philadelphia areas by August 1, 1980.³⁹ On March 7, 1980, the district court modified the consent decree on motion of the Commonwealth and delayed implementation of the I/M program until May 1, 1981.⁴⁰ On June 16, 1981, the district court further extended the deadline for implementation of the I/M program until May 1, 1982.⁴¹

On October 5, 1981, the General Assembly enacted House Bill 456, which prohibited the executive branch of the government from expending state funds on the implementation of an I/M program.⁴² Following the passage of House Bill 456, the district court found the Commonwealth to be in civil contempt for violating the terms of the consent decree and ordered the United States Department of Transportation to refrain from approving highway projects and awarding funds for highway projects unless the purpose of a project was for "safety, mass transit, or . . . related to air quality improvement or maintenance."⁴³ The Third Circuit Court of Appeals upheld the judgment of the district court on appeal.⁴⁴

Meanwhile, in June and July of 1981, members of the Assem-

ance under the Clean Air Act. *Id.* § 7413(b).

38. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 678 F.2d 470, 473 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982). The DER was the predecessor to the Pennsylvania Department of Environmental Protection. See 1995 Pa. Legis. Serv. 110, 136, § 501 (Purdon) (to be codified at PA. STAT. ANN. tit. 71, §§ 1340.501-.509) (establishing the Pennsylvania Department of Environmental Protection).

39. *Delaware Valley Citizens' Council*, 678 F.2d at 473. The I/M program was to be implemented in Allegheny, Beaver, Bucks, Butler, Chester, Delaware, Montgomery, Philadelphia, Washington, and Westmoreland Counties. *Id.* at 473 n.1.

40. *Id.* at 473.

41. *Id.*

42. Act of Oct. 5, 1981, Act No. 1981-99, 1981 Pa. Laws 289. The Assembly overrode a veto by Governor Thornburg. Although Governor Thornburg stated in his veto statement that he was ideologically opposed to the implementation of an I/M program, he maintained that he vetoed House Bill 456 because of the threat of a loss of \$400 million in highway funds. 1981 PA. LEGIS. J.-H.R. 1471, 1471.

43. *Delaware Valley Citizens' Council*, 678 F.2d at 474 (citation omitted).

44. *Id.* at 479. Thus, federal highway funds were withheld by the federal government and any projects that met the narrow exception allowed by the district court had to be approved by the district court. See *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 551 F. Supp. 827 (E.D. Pa. 1982) (approving approximately \$1 million in highway funds of approximately \$90 million requested by the Commonwealth).

bly initiated suit in the Pennsylvania Commonwealth Court, alleging that PennDOT lacked legislative authority to enter into the federal consent decree.⁴⁵ The commonwealth court held that PennDOT had the authority to enter into the consent decree⁴⁶ and the members of the Assembly appealed to the Pennsylvania Supreme Court.⁴⁷

The supreme court reversed the commonwealth court and held that PennDOT did not have the authority to enter into the consent decree and the court remanded the proceedings so that an injunction could be entered enjoining PennDOT from implementing the terms of the consent decree.⁴⁸ However, while the appeal was pending before the supreme court, the Assembly enacted legislation which enabled public fund expenditures for an I/M program in order to restore federal highway funding.⁴⁹

The supreme court held that the legislation which enabled expenditures did not retroactively give PennDOT the authority to enter into the consent decree.⁵⁰ In so holding, the court expressed extreme displeasure with the federal district court for coercing the Assembly into action it did not wish to take by withholding federal highway funds.⁵¹

Thus, the intervention of the federal courts, however unwelcome by the Assembly and Pennsylvania courts, ultimately forced the implementation of an I/M program in the Pittsburgh and Philadelphia areas. The federal courts, backed by the resoluteness of the EPA, adhered to the punitive provisions of the Clean

45. *Scanlon v. Commonwealth*, 467 A.2d 1108, 1110 (Pa. 1983). The plaintiffs, members of the Assembly, alleged "that, without authorizing legislation, PennDOT lacked the authority to: (1) establish and implement an auto emissions inspection system; (2) ensure enforcement of such a system; and (3) establish any subsidiary programs to a primary emissions program." *Scanlon*, 467 A.2d at 1110. The plaintiffs sought a declaratory judgment ruling that PennDOT did not have the power to enter into the consent decree and sought to enjoin PennDOT from implementing the terms of the consent decree. *Id.*

46. *Scanlon v. Commonwealth*, 443 A.2d 1197, 1201 (Pa. Commw. Ct. 1982), *rev'd*, 467 A.2d 1108 (Pa. 1983). The commonwealth court held that PennDOT had the authority to enter into the consent decree but not the financial means to implement an I/M program. *Scanlon*, 443 A.2d at 1201.

47. *Scanlon*, 467 A.2d at 1110.

48. *Id.* at 1113, 1115.

49. See Act No. 1983-3, 1983 Pa. Laws 4. The legislation provided that state funds may be expended to implement an I/M program when "necessary for the Commonwealth to receive or avoid the loss of Federal funds." *Id.*

50. *Scanlon*, 467 A.2d at 1114.

51. *Id.* The court stated that the federal district court order which authorized the withholding of federal highway funds "coerced" the Assembly into passing the legislation and the legislation was "delivered as ransom for the rescue of the citizens of Pennsylvania from the considerable financial distress caused by the withholding of million [sic] of dollars in taxpayers' funds ticketed for Pennsylvania highways." *Id.*

Air Act, which fostered great resentment in Pennsylvania. The battle set the stage for Pennsylvania's spirited noncompliance of the I/M program requirements of the 1990 Amendments.

B. Pennsylvania's Noncompliance under the 1990 Amendments

Pennsylvania's resistance to the establishment of an I/M program under the 1990 Amendments proved more successful. However, success did not come without a price because Pennsylvania had to "buy its way out" of the implementation of an I/M program that was in the advanced stages of development.

1. The Envirotest Contract

Pursuant to the 1990 Amendments, Pennsylvania submitted a SIP on November 5, 1993, which was conditionally approved on August 31, 1994.⁵² The SIP required centralized emissions testing in twenty-five counties in Pennsylvania starting in January of 1995.⁵³ The SIP also specified that testing would be performed every two years.⁵⁴ On November 11, 1993, the Commonwealth entered into a contract with Envirotest Corporation ("Envirotest")⁵⁵ to construct eighty-six test centers in the twenty-five counties and conduct emissions testing at the centers.⁵⁶

52. 59 Fed. Reg. 44,936, 44,936 (1994). Pennsylvania was no doubt motivated to submit a SIP due to the threat of the loss of federal highway funds, estimated to be about \$900 million in 1995. See Suzanne Elliott, *Auto-emissions Firm to Employ 400 as it Establishes 23 Area Testing Sites*, PITTSBURGH BUS. TIMES & J., Jan. 31, 1994, at 4.

53. 59 Fed. Reg. at 44,936. The counties include: Allegheny, Beaver, Berks, Blair, Bucks, Cambria, Centre, Chester, Cumberland, Dauphin, Delaware, Erie, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mercer, Montgomery, Northampton, Philadelphia, Washington, Westmoreland, and York. *Id.*

54. 59 Fed. Reg. 33,709, 33,712 (1994). Vehicles with vehicle identification numbers ("VIN's") which ended in odd numbers were to be tested in years which ended in odd digits starting in 1995. Joseph P. Ferry, *Emissions Test Sites are Taking Shape*, ALLENTOWN MORNING CALL, July 25, 1994, at 3. Vehicles with VIN's which ended in even numbers were to be tested in years which ended in even digits starting in 1996. *Id.*

55. *Envirotest Partners v. Commonwealth*, 664 A.2d 208, 210 (Pa. Commw. Ct. 1995) (holding that the Envirotest contract and the documents incorporated by reference are not exempt under the Right to Know Act, PA. STAT. ANN. tit. 65, §§ 66.1-4 (1959 & Supp. 1995)). Envirotest operates emissions testing centers in Connecticut, Florida, Illinois, Maryland, Minnesota, Ohio, Tennessee, Wisconsin, and British Columbia, Canada. Elliott, *supra* note 52, at 4.

56. Elliott, *supra* note 52, at 4. The contract specified that Envirotest was "to provide all qualified personnel, facilities, materials, and other services and, in consultation with the Commonwealth, perform a centralized emission inspection program." *Envirotest Partners*, 664 A.2d at 213. The Envirotest I/M program was termed the "E-Check Emissions Program." See *E-Check Emissions Program*, READING EAGLE, READING TIMES, Sept. 22, 1994, at B4 [hereinafter *E-Check*].

Under the terms of the contract, Envirotest was to be paid nothing by the Commonwealth and was to recover its investment through the fees it charged for inspections.⁵⁷ The facilities built by Envirotest were to include treadmills and other devices required to conduct transient emissions testing.⁵⁸ No repairs were to be performed at the facilities on vehicles that failed the testing.⁵⁹ However, under the terms of the contract, Envirotest was to perform free retests on vehicles that failed the emissions test.⁶⁰

2. *Opposition to the Envirotest E-Check Program*

Opposition to the Envirotest E-Check program intensified during 1994 as its implementation became imminent. The testing program was attacked on two fronts—opposition to test center locations and opposition to the testing program itself. Public opposition was fueled by the media and quickly spread to the Pennsylvania General Assembly.

a. *Opposition to Test Center Sites*

Given the current attitude of Americans to resist any development in their neighborhoods that is out of the ordinary, it is not surprising that Envirotest E-Check facilities were almost universally opposed despite their obvious benefits. Even a test center location in an industrial park was opposed by local residents.⁶¹ Construction of a test center was also opposed in an economically disadvantaged community, despite the prospect of increased jobs.⁶²

57. Redd, *supra* note 27, at 1. The fee charged by Envirotest was to be \$17 during the first twenty-one days of the month and \$22 during the remainder of the month. *Id.* For annual emissions testing required under the 1970 and 1977 Amendments, the fee charged by service stations is \$8. *Id.*

58. Elliott, *supra* note 52, at 4.

59. Redd, *supra* note 27, at 1. Under the annual emissions testing program required by the 1970 and 1977 Amendments, independent service stations perform testing and make repairs as required on vehicles that fail the test. *Id.* This testing scheme is referred to as "decentralized testing."

60. *E-Check*, *supra* note 56, at B4.

61. See Debra Erdley, *Test Sites for Autos: NIMBY*, TRIBUNE REV. (Greensburg, Pa.), June 3, 1994, at 1. Residents of Penn Township, Westmoreland County, opposed a three lane facility in the Penn Township Industrial Park because of fears of increased traffic. *Id.* A county official disagreed, noting that Envirotest was to stagger its testing schedule and stated that the test center would be "a very beautiful facility" that would "compliment" the industrial park. *Id.*

62. See Mike Tysarczyk, *Wilkinsburg Residents Seek to "Drive Envirotest Out,"* TRIBUNE REV. (Greensburg, Pa.), June 30, 1994, at 1. The six-lane testing center which was proposed in Wilkinsburg, Allegheny County, was to employ an estimated 35 workers. *Id.* However, local residents fearing increased traffic "vowed to use every

In addition to the prospect of increased jobs due to the addition of an Envirotest facility in a neighborhood, the facilities would have benefitted neighborhoods by placing tax delinquent properties back on local tax roles.⁶³ Also, the traffic problems that concerned local residents were seen as greatly exaggerated. Estimates showed that less vehicles would pass through an E-Check testing facility per day than pass through other commercial facilities.⁶⁴

b. Opposition to the Envirotest E-Check Program

Opposition to the Envirotest E-Check program grew in intensity as the deadline for the program's implementation approached.⁶⁵ There were many concerns about the cost, inconvenience, and effectiveness of the testing program. However, most of these concerns were unfounded or exaggerated but no doubt contributed significantly to the state government's reluctance to comply with the I/M mandates of the 1990 Amendments.

There were concerns that undergoing an emissions test at an Envirotest facility would be a time-consuming process. However, under the terms of the Envirotest contract, the testing centers were to be located at convenient locations, based on population distributions, so the drive time to and from the centers would be minimal.⁶⁶ Also, there were public concerns about the time

means possible to stop construction of the . . . facility." *Id.* A facility was also opposed in Plum Borough, Allegheny County, for fear of increased traffic, even though the center was to employ 30 to 35 workers. Stephen Liss, *Lights Go Out on Plum Presentation*, TRIBUNE REV. (Greensburg, Pa.), July 7, 1994, at 5.

63. See Stephen Liss, *Envirotest Won't Tell Locations*, TRIBUNE REV. (Greensburg, Pa.), July 3, 1994, at 12. Envirotest estimated that it would pay \$4 million annually in local real estate taxes and employ at least 2,500 full and part-time employees. Redd, *supra* note 27, at 1.

64. Envirotest estimated that a three-lane facility would test 100 to 200 cars per day and a six-lane facility would test less than 400 vehicles per day. Erdley, *supra* note 61, at 1; Tysarczyk, *supra* note 62, at 1. Fifteen hundred cars pass through an average convenience store per day, 800 to 1,000 cars pass through an average fast-food restaurant, and 600 cars typically pass through a drive-in bank. Liss, *supra* note 63, at 12.

65. A Gallup poll of Pennsylvania American Automobile Association ("AAA") members conducted in the Fall of 1994 indicated that 90 percent of the AAA members surveyed opposed the E-Check program. Peter L. Decoursey, *AAA Fighting to Halt Emissions Tests*, READING EAGLE, READING TIMES, Nov. 3, 1994, at A1. There were also grass roots petition drives that demonstrated opposition for the E-Check program. See Peter L. Decoursey, *Classic-car Owner Fuming—Emissions Testing Seen as Threat to Old Autos*, READING EAGLE, READING TIMES, Oct. 24, 1994, at B1.

66. The contract required that "[a]t least one inspection station must be within 5 miles of 80 percent of the population of an urban area and may be no longer than 10 miles away from 80 percent of the population in rural areas." Ferry, *supra* note 54, at 3.

spent at testing centers. However, under the terms of the contract, Envirotest was required to ensure that the majority of motorists using its facilities spent no more than thirty minutes at the facilities.⁶⁷ Common sense would tend to indicate that time spent by motorists would be no greater than the time spent at an average decentralized service center which performed enhanced emissions testing.

Many people were opposed to the E-Check program because of possible increased costs of operating and maintaining a vehicle due to the testing program. The cost of the actual testing was to be no higher than the cost of present emissions inspections required by the 1970 and 1977 Amendments,⁶⁸ but due to the stringency of the E-Check testing, the failure rate was predicted to be high.⁶⁹ Therefore, the cost to repair nonconforming vehicles could be high.⁷⁰ These increased costs would likely detrimentally impact lower income vehicle owners, who typically drive older model automobiles. However, stringent transient testing would not be performed on older model vehicles and therefore testing would not have produced a higher failure rate for older vehicles than is now experienced under present emissions testing.⁷¹

67. Under the terms of the contract, Envirotest was "required to inspect 85 percent of all vehicles within 15 minutes of their arrival at the station, 95 percent within 20 minutes and all vehicles within 25 minutes." Ferry, *supra* note 54, at 3. If Envirotest did not comply with this term of the contract, PennDOT could fine the company up to \$600 per day. *Id.* When the maximum wait time of the majority of the vehicles that were to pass through the testing centers is added to the 12 minute time of the test, the total time spent by motorists at the testing centers would be less than 30 minutes, every two years. See Liss, *supra* note 63, at 12.

68. The annual fee for current emissions inspections required under the 1970 and 1977 Amendments is \$8. Adrienne Redd & Tom Sink, *Car Repairers See Boon From Emissions Tests*, N.E. PA. BUS. J., July 1, 1994, at 1. Therefore, the E-Check test cost of \$17 every 2 years was to be approximately the same as that of the tests required under the current testing program.

69. Envirotest estimated that the E-Check testing program would fail 20 to 22 percent of the 5.9 million automobiles required to be tested. *E-Check*, *supra* note 56, at B4. PennDOT estimated that 30 percent of the vehicles required to be tested would fail. Redd, *supra* note 27, at 1.

70. The EPA estimated that the average cost of repairs for vehicles failing the transient test would be \$120. 57 Fed. Reg. at 52,963. A common vehicle component that needs to be replaced because of a failed emissions test is the catalytic converter. The catalytic converter "filters exhaust gases through a dense honeycomb structure coated with a fine layer of such precious metals as platinum, palladium, and rhodium. Chemical reactions occur on this surface that convert unburned hydrocarbons (HC), carbon monoxide (CO), and oxides of nitrogen (NOx) into less harmful gases." Barry Winfield, *The Trouble With Getting On-Board*, CAR & DRIVER, Dec. 1995, at 87. The cost of replacing a catalytic converter could be upwards of \$700. Peter L. DeCoursey, *Catalytic Converters Key to Auto Test*, READING EAGLE, READING TIMES, Sept. 26, 1994, at B1.

71. The failure rate would not increase but the number of automobiles failing would likely increase due to the expanded geographical coverage of the E-Check tes-

Many motorists were also concerned with having to have their vehicles tested at centralized testing centers and, if their vehicles failed the test, getting repairs made at separate service centers. The EPA mandated a centralized testing network under the 1990 Amendments to prevent conflict of interest scenarios that might exist with a decentralized program.⁷² Because current emissions testing is performed by private garages, those garages would have to scrap expensive emissions testing machines.⁷³ However, despite lost emissions inspection fees and the loss of the purchase or lease price of existing testing machines, it was estimated that the increased failure rate of the E-Check program would bring increased revenues to private garages.⁷⁴ Also, the E-Check centralized program would have cost PennDOT less to regulate than a decentralized program.⁷⁵

Opponents of the E-Check program also cited unsuccessful centralized emissions testing programs in other states as analogous to Pennsylvania's proposed E-Check program. State Representative Allen Kukovich raised concerns about inaccurate testing results at a centralized facility in Wayne, New Jersey.⁷⁶ However, New Jersey Division of Motor Vehicles officials disputed reports of inaccuracies.⁷⁷ Also, centralized testing was suspended in Maine after increased public opposition.⁷⁸ However,

ing program. The state or the federal government should have addressed this concern by offering vehicle repair financial assistance to lower income vehicle owners.

72. See 57 Fed. Reg. at 52,958. The EPA conducted a study where it removed the catalytic converters from 38 vehicles in the St. Louis, Missouri area and had the vehicles emissions tested at decentralized private garages. Voas, *supra* note 29, at E1. Despite the lack of catalytic converters on the vehicles, seventy-six percent of the garages certified that the vehicles passed emissions testing. *Id.*

73. Redd, *supra* note 27, at 1. The machines generally cost garage owners seven to nine thousand dollars to purchase or lease. *Id.*

74. One garage owner estimated a 10 percent increase in business if the E-Check program were implemented. Redd & Sink, *supra* note 68, at 1.

75. Sharon Voas, *Crash of Emission Test Program Takes Jobs, Hopes with it*, PITTSBURGH POST-GAZETTE, Nov. 17, 1994, at A15. A Joint Legislative Budget and Finance Committee report estimated that it would cost PennDOT \$7.4 million to regulate a decentralized program and \$5.5 million to regulate a centralized program. *Id.*

76. See Voas, *supra* note 29, at E1.

77. *Id.* Based on I/M 240 testing of 15,000 vehicles, an EPA official estimated that transient I/M 240 testing is more accurate at failing high polluting cars and passing conforming vehicles than existing idle testing. *Id.* Also, an EPA official estimated that a vehicle does not fail the I/M 240 test unless it produces many times the acceptable levels of pollutants. *Id.* Studies in Minnesota and Nevada reached contrary results, thus raising doubts about the EPA study. *Id.*

78. *Citizens' Fury Forces Maine to Halt Vehicle Emissions Test*, THE HARRISBURG PATRIOT, Oct. 6, 1994, at A7. Maine residents opposed the testing, which was run by an Envirotest competitor, because of long waits, the centers' cash only payment terms for the payment of fees, computer glitches, and poorly trained techni-

the problems with Maine's testing system, such as long customer waits and poorly trained technicians, should not have occurred as frequently in Pennsylvania because Envirotest was contractually committed to short customer wait times and had established an extensive technician training program.

Many opponents to the E-Check program were classic car owners who feared that their vehicles would not pass emissions testing or that Pennsylvania would implement a "scrappage" program designed to eliminate older, more polluting vehicles.⁷⁹ However, post-1968 model year classic automobiles would only be subject to an idle test, which accurately measures emissions from pre-1977 vehicles.⁸⁰ Also, legislation imposing a "scrappage" program in Pennsylvania was not imminent because such programs are generally not used until other anti-pollution controls have failed.⁸¹

3. Pennsylvania's Executive and Legislative Response to the Envirotest E-Check Program

As in the late 1970's and early 1980's, the Pennsylvania General Assembly was the focal point of emissions testing program noncompliance. This time, however, the federal government retreated and did not impose available sanctions to force compliance. Because the federal government chose such a course, the Assembly and the Governor were able to stop the implementation of the E-Check program as it was nearing completion.

The Assembly first tried to thwart the E-Check program in the Summer of 1994, but a senate resolution was defeated.⁸² The General Assembly, in another attempt to delay the E-Check program, passed delaying legislation which was vetoed by Governor Casey on October 13, 1994.⁸³ However, on November 15, 1994,

cians. *Id.* Maine residents were also opposed to the testing of automobiles because trucks and buses were not subject to the testing. *Id.* Although trucks and buses are not subject to I/M 240 testing, the 1990 Amendments provide for stricter regulations regarding truck and bus emissions. See 42 U.S.C. § 7554 (Supp. V 1993) (prescribing rules for urban bus emissions); *Id.* § 7585 (prescribing rules for heavy duty clean fuel vehicle emissions).

79. DeCoursey, *supra* note 65, at B1. A scrappage program is a program in which businesses buy older automobiles and take them off the road in exchange for pollution credits that allow them to operate nonconforming stationary industrial sites. *Id.*

80. *Id.*

81. *Id.*

82. Frank Reeves, *Senate, House Size Up Hurdles for Auto Emissions Program*, Sept. 24, 1994, at B1. The resolution was introduced by Senator Gerald LaValle. *Id.*

83. Veto No. 1994-4, 1994 Pa. Laws 1696.

the Assembly successfully overrode the veto, thus delaying the E-Check program until April of 1995.⁸⁴ Shortly after the legislation was enacted, the Assembly attempted to divert attention to the Envirotech contract itself, alleging that it was invalid because a former state official had taken a job with Envirotech, thus creating a conflict of interest.⁸⁵ However, the official had not participated in contract negotiations and had worked for the Bureau of Motor Vehicles, which was not an agency party to the contract.⁸⁶

After the Assembly passed the delaying legislation, the EPA held firm in its commitment to impose federal highway sanctions for Pennsylvania's noncompliance with the requirements of the 1990 Amendments.⁸⁷ Following the veto override, the EPA's resoluteness softened. The Regional Administrator stated that he would not impose federal highway fund sanctions on Pennsylvania until he met with state officials.⁸⁸ On February 27, 1995, Governor Ridge, in a letter to the Assembly, indefinitely suspended the E-Check program pending new regulations by the EPA.⁸⁹ The EPA restated its willingness to refrain from imposing sanctions on Pennsylvania, citing the need for the EPA and Pennsylvania to cooperate on meeting the emissions attainment levels mandated by the 1990 Amendments.⁹⁰

The EPA promulgated new rules on September 18, 1995 which allow states to adopt decentralized emissions testing programs.⁹¹

84. 1994 Pa. Laws 614, 620.

85. John Pachuta was director of the Pennsylvania Bureau of Motor Vehicles. Peter L. Decoursey, *Adviser's Move to Envirotech Raises Eyebrows*, READING EAGLE, READING TIMES, Oct. 8, 1994, at A1. Envirotech hired Pachuta as a supervising engineer of construction for Envirotech's Colorado emissions testing program. *Id.*

86. Lois Caliri, *Some Question Envirotech Contract*, CENTRAL PENN BUS. J., June 2, 1995, at 1. Pachuta also conformed to the requirements of a state ethics committee report, which prohibited him from interacting with PennDOT for one year. Decoursey, *supra* note 85, at A1.

87. John D. Forester, Jr., *EPA Riles Lawmakers From Area*, READING EAGLE, READING TIMES, Oct. 8, 1994, at B1. Peter Kostmayer, then the EPA Regional Administrator, stated that the EPA would play "hardball" with Pennsylvania and withhold federal highway funds. *Id.*

88. Garry Lenton & Frank Cozzoli, *Feds Will Let State Sort Out Clean Air Rift—EPA Won't Pull Funding Plug Yet*, THE HARRISBURG PATRIOT, Nov. 17, 1994, at B1. There was some confusion about whom the EPA had to meet with because Governor Casey, a supporter of the E-Check program, was to leave office at the end of 1994 and governor-elect Tom Ridge was not to take office until January of 1995. *Id.* The EPA's refusal to impose sanctions against Pennsylvania angered Governor Casey because he felt betrayed by the EPA. *EPA Official Taken to Wood Shed*, THE HARRISBURG PATRIOT, Nov. 18, 1994, at B3.

89. Frank Reeves, *Ridge Halts Auto Testing Emissions Program on Hold Indefinitely for EPA Guidelines*, PITTSBURGH POST-GAZETTE, Feb. 28, 1995, at A1.

90. Reeves, *supra* note 89, at A1.

91. 60 Fed. Reg. 48,029, 48,031-32 (1995). The EPA also established a new

Following the new rules, Governor Ridge canceled the E-Check program and proposed a decentralized emissions testing program.⁹² The new program would not require transient testing, but would instead require only idle testing.⁹³ The Governor's proposal also mandates that business and industry further reduce emissions.⁹⁴ On November 28, 1995, President Clinton signed into law a provision that eliminates the withholding of federal highway funds as a sanction for noncompliance with the 1990 Amendments.⁹⁵

Meanwhile, the Commonwealth was faced with the prospect of a breach of contract action by Envirotest. In April of 1995, Envirotest and the Commonwealth entered into a ninety-day negotiating agreement.⁹⁶ Although the agreement expired, Envirotest and the Commonwealth continued settlement talks, culminating in a final settlement that required the state to pay \$145 million, which was approved by the state senate on December 12, 1995, the state house on December 13, 1995, and was signed into law by Governor Ridge on December 15, 1995.⁹⁷ The majority of the money paid to Envirotest will come from the state Catastrophic Loss Benefit Continuation Fund, which pays medical benefits to victims of motor vehicle accidents that occurred before January 1, 1990.⁹⁸ Finally, the state house and senate have introduced resolutions which urged the state attorney general and Governor Ridge to seek reimbursement from the federal government for the Envirotest settlement.⁹⁹

"alternate low enhanced I/M standard" that requires idle testing similar to that required by the 1970 and 1977 Amendments. *Id.* at 48,035-36 (to be codified at 40 C.F.R. § 51.351(g)).

92. Sharon Voas & Peter J. Shelly, *Ridge Kills New Emissions Tests—He Proposes a Decentralized Plan that is Virtually the Same as Current Inspections*, PITTSBURGH POST-GAZETTE, Oct. 19, 1995, at A1.

93. Voas & Shelly, *supra* note 92, at A1. Governor Ridge proposed adding anti-fraud provisions to the program to eliminate EPA conflict of interest concerns. *Id.*

94. *Id.*

95. National Highway System Designation Act of 1995, Pub. L. 104-59, § 205, 109 Stat. 568 (to be codified at 23 U.S.C. § 303(c)), available in Westlaw, at *26.

96. Caliri, *supra* note 86, at 1.

97. Act 1995-72, 1995 Pa. Legis. Serv. 601, 606-07, § 4706.1 (Purdon) (to be codified at 75 PA. CONS. STAT. § 4706.1). See *Settlement with Envirotest Signed by Gov. Ridge*, THE HARRISBURG PATRIOT, Dec. 16, 1995, at B2. The settlement agreement provides that the Commonwealth had to pay \$25 million by January 1, 1996 and payments of \$40 million in July of 1996, 1997, and 1998. *Id.*

98. 1995 Pa. Legis. Serv. at 606-07, § 4706.1(b). See 75 PA. CONS. STAT. § 1798.4 (1992 & Supp. 1995). The Catastrophic Loss Benefit Continuation Fund is funded by surcharges on speeding tickets. See *id.* § 6506.

99. See H. R. RES. 267, 179th Leg. (1995); S. RES. 97, 179th Leg. (1996).

III. PENNSYLVANIA'S MOTIVATION FOR I/M PROGRAM NONCOMPLIANCE

The public opposition to the Envirotest E-Check program, although seemingly focused on defects in the testing scheme, was also aimed at the manner in which the program was mandated by the federal government.¹⁰⁰ Pennsylvania lawmakers, themselves dissatisfied with the federal mandates, were more successful in thwarting the E-Check program than in stopping the I/M program mandated by the 1970 and 1977 Amendments because of the current trend toward contracting federalism and the support for expanding notions of state sovereignty in the Judicial and Legislative branches of the federal government. It was due to these shifting attitudes that the EPA retreated from the threat of sanctions after the cancellation of the E-Check program.¹⁰¹

Federalism has greatly expanded in the last thirty years as a result of "the spectacular growth of the federal regulatory state."¹⁰² This expansion has been conspicuous in federal clean air legislation, where Congress has kept policy-making decisions for the federal government while giving states a role in the implementation and enforcement of the provisions of the legislation.¹⁰³ The grant of implementation and enforcement power has allowed Congress to make decisions while assuring itself that states would have to do the "dirty work," thus insulating Congress and the federal government from much of the opposition that surrounds clean air legislation.¹⁰⁴

Congress has, with a grant of significant power to the states, legislated strict sanctions that may be imposed on states that do not comply with its environmental mandates. It is this power that so angers and incites state legislators. However, Congress has crafted the sanctions, such as the withholding of federal

100. As opposition grew, many citizen opponents of the E-Check program likened themselves to conducting a modern "Boston Tea Party." Forester, *supra* note 87, at B1.

101. Former EPA Regional Administrator Peter Kostmayer admitted that the EPA did not impose sanctions against Pennsylvania because of a fear that the United States Congress would render the Clean Air Act ineffective if the EPA maintained an unyielding position. Sharon Voas, *Anti-pollution "Menu" Possibilities Outlined*, PITTSBURGH POST-GAZETTE, Dec. 14, 1994, at B1. See also Timothy Aepfel, *Not in My Garage: Clean Air Act Triggers Backlash as Its Focus Shifts to Driving Habits*, WALL ST. J., Jan. 25, 1995, at A1.

102. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1184 (1995).

103. Dwyer, *supra* note 102, at 1184-85. The grant of power assures that states are not "puppets" to the federal government, but instead wield a significant amount of power. *Id.* at 1190.

104. *Id.* at 1192.

highway funds, so as to not violate the Tenth Amendment to the United States Constitution.¹⁰⁵ Because Congress does not directly legislate state action but instead withholds federal highway funds for state noncompliance with clean air legislation, it is likely that congressional actions under the 1990 Amendments would survive judicial scrutiny.¹⁰⁶

The entrenched nature of the federalist system surrounding clean air legislation and the unassailability of the constitutionality of such legislation presented bleak prospects of success if Pennsylvania had to defend its noncompliance in court. Also, Pennsylvania had suffered a resounding defeat in federal court for its noncompliance under the 1970 and 1977 Amendments.¹⁰⁷ Therefore, the Pennsylvania General Assembly instead chose to react to public criticisms and its own distaste for federal clean air mandates by simply taking no action. The Assembly took a calculated risk that the EPA would back down from sanctions because of the conservative make-up of Congress and the Supreme Court's recent advocacy of contracting federalism.¹⁰⁸ The Assembly's display of state sovereignty in response to the mandates of the 1990 Amendments was by no means unprecedented, and the EPA's response to actions by other state legislatures was lukewarm at best.¹⁰⁹

Although some commentators argue that the federal government must continue to allow a large clean air legislation imple-

105. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The United States Supreme Court has validated the withholding of federal highway funds for state non-compliance with federal mandates. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding congressional power to withhold federal highway funds from South Dakota for South Dakota's failure to raise its minimum drinking age to 21). *But see* *New York v. United States*, 505 U.S. 144 (1992) (invalidating a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842, 1850 (repealed), which required state disposal of radioactive waste according to federal guidelines).

106. See William J. Klein, *Pressure or Compulsion? Federal Highway Fund Sanctions of the Clean Air Act Amendments of 1990*, 26 *RUT.-CAM. L.J.* 855 (1995) (arguing that the sanctions under the 1990 Amendments would survive constitutional attacks in the Supreme Court).

107. In affirming the district court's order to impose sanctions for Pennsylvania's noncompliance under the 1970 and 1977 Amendments, the Third Circuit Court of Appeals held that the district court did not impose improper pressure on the Assembly to expend state funds. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 678 F.2d 470, 476 (3d Cir. 1982).

108. See Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 *DUQ. L. REV.* 71, 92-95 (1995) (arguing that the Rehnquist Court has actively contracted federalism in its recent decisions).

109. See Dwyer, *supra* note 102, at 1212-16.

mentation role for states,¹¹⁰ the federal government should have directly implemented a centralized I/M program in each noncomplying region of each state.¹¹¹ In Pennsylvania, this would have allowed the Assembly to voice its opposition to the I/M program while eliminating the Assembly's authority to cancel the implementation of the program. Congress could have required states to withhold vehicle registrations for noncomplying vehicles, while not placing federal highway funds in jeopardy.¹¹² Although such actions by the EPA may have garnered fierce opposition, air quality in Pennsylvania and other noncomplying states would be enhanced, thus improving the quality of life for state residents. Also, Pennsylvania residents would not have been forced to pay a sizable settlement fee resulting from the Envirotest breach of contract action.

A direct federal implementation of an I/M program would foster greater resentment from state citizens. However, the federal government currently imposes clean air legislation requirements directly.¹¹³ Although these requirements generally relate to new vehicle manufacture regulations, opposition, especially from state governments, is essentially muted. Although the manufacturing regulations may impose certain inconveniences and costs, the federal government has forged ahead in the face of opposition, even by the powerful automobile manufacturers lobby, because the net result will be cleaner air and a higher standard of living for Americans.

110. *Id.* at 1216-18 (arguing that states play a critical role in the implementation of federal environmental legislation because implementation has traditionally been in the domain of states, there is great diversity between local conditions from state to state, and implementation is controversial).

111. The Clean Air Act currently grants the EPA power to implement an emissions reduction plan for states that have not been granted SIP approval two years after the required submission date. *See* 42 U.S.C. § 7661a(d)(3) (Supp. V 1993).

112. The power of Congress to mandate that states withhold vehicle registrations for noncomplying vehicles has been upheld in federal court. *See United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980) (upholding congressional power to require states to withhold vehicle registrations for noncompliance with the 1990 Amendments).

113. For example, the federal government has mandated that automakers provide on board diagnostic ("OBD") equipment that monitors emissions and directs the mechanical systems of the automobile to make adjustments in order to provide optimum levels of emissions. Winfield, *supra* note 70, at 87. The OBD systems must also signal a warning light when emissions levels become high and the automobiles' mechanical systems cannot reduce the emissions levels. *Id.*

CONCLUSION

The real losers of Pennsylvania's failure to implement an automobile emissions inspection program as required by the 1990 Amendments to the Clean Air Act will be the residents of Pennsylvania and neighboring states affected by Pennsylvania's urban pollution. Pennsylvania's citizens will have to pay for the money owed as a result of the breach of the Envirotest contract. Also, PennDOT spent millions of dollars on the implementation of the E-Check program before it was aborted.¹¹⁴

Many of Pennsylvania's citizens were adversely affected by the contract breach. In addition to the many Envirotest workers whose jobs were terminated after the cancellation of the Envirotest contract, many contractors were adversely impacted because construction was halted on unfinished testing centers.¹¹⁵ Although it is easy to understand the opposition to the E-Check program and the state legislature's refreshing assertion of state sovereignty, once the E-Check program was almost complete, the General Assembly should not have suspended its implementation.

The federal government's scheme under the 1990 Amendments was flawed from the onset. The growing dissatisfaction with expansive federalism was enough for the Assembly to overcome threatened sanctions. A system of direct implementation of clean air legislation would be more effective than directing state implementation with the threat of sanctions for noncompliance. Such a program would undoubtedly and justifiably create angst because it would mean more federal government and more federal governmental intrusion in an era when less government and less governmental intrusion is desired. However, a federally implemented program would achieve a result that would benefit all Americans—clean air.

Jonathan C. Parks

114. Peter L. DeCoursey, *Pa. Coughs up Millions to Clean Air*, READING EAGLE, Nov. 20, 1994, at A1. PennDOT spent over \$35 million to implement the E-Check program and other programs required by the 1990 Amendments between July of 1993 and October of 1994. *Id.*

115. Jon Rutter, *Emissions Flap Leaves Builders Holding the Bill—Contractors Across the State are Owed Millions Because Legislators Canceled Vehicle Tests*, LANCASTER NEW ERA, Oct. 8, 1995, at B1.