

September 1996

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Laura Rapacioli

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### Recommended Citation

Laura Rapacioli, *Be Careful What You Ask for: Attacking the Constitutionality of the Clean Air Act Operating Permit Program*, 14 Pace Env'tl. L. Rev. 323 (1996)

Available at: <http://digitalcommons.pace.edu/pelr/vol14/iss1/19>

# Be Careful What You Ask For: Attacking the Constitutionality of the Clean Air Act Operating Permit Program

LAURA RAPACIOLI\*

## I. Introduction

In response to the Environmental Protection Agency's (EPA) disapproval of the Commonwealth of Virginia's (Virginia) Clean Air Act<sup>1</sup> (CAA) Title V operating permit program,<sup>2</sup> Virginia filed two lawsuits challenging the EPA's final action and the constitutionality of several provisions of the CAA operating permit program.<sup>3</sup> On January 9, 1995, Virginia initiated a declaratory judgment action in the United States District Court for the Eastern District of Virginia under 28 U.S.C. section 1331.<sup>4</sup> Simultaneously, Virginia also

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\* May, 1997 candidate for the J.D. with a certificate in Environmental Law. This Comment is dedicated to my husband, Mark, who has stood by me throughout law school, and to my children, Dominick and Samantha, who are the greatest joy in my life. I would like to thank Mr. David J. Kaplan, Esq. of the Department of Justice for his assistance in researching the information used in this Comment.

1. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1984 & Supp. V 1993).

2. Title V of the CAA calls for states to implement operating permit programs to regulate major stationary sources of air pollution. See CAA § 502, 42 U.S.C. § 7661a. The EPA is to administer a federal permit program in those states which do not submit their own programs as requested. See CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). See *infra* sections II.A and II.B for a discussion of Title V permit programs.

Virginia submitted its proposed operating permit program to the EPA on November 12, 1993. See *Virginia v. Browner*, 80 F.3d 869, 874 (4th Cir. 1996) (*Virginia III*). Final EPA disapproval of the program was published in the Federal Register on December 5, 1994. See *Clean Air Act Final Disapproval of Operating Permits Program; Commonwealth of Virginia*, 59 Fed. Reg. 62,324 (1994) (to be codified at 40 C.F.R. pt. 70).

3. See *Virginia III*, 80 F.3d at 875 & n.4.

4. In the declaratory judgment action, Virginia challenged the constitutionality of all of Title V, the volatile organic compound (VOC) control strategy,

petitioned for judicial review of the EPA's final disapproval of Virginia's permit program in the United States Court of Appeals for the Fourth Circuit.<sup>5</sup> In addition to challenging the EPA's administrative determination that the State's permit program did not meet the CAA standards, Virginia also claimed that portions of the CAA itself are unconstitutional.<sup>6</sup> For instance, Virginia asserted that the use of federal highway sanctions against states not submitting an approvable program violates the Spending Clause of the United States Constitution.<sup>7</sup> The complaint also contended that the CAA permit program requirement that states must grant review to persons capable of demonstrating standing under Article

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the inspection and maintenance programs, the sanctions provisions, and transportation conformity provisions. See *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995) (*Virginia I*). The EPA filed a motion to dismiss on grounds that the Court of Appeals has exclusive jurisdiction over Virginia's constitutional claims. *Id.* The District Court granted the EPA's motion to dismiss and ruled that it lacked subject matter jurisdiction over Virginia's constitutional claims. See *Virginia I*, 926 F. Supp. at 546. On appeal, the Fourth Circuit affirmed the district court's decision. See *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996) (*Virginia II*). The Fourth Circuit relied on a prior decision which held that, when Congress has named the United States Circuit Court of Appeals as the exclusive forum for challenging agency action, all legal issues related to the agency action are to be brought in the circuit court. See *Virginia II*, 74 F.3d at 523 (citing *Palumbo v. Waste Technologies Indust.*, 989 F.2d 156, 161 (4th Cir. 1993)) (emphasis added). The court noted that Virginia had launched a facial attack on the CAA, and that such a claim was capable of decision without resorting to the fact-finding powers of a district court. See *Virginia II*, 74 F.3d at 524. The Court of Appeals explained its position by stating that it could simply remand the case to a district court if development of a factual record became necessary. See *id.*

5. See *Virginia II*, 74 F.3d at 522. Under § 307(b) of the CAA, a petition for judicial review of "[any] . . . final action of the EPA Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." See CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

6. See *Virginia III*, 80 F.3d at 873.

7. See *id.* The relevant portion of the United States Constitution reads: "Congress shall have Power to Lay and Collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1. The CAA provides for several different types of sanctions, including the withholding of certain federal highway funds, to encourage the states to submit their own operating permit programs rather than having the EPA administer a federal program. See CAA § 179(b), 42 U.S.C. § 7509(b). A discussion of the sanctions provisions is provided in section II.A.2.b of this Comment.

III of the Constitution infringes on states' Tenth Amendment rights.<sup>8</sup>

Along with the constitutional claims, Virginia challenged the EPA's final decision claiming that the EPA acted arbitrarily and capriciously in disapproving Virginia's program submission.<sup>9</sup> This Comment addresses only the constitutional claims, however, and does not discuss whether the EPA acted arbitrarily and capriciously in interpreting Title V.

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8. See *Virginia III*, 80 F.3d at 873. The Tenth Amendment states that "[t]he 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 term "standing under Article III" or "Article III standing" refers to the requirements that a party must demonstrate in order for a federal court established under Article III of the Constitution (for example, a United States District Court or a Circuit Court of Appeals) to exercise jurisdiction over their claims. The basic requirements for Article III standing have been set out by the Supreme Court in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). In order to demonstrate standing to sue, a plaintiff must show an injury in fact which is concrete and particularized, causation, and likelihood that the relief sought, if granted, would redress the injury. See *Lujan*, 112 S. Ct. at 2136. The Supreme Court has stated that aesthetic and environmental well-being interests are sufficient to establish an injury in fact. See *id.* at 2137.

The EPA also addressed the issue of "prudential standing" in its disapproval of Virginia's operating permit program. The doctrine of "prudential standing" requires that a person seeking to challenge an agency action must demonstrate that his interests are within the scope of interests sought to be protected or regulated by Congress. See Clean Air Act Final Disapproval of Operating Permits Program; Commonwealth of Virginia, 59 Fed. Reg. 62,324 (1994) (to be codified at 40 CFR Part 70) (citing Hazardous Waste Treatment Council v. EPA, 885 F.2d 918 (D.C. Cir. 1989)). EPA agreed that the "prudential standing" doctrine applied to permit programs but argued that Congress specifically created a "zone of interest protected by Title V" to include those people who participated in the comment process. See 59 Fed. Reg. 62,324, 62,325 (1994).

9. See *Virginia III*, 80 F.3d at 875. Virginia claimed that the EPA's interpretation of the judicial review requirements for state permit programs, set out in CAA § 502(b)(6), was incorrect. See *Virginia III*, 80 F.3d at 876. Virginia also alleged that the EPA acted arbitrarily and capriciously in deciding that Virginia's judicial review statute was too narrow. See *id.* In addition to the above claims, Virginia objected to several other reasons the EPA had listed for disapproving the permit program. See *Virginia III*, 80 F.3d at 875. See *infra* section II.C of this Comment for a discussion of the EPA's disapproval of Virginia's program submission.

In a related case, the State of Missouri filed a federal district court action claiming, in part, that the sanctions provisions of the CAA are unconstitutional.<sup>10</sup> Although the *Missouri* case is in the context of an EPA finding that Missouri failed to submit certain revisions to its state implementation plan<sup>11</sup> (SIP), the same constitutional challenges regarding the CAA sanctions provisions raised by Virginia were also at issue in the *Missouri* case.<sup>12</sup> Both the *Virginia* and the *Missouri* courts have reached the conclusion that, facially, the sanctions provisions do not violate either the Tenth Amendment or the Spending Clause.<sup>13</sup> Although the *Virginia* court made no distinction between a facial attack on the sanctions and an as-applied attack,<sup>14</sup> the *Missouri* court did leave the door open for future constitutional analysis by dismissing Missouri's as-applied claims without prejudice.<sup>15</sup>

The complexity of the recent litigation is indicative of the intricacy of the statute involved. The CAA has gone through several major changes since 1967.<sup>16</sup> One article has noted that, in part, the 1990 Amendments were a response to a plea from state officials for more guidance and direction from the federal government in dealing with air pollution.<sup>17</sup> If there is one thing the 1990 Amendments gave the states it was direc-

10. See *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996).

11. States are strongly encouraged to adopt SIPs consisting of state statutes and regulations which will implement the requirements of the federal CAA. See CAA § 110, 42 U.S.C. § 7410. Failure to submit or revise a SIP according to statutory or regulatory instructions results in the imposition of sanctions. See CAA § 110(m), 42 U.S.C. § 7410(m). Continued failure to submit or revise a SIP could also result in the EPA administration of the CAA through a federal implementation plan (FIP). See CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1).

12. See *Missouri*, 918 F. Supp. at 1322 (noting that Missouri charges that the sanctions violate the Spending Clause and the Tenth Amendment of the Constitution).

13. See *Virginia III*, 80 F.3d at 883; *Missouri*, 918 F. Supp. at 1338.

14. The Fourth Circuit merely found that "the sanctions Virginia faces are constitutional." *Virginia III*, 80 F.3d at 883.

15. See *Missouri*, 918 F. Supp. at 1338.

16. A detailed history of the CAA from its 1967 identity as the Air Quality Act of 1967 through the 1970, 1977, and 1990 Amendments is provided in Steve Novick and Bill Westerfield, *Whose SIP Is It Anyway? State-Federal Conflict In Clean Air Act Enforcement*, 18 WM. & MARY J. ENVTL. L. 245, 260-68 (1994).

17. See *id.* at 268.

tion, and then some. Now that the states and the people have presumably received what they wanted, at least two states, Virginia and Missouri, are complaining that they received too much direction. This Comment explores whether Congress went too far in its effort to guide the states in the control of air pollution through the operating permit program or whether the states merely got what they asked for and cannot use the Constitution as a weapon to roll back the course of pollution control. The Comment will focus largely on Title V and the Virginia cases, but the Missouri decision will be used to fill in the many gaps left by the Fourth Circuit in its constitutional analysis.

The constitutional issues addressed by the *Missouri* and *Virginia* courts are particularly relevant in light of a 1996 regulation under the Clean Water Act<sup>18</sup> (CWA). This regulation amends the requirements for an approvable state pollutant discharge permit system (SPDES) program<sup>19</sup> to include the same opportunity for judicial review by interested persons as is available under Article III of the United States Constitution.<sup>20</sup> Prior to this new regulation, which became effective in 1996, there was no requirement that a state administering an SPDES program include an opportunity for judicial review as broad as Article III standing.

Although development of state permit programs is not encouraged as vigorously in the CWA as in the CAA,<sup>21</sup> this

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18. Federal Water Pollution Control Act [Clean Water Act] (CWA), §§ 101-607, 33 U.S.C. §§ 1251-1387 (1984 & Supp. V 1993).

19. Similar to the CAA, the CWA § 502(b) provides for states, rather than the EPA, to administer a permit program. See CWA § 402(b), 33 U.S.C. § 1342(b). In contrast to the strong language urging state adoption of a CAA permit program, the CWA language, which states, in part, that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the [EPA] Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." CWA § 402(b), 33 U.S.C. § 1342(b) is devoid of incentives for states to submit a permit program of their own.

20. See Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 Fed. Reg. 20,972 (1996) (to be codified at 40 C.F.R. pt. 123). See *supra* note 8 for a discussion of Article III standing requirements.

21. See *infra* note 104.

new regulation has already caused some controversy in Virginia and elsewhere.<sup>22</sup> For example, in its final rule publication, the EPA noted that several individuals suggested that the regulation may unconstitutionally infringe upon states' rights not to be sued without its consent.<sup>23</sup> In answer to this concern, the EPA stated simply that states that are dissatisfied with the new regulation could simply leave the administration of a permit program to the federal government.<sup>24</sup> Another concern expressed by those commenting on the rule was that Virginia was being singled out because, at the time the rule was proposed, its judicial review statute enacted to implement the CWA permit program restricted review to an "owner aggrieved" and effectively barred all others from challenging the state's issuance of a permit.<sup>25</sup> This restriction prompted several environmental groups to petition the EPA to withdraw approval of Virginia's program.<sup>26</sup> The EPA did note in its final rule that Virginia had amended its statute in 1996,<sup>27</sup> but stated that it had not made a final decision as to whether the Amendment satisfied the new regulation.<sup>28</sup>

It appears from the above discussion that the stage is set for a renewed discussion of citizen's standing to review state environmental agencies' decisions regarding pollution permits. Given the lack of incentive for states to adopt its own SPDES programs, it is unclear whether the same vigorous

22. See 61 Fed. Reg. 20,972, 20,975-77 (1996).

23. See *id.* at 20,976.

24. See *id.*

25. See 61 Fed. Reg. 20,972, 20,978 (1996). See also Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 60 Fed. Reg. 14,588, 14,588-89 (1995) (to be codified at 40 C.F.R. pt. 123) for the EPA's use of Virginia's standing statute as a rationale for promulgating the new judicial review regulation.

26. See 61 Fed. Reg. 20,972, 20,973.

27. In fact, Virginia provided for alternate amendment of its SPDES judicial review statute. See VA. CODE ANN. § 62.1-44.29 (Michie 1992). The new law provides for one version which will be effective until there is a final, non-appealable decision on Virginia's operating permit judicial review provision and a second version which would go into effect in the event that the above-mentioned final, appealable decision was adverse to Virginia. See *id.* This latter version specifically adopts Article III standing requirements in an action for judicial review of a state decision regarding an SPDES permit. See *id.*

28. See 61 Fed. Reg. 20,972, 20,973.

challenges to the CAA will also plague the CWA. However, there is a possibility that, armed with two favorable decisions, the EPA or Congress may now reexamine other environmental statutes to find new ways to encourage states to regulate the way the EPA itself would. While it is doubtful that this possibility was envisioned by those who, prior to the 1990 Amendments, requested some direction in implementing the CAA, it may be an answer that many citizens, companies, and state officials will get in the end.

Since the imposition of sanctions is complete or imminent in at least two states and the new CWA regulations threaten to further drag out the debate, the constitutionality of the relevant CAA provisions is a major concern. To effectively examine the issues, Part II of this Comment provides background information, including the relevant provisions of the CAA and its legislative histories, regulatory action taken by the EPA in implementing the state permit program, the EPA's decisions with regard to Virginia's proposed permit program, and case law relevant to the constitutional issues. The constitutional arguments made by Missouri, Virginia, the EPA, and amici, and the courts' analyses of those arguments, are set out in Part III. Part IV consists of a legal analysis of the courts' opinions. Part V discusses the policy reasons supporting a finding of constitutionality and possible impacts of a ruling in favor of Virginia and Missouri. Finally, Part V also concludes that the courts were correct in ruling against Virginia and Missouri for the legal and practical reasons previously discussed.

## II. Background

### A. Title V of the Clean Air Act

#### 1. Purpose of and Expectations for the Operating Permit Program

The CAA was enacted in 1963.<sup>29</sup> However, it was not until the 1990 Amendments to the CAA that an operating per-

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29. See S. REP. NO. 228, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3387 [hereinafter S. REP. 228].



mit program was established.<sup>30</sup> Congress set out two major reasons for creating an operating permit program.<sup>31</sup> First, Congress claimed that an operating permit program would provide for easier enforcement of the statutory and regulatory requirements of the CAA.<sup>32</sup> Second, a permit program which contained provisions for modifications would create a more streamlined method for implementing new requirements.<sup>33</sup> Congress noted that several other major environmental statutes had provisions for the issuance of permits and permit-like documents and sought to bring the CAA up to speed with these other statutes.<sup>34</sup>

Congress envisioned several benefits to the implementation of a permit program.<sup>35</sup> The first anticipated benefit was that a permit program would make the requirements of the CAA more enforceable against the regulated entities.<sup>36</sup> Without a permit program, regulated entities were forced to search through the provisions of the CAA, federal regulations, and SIPs<sup>37</sup> to find the requirements applicable to their

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30. See S. REP. 228, *supra* note 29, at 346, reprinted in U.S.C.C.A.N. 3385, 3729. The CAA, prior to the 1990 Amendments, contained provisions requiring permits only for construction of new and modified major air pollution sources. See *id.*

31. See *id.*

32. See *id.*

33. See *id.* at 346.

34. See S. REP. 228, *supra* note 29, at 346, reprinted in U.S.C.C.A.N. 3385, 3729. See *infra* note 104 for a discussion of other environmental statutes utilizing a permit system.

35. See *id.* at 347.

36. See *id.*

37. Under CAA § 110(a), each state must submit to the EPA "a plan which provides for implementation, maintenance, and enforcement" of the primary and secondary national ambient air quality standards (NAAQS) for each air quality control region in that state. See CAA § 110(a), 42 U.S.C. § 7410(a). SIPs are required to contain, *inter alia*, emission limitations, monitoring programs, enforcement mechanisms, and provisions for SIP revisions. See CAA § 110(a)(2), 42 U.S.C. § 7410(a)(2). SIPs are adopted by each state "after reasonable notice and public hearing." CAA § 110(a), 42 U.S.C. § 7410(a). The EPA has 60 days to review a SIP submission and determine its adequacy. See CAA § 110(k)(1)(B), 42 U.S.C. 7410(k)(1)(B). Failing to submit a plan or submission of an inadequate plan triggers the sanction provisions of the CAA. See CAA § 179, 42 U.S.C. § 7509. See also CAA § 110(m), U.S.C. § 7410(m). See *infra* section II.A.2 of this Comment for a discussion of the sanction provisions.

particular facility.<sup>38</sup> Congress noted that the confusion caused by the unorganized location of compliance requirements resulted in extreme difficulty in determining whether a source was in compliance or not.<sup>39</sup> To address this problem, permits would include both general and industry-specific requirements and set out necessary monitoring, recordkeeping, and reporting requirements needed to adequately ascertain the source's compliance.<sup>40</sup>

The second benefit to the implementation of a permit program would be ease in modifying a source's compliance obligations.<sup>41</sup> Congress noted that the current method required a "double key" system whereby changes were made in the state's SIP and then approved by the EPA after notice and comment.<sup>42</sup> By requiring the EPA to review permit changes within ninety days, new obligations would be in place quicker and with less confusion.<sup>43</sup> Congress also predicted that the requirement of permit fees would allow the states ample resources for administering their air pollution control programs.<sup>44</sup>

Finally, Congress hoped the permit program would assist states in implementing the new air toxics and acid deposition programs contained in the 1990 Amendments.<sup>45</sup> These programs are particularly complex under the 1990 Amendments. For instance, Congress directly required regulation of 191

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38. See S. REP. 228, *supra* note 29, at 347, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3730.

39. See *id.*

40. See *id.*

41. See *id.*

42. See *id.* at 347-48, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3730-31.

43. See S. REP. 228, *supra* note 29, at 347-48, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3730-31. There are actually several methods for permit revision allowed under the CAA. See 40 C.F.R. § 70.7(d)-(e) (1995) for the requirements for effecting various types of permit revisions. The state's permit program must provide the permitting authority with the power to modify a source's permit. See CAA § 502(b)(5)(D), 42 U.S.C. § 7661a(b)(5)(D). Also, for permits which have a term of three or more years, permits are to be updated when a source's compliance obligations are revised. See CAA § 502(b)(9), 42 U.S.C. § 7661a(b)(9).

44. See S. REP. NO. 228, *supra* note 29, at 348, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3731.

45. See *id.*

hazardous air pollutants<sup>46</sup> and anticipated that there could be more than 200 categories of major sources of hazardous air pollutants.<sup>47</sup>

## 2. Implementation of Operating Permit Programs

### a. Components of an Approvable Program

Section 502 of the CAA required the Administrator of the EPA to promulgate regulations setting forth the minimum requirements for the operating permit program by November 15, 1991.<sup>48</sup> The regulations were to address provisions for permit applications,<sup>49</sup> monitoring and reporting requirements,<sup>50</sup> permit fees,<sup>51</sup> state administration of the permit program,<sup>52</sup> permit revisions,<sup>53</sup> and operational flexibility.<sup>54</sup>

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46. *See id.* at 147, reprinted in 1990 U.S.C.C.A.N. 3385, 3530. Section 112(b) of the CAA lists the 191 hazardous air pollutants (HAPs) which the EPA must regulate. *See* CAA § 112(b), 42 U.S.C. § 7412(b). The EPA is required to review the list and add pollutants which pose or may pose a "threat of adverse human health effects . . . or adverse environmental effects . . ." CAA § 112(b)(2), 42 U.S.C. § 7412(b)(2). The list may also be modified upon petition by any person. *See* CAA § 112(b)(3), 42 U.S.C. § 7412(b)(3). To have a substance added to the list, the petitioner must show (or the Administrator may independently determine) that the pollutant is "known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects." CAA § 112(b)(3)(B), 42 U.S.C. § 7412(b)(3)(B). Similarly, to have a substance removed from the list, the petitioner must demonstrate (or the Administrator may independently determine) that "there is adequate data on the health and environmental effects of the substance to determine that . . . [it] may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects." CAA § 112(b)(3)(C), 42 U.S.C. § 7412(b)(3)(C).

47. *See* S. REP. 228, *supra* note 29, at 148, reprinted in 1990 U.S.C.C.A.N. 3385, 3531. CAA § 112(c) directs the EPA to promulgate and periodically review and revise a list of categories of sources subject to regulation under CAA § 112. *See* CAA § 112(c), 42 U.S.C. § 7412(c). The EPA published its initial list of source categories on July 16, 1992. *See* Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 31,576 (1992). This initial list contained over 150 source categories. *See id.* at 31,591. The CAA provides for addition and deletion of source categories from the list. *See* CAA § 112(c), 42 U.S.C. § 7412(c).

48. *See id.* § 502(b), 42 U.S.C. § 7661a(b).

49. *See id.* § 502(b)(1), 42 U.S.C. § 7661a(b)(1).

50. *See id.* § 502(b)(2), 42 U.S.C. § 7661a(b)(2).

51. *See id.* § 502(b)(3), 42 U.S.C. § 7661a(b)(3).

52. *See* CAA § 502(b)(4)-(7), 42 U.S.C. § 7661a(b)(4)-(7).

53. *See id.* § 502(b)(9), 42 U.S.C. § 7661a(b)(9).

The EPA is required to assure that states have "adequate personnel and funding to administer the program."<sup>55</sup> The regulations must also provide for:

[a]dequate, streamlined, and reasonable procedures . . . for public notice, including offering an opportunity for public comment and a hearing . . . and including an opportunity for judicial review in State court of the permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.<sup>56</sup>

States were required to submit their proposed permit programs to the EPA no later than November 15, 1993.<sup>57</sup> Submissions were also to include a legal opinion that the laws of the state provide sufficient authority for the pollution control agency to carry out the requirements of the CAA.<sup>58</sup> The EPA had one year to approve or disapprove the submitted state programs.<sup>59</sup> Thus, in theory, all state programs

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54. See *id.* § 502(b)(10), 42 U.S.C. § 7661a(b)(10).

55. *Id.* § 502(b)(4), 42 U.S.C. § 7661a(b)(4).

56. *Id.* § 502(b)(6), 42 U.S.C. § 7661a(b)(6). This particular provision is a main source of the controversy between Virginia and the EPA as the EPA has determined that Virginia law does not satisfy the stated judicial review requirements. See Clean Air Act Disapproval of Operating Permits Program; Commonwealth of Virginia, 59 Fed. Reg. 31,183 (1994) (to be codified at 40 C.F.R. pt. 70). Although S. 1630, the Senate bill which eventually became the Clean Air Act Amendments of 1990, was introduced in September 1989, see 135 CONG. REC. S11,126, S11,139 (daily ed. Sept. 14, 1989), the requirement of an opportunity for judicial review in state court of final permit actions emerged in an amendment offered in May 1990. See 136 CONG. REC. H2771, H2817 (daily ed. May 23, 1990) (amendment proposed by Representative Dingell). Prior to this amendment, the minimum requirement for permit programs was that they contain "adequate procedures for public notice, including offering an opportunity for public comment and a hearing, on any permit action." 136 Cong. Rec. S27, S72 (daily ed. Jan. 23, 1990).

57. See CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1).

58. See *id.* § 502(d)(1), 42 U.S.C. § 7661a(d)(1).

59. See *id.* § 502(d)(1), 42 U.S.C. § 7661a(d)(1). If EPA proposes to disapprove the program, it must explain the revisions necessary to make the program approvable. See *id.* § 502(d)(1), 42 U.S.C. § 7661a(d)(1).

should have been in place by November 15, 1994. This has not happened.<sup>60</sup>

### 3. Sanctions for Failure to Submit an Approvable Program

States that fail to submit an approvable program by the statutory deadline have an additional eighteen-month grace period to submit an acceptable program.<sup>61</sup> If a state fails to submit an approvable program within this grace period, the EPA must begin applying one of the two sanctions set out in section 179 of the CAA.<sup>62</sup> If the state has still not submitted an approvable program six months later, both of the sanctions will be applied.<sup>63</sup> In addition to these two sanctions, the Administrator also has the option of withholding air pollution planning grants authorized under CAA section 105.<sup>64</sup> None of these sanctions are to be applied unless the failure to submit or disapproval "relates to an air pollutant for which such

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60. See *infra* note 103 for a discussion of the status of the implementation of the state operating permit programs.

61. See CAA § 502(d)(2)(B), 42 U.S.C. § 7661a(d)(2)(B).

62. *Id.* § 502(d)(2)(B), 42 U.S.C. § 7661a(d)(2)(B). The CAA provides for two types of sanctions: the withholding of certain federal highway grants and the imposition of 2:1 offsets on new or modified stationary sources. See *infra* notes 70-84 and accompanying text for a discussion of how the sanction provisions of the CAA work.

The EPA regulations specify the manner in which the sanctions are to be imposed. See 40 C.F.R. § 70.4(k) (1995), 40 C.F.R. § 70.10(a)(ii) (1995). 40 C.F.R. § 70.10(a)(ii) provides that eighteen months following disapproval of a state permit program submission, the EPA "will apply such sanctions in the same manner and with the same conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act." 40 C.F.R. § 70.10(a)(ii). Regulations implementing CAA § 179(a) prescribe that the EPA will apply the offset sanction first and will only apply the highway sanction if the deficiency has not been corrected six months after the imposition of the offsets. See 40 C.F.R. § 52.31(d)(1) (1995). However, the EPA has the authority to decide, after notice and comment, that the highway sanction should be imposed first. See 40 C.F.R. § 52.31(d)(6) (1995).

63. See *id.*

64. CAA § 105, 42 U.S.C. § 7405. Under this section, the EPA is authorized to make grants of up to three-fifths of the cost of instituting air pollution control programs. See *id.* § 105(a)(1)(A), 42 U.S.C. § 7405(a)(1)(A). The amount of the grant is determined based on the population, extent of the air pollution problem, and financial need. See *id.* § 105(b)(1), 42 U.S.C. § 7405(b)(1).

area has been designated a nonattainment area.<sup>65</sup> The EPA has been given discretion to apply the sanctions before the expiration of the eighteen-month grace period.<sup>66</sup> If the state has still failed to submit an approvable program two years after the initial deadline, the EPA must implement a federal permit program.<sup>67</sup> Although the sanctions clock may be stopped and reset to zero in some cases, such as when a state submits an administratively complete SIP revision after the EPA had made a finding of failure to submit, merely making a complete submission does not stop the implementation of a FIP.<sup>68</sup> That two-year countdown is halted only upon approval of the required program.<sup>69</sup>

Section 179 provides for two types of sanctions.<sup>70</sup> The first sanction is known as the "highway sanction."<sup>71</sup> A state subject to highway sanctions is prohibited from receiving federal funding or grants authorized under Title 23 of the United States Code for projects that are not "safety projects."<sup>72</sup> In addition to safety projects, a state may still receive funding for other transportation projects which would serve to promote air quality improvement.<sup>73</sup> The statute specifically lists seven different types of projects for which a state may receive funding despite imposition of the sanction. States may receive funding for public transportation programs,<sup>74</sup> construction of high occupancy vehicle (HOV)

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65. *Id.* § 502(d)(2)(C), 42 U.S.C. § 7661a(d)(2)(C). A region is designated a nonattainment area if the concentration of a criteria pollutant (such as ozone) exceeds the NAAQS standard.

66. *See id.* § 502(d)(2)(A), 42 U.S.C. § 7661a(d)(2)(A).

67. *See* CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). The EPA has proposed regulations which would create the federal operating permit program. *See* Federal Operating Permits Program, 60 Fed. Reg. 20,804 (1995) (to be codified at 40 C.F.R. pt. 55 and 71). Once final, these regulations would be codified at 40 C.F.R. pt. 71. *See id.*

68. *See* *Virginia v. United States*, 74 F.3d 517, 522 n.4 (4th Cir. 1996) (*Virginia II*) (citing *Natural Resources Defense Council v. Browner*, 57 F.3d 1122, 1126 & n.7 (D.C. Cir. 1995)).

69. *See id.*

70. *See* CAA § 179, 42 U.S.C. § 7509.

71. *See id.* § 179(b)(1), 42 U.S.C. § 7509(b)(1).

72. *See id.* § 179(b)(1)(A), 42 U.S.C. § 7509(b)(1)(A).

73. *See id.* § 179(b)(1)(B), 42 U.S.C. § 7509(b)(1)(B).

74. *See id.* § 179(b)(1)(B)(i), 42 U.S.C. § 7509(b)(1)(B)(i).

lanes,<sup>75</sup> employee trip reduction programs,<sup>76</sup> measures to improve traffic flow,<sup>77</sup> parking for carpool programs,<sup>78</sup> programs aimed at reducing traffic in downtown areas during rush hours,<sup>79</sup> programs designed to reduce congestion associated with accidents or breakdowns,<sup>80</sup> and any other project which would reduce emissions or not promote vehicle use by only one person.<sup>81</sup>

The second type of sanction listed under CAA section 179 is the imposition of 2:1 offsets for construction of new or modified sources.<sup>82</sup> The imposition of 2:1 offsets means that in order for a new or modified source to obtain a construction permit, a decrease in emissions from sources in the same nonattainment area equal to twice the amount of emissions from the new or modified source must be demonstrated.<sup>83</sup> If the offset sanction is imposed, the 2:1 ratio would replace any other ratio that a new or modified source would be subject to under the nonattainment provisions of section 173 of the CAA.<sup>84</sup>

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75. See CAA § 179(b)(1)(B)(ii), 42 U.S.C. § 7509(b)(1)(B)(ii).

76. See *id.* § 179(b)(1)(B)(iii), 42 U.S.C. § 7509(b)(1)(B)(iii).

77. See *id.* § 179(b)(1)(B)(iv), 42 U.S.C. § 7509(b)(1)(B)(iv).

78. See *id.* § 179(b)(1)(B)(v), 42 U.S.C. § 7509(b)(1)(B)(v).

79. See *id.* § 179(b)(1)(B)(vi), 42 U.S.C. § 7509(b)(1)(B)(vi).

80. See CAA § 179(b)(1)(B)(vii), 42 U.S.C. § 7509(b)(1)(B)(vii).

81. See *id.* § 179(b)(1)(B)(viii), 42 U.S.C. § 7509(b)(1)(B)(viii).

82. See *id.* § 179(b)(2), 42 U.S.C. § 7509(b)(2).

83. *Cf. id.* § 173(c)(1), 42 U.S.C. § 7503(c)(1) (explaining the use of offsets for construction of new or modified stationary sources in nonattainment zones).

84. See *id.* § 179(b)(2), 42 U.S.C. § 7509(b)(2). Offsets are necessary for construction or modification of major sources in all nonattainment areas regardless of the status of the state's permit program. See CAA § 173(c), 42 U.S.C. § 7503(c). Each ozone nonattainment area has its own offset requirement depending on its classification under CAA § 181. See *id.* § 181, 42 U.S.C. § 7511. For construction permits in marginal ozone nonattainment areas, volatile organic compound (VOC) pollution offsets of 1.1:1 must be achieved. See *id.* § 182(a)(4), 42 U.S.C. § 7511a(a)(4). Moderate, serious, severe, and extreme ozone nonattainment areas have VOC offset requirements of at least 1.15:1, 1.2:1, 1.3:1, and 1.5:1, respectively. See *id.* § 182(b)(5), (c)(10), (d)(2), (e)(1), 42 U.S.C. § 7511a(b)(5), (c)(10), (d)(2), (e)(1). A state in a severe or extreme ozone nonattainment area can reduce the offset burden to 1.2:1 by requiring all major sources in the nonattainment area to "use best available control technology (as defined in [42 U.S.C.] § 7479(3))." *Id.* § 182(d)(2), (e)(1), 42 U.S.C. § 7511a(d)(2), (e)(1).

#### 4. Federal-State Interaction Following the EPA Approval

Once a state has established an approvable operating permit program, the EPA must suspend the issuance of federal permits, but continues to retain jurisdiction over federal permits that have not yet expired.<sup>85</sup> The EPA may also retain jurisdiction over permits that have been issued but are still being either administratively or judicially reviewed.<sup>86</sup> Although the approval of partial state permit programs is discouraged,<sup>87</sup> the EPA may grant interim approval to states which submit programs that “substantially” meet the requirements of the CAA.<sup>88</sup>

After a state begins administering a permit program, the EPA still has oversight authority. Upon finding that a state is not properly administering or enforcing the program, the EPA has the discretion to apply the CAA section 179 sanctions described above, but must apply sanctions if inadequate administration or enforcement continues for more than eighteen months.<sup>89</sup> As with the failure to submit an approvable program, sanctions only apply where inadequate administration or enforcement relates to a nonattainment area.<sup>90</sup> If state efforts are still inadequate two years after the EPA’s initial finding, the EPA must establish a federal permit program.<sup>91</sup>

Congress also provided that the EPA Administrator retain oversight authority over the permits themselves.<sup>92</sup> States must submit to the Administrator a copy of each permit application, proposed permit, and issued permit.<sup>93</sup> The Administrator must object within forty five days to a permit

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85. See CAA § 502(e), 42 U.S.C. § 7661a(e).

86. See *id.* § 502(e), 42 U.S.C. § 7661a(e).

87. See *id.* § 502(f), 42 U.S.C. § 7661a(f).

88. See *id.* § 502(g), 42 U.S.C. § 7661a(g). Interim approval is effective for up to two years and is not renewable. See *id.* See *infra* note 103 for a discussion of the status of state submissions of operating permit programs.

89. See *id.* § 502(i)(1)-(2), 42 U.S.C. § 7661a(i)(1)-(2).

90. See CAA § 502(i)(3), 42 U.S.C. § 7661a(i)(3).

91. See *id.* § 502(i)(4), 42 U.S.C. § 7661a(i)(4).

92. See *id.* § 505, 42 U.S.C. § 7661d.

93. See *id.* § 505(a)(1), 42 U.S.C. § 7661d(a)(1).



which does not meet the requirements of the CAA or the applicable SIP.<sup>94</sup> If the Administrator objects, the state must revise the permit to correct the deficiencies.<sup>95</sup> If the state does not revise the permit accordingly within ninety days, the Administrator must issue or deny a permit to the applicant.<sup>96</sup> If the Administrator does not object to the permit within the forty five day period, persons who participated in the public comment process<sup>97</sup> have sixty days to petition the Administrator to object to the permit.<sup>98</sup> Such a petition will not alter the effectiveness of a permit that has already been issued by the state.<sup>99</sup> If the Administrator denies the petition, the petitioner may obtain judicial review of this decision under the judicial review provisions in CAA section 307.<sup>100</sup>

#### B. Regulatory Action Implementing Title V Provisions

The EPA published a proposed rule for implementing the state operating permit programs on May 10, 1991.<sup>101</sup> Final regulations establishing the operating permit program were published on July 12, 1992.<sup>102</sup> The regulations governing the implementation of state operating permit programs are contained in 40 C.F.R. Part 70.<sup>103</sup>

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94. See *id.* § 505(b)(1), 42 U.S.C. § 7661d(b)(1).

95. See CAA § 505(b)(3), 42 U.S.C. § 7611d(b)(3).

96. See *id.* § 505(c), 42 U.S.C. § 7661d(c).

97. See *supra* text accompanying note 56 for the CAA requirement of an opportunity for public comment on permit applications.

98. See CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2).

99. See *id.* § 505(b)(2), 42 U.S.C. § 7661d(d)(2).

100. See *id.* CAA § 307(b)(1) provides for judicial review of final EPA actions which are "locally or regionally applicable . . . in the United States Court of Appeals for the appropriate circuit." *Id.* § 307(b)(1), 42 U.S.C. § 7607(b)(1).

101. Operating Permit Program, 56 Fed. Reg. 21,712 (1991) (to be codified at 40 C.F.R. pt. 70).

102. See 57 Fed. Reg. 32,250 (1992).

103. Appendix A of 40 C.F.R. Part 70 details the status of the state permit program submission. As of February 18, 1996, the EPA had granted final full approval for only ten operating permit program submissions. States submitting fully approvable programs for either the entire state or portions thereof were Tennessee (Clean Air Act, Final Full Approval of Operating Permits Programs; Metropolitan Health Dept., Metropolitan Government of Nashville and Davidson County, TN, 61 Fed. Reg. 5705 (1996) (to be codified at 40 C.F.R. pt. 70)); Clean Air Act Final Full Approval of Operating Permits Programs; Knox County, Department of Air Pollution Control, Knox County, Tennessee, 61 Fed.

Reg. 18,966 (1996) (to be codified at 40 C.F.R. pt. 70)), Kansas (Final Full Approval of Operating Permits Programs: State of Kansas, and Delegation of 112(1) Authority, 61 Fed. Reg. 2938 (1996) (to be codified at 40 C.F.R. pt. 70)), South Dakota (Clean Air Act Final Full Approval of Operating Permits Program State of South Dakota 61 Fed. Reg. 2720 (1996) (to be codified at 40 C.F.R. pt. 70)), Nebraska (Clean Air Act (CAA) Final Full Approval of Operating Permits Program; State of Nebraska, City of Omaha, and Lincoln-Lancaster County Health Department (LLCHD) and Delegation of 112(1) Authority 60 Fed. Reg. 53,872 (1995) (to be codified at 40 C.F.R. pt. 70)), Oregon (Clean Air Act Final Full Approval of Operating Permits Programs in Oregon, 60 Fed. Reg. 50,106 (1995) (to be codified at 40 C.F.R. pt. 70)), Louisiana (Clean Air Act Final Full Approval of Operating Permits Program; Louisiana Department of Environmental Quality, 60 Fed. Reg. 47,296 (1995) (to be codified at 40 C.F.R. pt. 70)), Ohio (Clean Air Act Final Full Approval of Operating Permits Program; Ohio, 60 Fed. Reg. 42,045 (1995) (to be codified at 40 C.F.R. pt. 70)), South Carolina (Clean Air Act Final Full Approval of Operating Permits Program; State of South Carolina, 60 Fed. Reg. 32,913 (1995) (to be codified at 40 C.F.R. pt. 70)), Utah (Clean Air Act Final Full Approval of Operating Permits Programs; Approval of Construction Permit Program Under Section 112(1); State of Utah, 60 Fed. Reg. 30,192 (1995) (to be codified at 40 C.F.R. pt. 70)), and Mississippi (Clean Air Act Final Full Approval of 40 C.F.R. pt. 70 Operating Permits Program; State of Mississippi, 59 Fed. Reg. 66,737 (1994) (to be codified at 40 C.F.R. pt. 70)). Final interim approval was granted in over 48 states or air quality control regions. See 40 C.F.R. Pt. 70 App. A for a listing of approvals and disapprovals broken down by state. The EPA will be reviewing more than 50 submissions since several states, such as California, have more than one air pollution control region and submit operating permit programs for each region. See 40 C.F.R. Pt. 70 App. A. In addition, territories of the United States, such as Puerto Rico and the United States Virgin Islands, are regulated under the CAA. See CAA § 302(d), 42 U.S.C. § 7602(d) (defining the term "State" to include "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, . . . American Samoa and . . . the Commonwealth of the Northern Mariana Islands"). In fact, the District of Columbia received final interim approval of its operating permit program on August 7, 1995. Title V Clean Air Act Final Interim Approval of Operating Permits Program; District of Columbia, 60 Fed. Reg. 40,101 (1995) (to be codified at 40 C.F.R. pt. 70).

As of August 24, 1996, Virginia was the only state to have had an operating permit program finally disapproved. However, Virginia is not the only state whose standing statute needs revision. On October 30, 1995, the EPA proposed interim approval for Maryland's operating permit program but noted that the state's standing statute had to be amended before full approval could be granted. Clean Air Act Proposed Interim Approval of Operating Permits Program; State of Maryland, 60 Fed. Reg. 55,231, 55,233 (1995) (to be codified at 40 C.F.R. pt. 70). The EPA determined that Maryland's standing statute provides sufficient opportunity for judicial review to state residents. See *id.* The EPA was concerned, however, that under current law out-of-state individuals and corporations not doing business in Maryland have to demonstrate "a specific interest or property right" that will be harmed in a way that is different from the general public. See *id.* While Maryland grants the equivalent of Article III

In the preamble to the final regulations, the EPA noted several important aspects of the CAA operating permit program. First, the EPA acknowledged that creating a CAA permit program brings the CAA up to speed with other comprehensive permit-based environmental statutes.<sup>104</sup> Second, one of the goals of enacting the regulations was to “minimize the disruption to current State efforts by offering as much flexibility as is provided by the law.”<sup>105</sup> Third, the permit program was designed to reduce confusion by state officials and the regulated public and improve enforcement efforts by including all relevant requirements into a single document.<sup>106</sup>

The regulation covering standing to seek judicial review of a final permit action is contained in 40 C.F.R. section 70.4(b)(3)(x). This section provides that when a state submits a proposed operating permit program for approval by the EPA, the submission must contain, *inter alia*, a legal opinion that the state has adequate authority to:

[p]rovide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to section 70.7(h) of [40 C.F.R. Part 70], and any other person who could obtain judicial review of such actions under State laws.<sup>107</sup>

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standing (*See supra* note 9 and accompanying text for a discussion of Article III standing) to state residents and corporations doing business in the state, such standing is not granted to out-of-state individuals or corporations not doing business in the state. *See id.* Virginia’s statute, on the other hand, does not even grant Article III standing to its own residents. *See e.g.* Clean Air Act Final Disapproval of Operating Permits Program; Commonwealth of Virginia, 59 Fed. Reg. 62,324, 62,325 (1994) (to be codified at 40 C.F.R. pt. 70).

104. *See* 57 Fed. Reg. 32,250, 32,251 (1992). Two other major environmental statutes which utilize a permit program are the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901-6992k (1984 & Supp. V 1993)) and the Clean Water Act (CWA § 101-607, 33 U.S.C. §§ 1251-1387). Unlike the CAA, however, neither of these statutes set out any specific incentives for states to develop their own permit programs.

105. 57 Fed. Reg. 32,250, 32,251 (1992).

106. *See id.*

107. 40 C.F.R. § 70.4(b)(3)(x) (1994). The corresponding statutory authority states that an opportunity for judicial review should be provided to “the applicant, any person who participated in the public comment process, and any other

The regulations imposed several other limits on the opportunity for judicial review of final permit actions. First, when an approved permit program is in place, judicial review of a final permit action by the permitting authority may only be obtained in State court by means of a petition filed within ninety days of the final action.<sup>108</sup> States may provide for a shorter time.<sup>109</sup> Second, the terms of the permit are not subject to review in any state or federal enforcement action.<sup>110</sup> In the preamble to the final regulations, the EPA explained that these limitations were necessary to provide "greater certainty for sources and State and Federal enforcement personnel as to what requirements under the Act apply to a particular source."<sup>111</sup>

### C. The EPA regulatory action on Virginia's operating permit program

Virginia submitted its proposed operating permit program and certification of legal sufficiency on November 12, 1993.<sup>112</sup> After reviewing Virginia's information, the EPA proposed to disapprove the permit program on June 17, 1994.<sup>113</sup> Several reasons were listed as justification of the EPA's disapproval. Specifically, the EPA noted that Virginia's judicial review statute<sup>114</sup> failed to provide for judicial review of state permit actions to all categories of interested persons specified in the CAA.<sup>115</sup> While regulatory provisions require that judi-

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person who could obtain judicial review of that action under applicable law." CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6). The regulation uses the word "state" instead of the word "applicable" because the EPA has interpreted "applicable law" to mean "state law." See Brief of Respondent, at 20 n.9, *Virginia v. Browner*, 80 F.rd 869 (4th Cir. 1996) (no. 95-1052) (*Virginia II*).

108. See 40 C.F.R. § 70.4(b)(3)(xii) (1994). Petitions submitted after the deadline will be granted only if grounds for review arise following the expiration of the 90 day deadline. *Id.*

109. See *id.*

110. See *id.*

111. 57 Fed. Reg. 32,250, 32,265-66 (1992).

112. See Clean Air Act Disapproval of Operating Permits Program; Commonwealth of Virginia, 59 Fed. Reg. 31,183 (1994) (to be codified at 40 C.F.R. pt. 70).

113. See *id.*

114. See VA. CODE ANN. § 10.1-1318(B) (Michie 1993).

115. See 59 Fed. Reg. 31,183, 31,184 (1994).

cial review be afforded to "any person who participated in the public comment process . . . and any other person who could obtain judicial review of such actions under State laws,"<sup>116</sup> Virginia's statute further limits judicial review to only those persons who demonstrated an immediate, pecuniary harm.<sup>117</sup> Virginia's judicial review statute specifically states:

The person invoking jurisdiction under this subsection bears the burden of establishing that (i) such person has suffered an actual, threatened, or imminent injury; (ii) such an injury is an invasion of an immediate, legally protected, *pecuniary and substantial* interest which is concrete and particularized; (iii) such injury is fairly traceable to the decision of the [Air Pollution Control] Board . . . and (iv) such injury will likely be redressed by a favorable decision by the court.<sup>118</sup>

Several other reasons not within the scope of this Comment were also given by the EPA.<sup>119</sup>

On December 5, 1994, following an extended comment period,<sup>120</sup> the EPA published its final disapproval of Virginia's operating permit program.<sup>121</sup> In its final disapproval, EPA addressed the comments related to the judicial review

116. 40 C.F.R. § 70.4(b)(3)(x) (1994). See *supra* note 88 and accompanying text.

117. See 59 Fed. Reg. 31,183, 31,184 (1994). To obtain judicial review in federal court, the injury need not be monetary in nature; environment-based injuries are sufficient. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992). See *supra* note 8 for a discussion of standing to sue in federal court.

118. VA. CODE ANN. § 10.1-1318(B) (Michie 1993) (emphasis added).

119. The EPA noted that some of Virginia's key regulations had expired and not been renewed. See 59 Fed. Reg. 31,183 (1994). The disapproval was also based on the EPA's determination that "the regulatory portion of the program does not include the proper universe of sources required to be subject to a state operating permit program or ensure that permits contain all applicable requirements, or correctly delineating provisions enforceable only in Virginia." *Id.*

120. At the request of counsel for amicus National Independent Energy Producers and Ogden Martin Systems, the EPA extended the deadline for comments on the proposed disapproval of Virginia's permit program from July 18, 1994 to August 17, 1994. See Clean Air Act Disapproval of Operating Permits Program; Commonwealth of Virginia-Extension of Comment Period, 59 Fed. Reg. 41,265 (1994) (to be codified at 40 C.F.R. pt. 52).

121. See 59 Fed. Reg. 62,324 (1994).

provisions. Specifically, the EPA responded to the assertion that Virginia's judicial review statute met the requirements of CAA section 502(b)(6).<sup>122</sup>

In response, the EPA pointed out, that under Virginia law, a person who participated in the public comment process and otherwise met the requirements of Article III prudential standing<sup>123</sup> could nevertheless be precluded from judicial review of the granting (or denial) of a permit since Virginia's requirements for standing are stricter than traditional Article III prudential standing limitations.<sup>124</sup> The EPA also responded to a comment which suggested that CAA section 502(b)(6) might violate the Tenth Amendment.<sup>125</sup> The EPA cited both *Hodel v. Virginia Surface Mining & Reclamation Assn, Inc.*<sup>126</sup> and *New York v. United States*<sup>127</sup> in concluding that, through cooperative federalism, a federal agency can use incentives or federal preemption as a means of encouraging states to regulate in the manner suggested by Congress.<sup>128</sup>

Following the filing of Virginia's district court complaint and Fourth Circuit petition for judicial review, Virginia sub-

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122. 59 Fed. Reg. 62,324, 62,325 (1994).

123. See *supra* note 8 for a discussion of Article III and prudential standing.

124. See 59 Fed. Reg. 62,324, 62,325-26 (1994).

125. See *id.* at 62,326.

126. 452 U.S. 264 (1982). In *Hodel*, the Supreme Court addressed, *inter alia*, a Tenth Amendment challenge to the Surface Mining and Control and Reclamation Act of 1977. See *id.* at 268. The statute at issue had a regulatory permit program quite similar to that of the CAA except the only incentive for states to develop their own surface mining permit programs was the avoidance of federal preemption. See *id.* at 288. In overturning a district court finding that the federal regulation of surface mining violated the Tenth Amendment because regulating land use was a traditional state function, the Supreme Court declared that Congress was permissibly regulating private businesses and not the State as a state. See *id.* at 293. The Court also determined that since Congress clearly was permitted to preempt state regulation in the field of surface mining, it was not a violation of the Tenth Amendment for Congress to use the threat of preemption as an incentive for the states to regulate themselves according to the federal program. See *id.* at 290-91.

127. 112 S. Ct. 2408 (1992). See *infra* section II.D.1 of this Comment for an extensive discussion of *New York v. United States*.

128. See 59 Fed. Reg. 62,324, 62,326 (1994).

mitted a revised operating permit program.<sup>129</sup> The EPA proposed to disapprove of Virginia's second program submission on September 19, 1995.<sup>130</sup> Again, the EPA cited deficiencies in Virginia's judicial review statute in light of the fact that Virginia had not amended its standing law.<sup>131</sup> The EPA refused to consider even interim approval of Virginia's plan stating that:

[i]f Virginia is permitted to narrowly preclude public commenters from exercising judicial review rights, one of the chief incentives for permit decision makers to fully consider public comments would be significantly reduced and the public comments process would thereby be rendered less meaningful.<sup>132</sup>

#### D. Constitutional Background

##### 1. The Tenth Amendment as Interpreted in *New York v. United States*<sup>133</sup>

The Supreme Court faced a problem similar to the one at issue between Virginia and the EPA in *New York v. United States*. In *New York*, the State of New York and the counties of Allegheny and Cortland (petitioners) challenged the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act (LLRWPA).<sup>134</sup> Petitioners' challenge was

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129. See Clean Air Act Proposed Disapproval of Operating Permits Program; Commonwealth of Virginia, 60 Fed. Reg. 48,435, 48,436 (1995) (to be codified at 40 C.F.R. pt. 70).

130. See 60 Fed. Reg. 48,435.

131. See *id.* at 48,436.

132. *Id.*

133. 112 S. Ct. 2408.

134. See *id.* at 2414. The Low-Level Radioactive Waste Policy Act (LLRWPA), 42 U.S.C. §§ 2021b to 2021j (1988 & Supp. V 1993), was originally enacted in 1980. Pub. L. 96-573, 94 Stat. 3347 (1980). The LLRWPA was to make each state "responsible for providing for the availability of capacity . . . for the disposal of low-level radioactive waste generated within its borders." LLRWPA § 4(a)(1)(A), 94 Stat. 3347, 3348. In furtherance of this policy, the states were authorized to enter into regional compacts with other states "to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." *Id.* § 4(a)(2)(A), 94 Stat. 3347, 3348. However, there were no incentives for the states to enter into such compacts nor any penalties

based on the Tenth Amendment and the Guarantee Clause<sup>135</sup> of the United States Constitution.<sup>136</sup>

a. State Responsibilities Under the LLRWPA

To meet the requirements of the LLRWPA, states were to enact legislation to secure disposal of its low-level radioactive waste.<sup>137</sup> States or regional compacts that did not have disposal facilities within their own borders were given incentives to develop sites of their own. First, the state in which a disposal facility is located could exact a surcharge on the disposal of waste from outside their state or compact region.<sup>138</sup> A portion of the surcharges were to be placed in an escrow account, to be held by the Secretary of Energy, and paid back to the states which reached the indicated legislative or administrative milestones set out in the LLRWPA.<sup>139</sup> The second incentive for states to develop disposal plans involved the use of disposal site access restrictions.<sup>140</sup> States failing to meet the statutory milestones were charged additional

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for failure to do so. *See New York v. United States*, 112 S. Ct. 2408, 2415. To give the initial act more teeth, Congress enacted the amendments at issue in *New York*. *See id.*

135. *See* U.S. CONST. art. IV, § 4. Under the Guarantee Clause, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." *Id.* The Court held that those provisions of the LLRWPA which did not offend the Tenth Amendment also did not violate the Guarantee Clause.

136. *New York v. United States*, 112 S. Ct. at 2433.

137. *See* 42 U.S.C. § 2021e(e)(1) (1988). The LLRWPA sets out four statutory deadlines. By 1986, states were to "ratify compact legislation or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within such State." 42 U.S.C. § 2021e(e)(1). By 1988, compact regions not containing a disposal site were to identify a location for such a facility and states which were not members of compacts were to develop a siting plan. 42 U.S.C. § 2021e(e)(1)(B). Applications for licenses to operate disposal facilities were due by January 1, 1990. 42 U.S.C. § 2021e(e)(1)(C)(i). In the alternative, states were to certify that they had a waste disposal plan which would take effect by December 31, 1992. 42 U.S.C. § 2021e(e)(1)(C)(ii). Finally, by January 1, 1992, applications for licensing of disposal facilities for all states and non-sited compact regions were to be filed. 42 U.S.C. § 2021e(e)(1)(D).

138. *See* 42 U.S.C. § 2021e(d)(1) (1988).

139. *See* 42 U.S.C. § 2021e(d)(2) (1988). *See supra* note 118 for a description of the goals to be met by each state or compact.

140. *See* 42 U.S.C. § 2021e(e)(2) (1988).



surcharges and could have all access to disposal facilities denied to them.<sup>141</sup> Finally, states that did not provide for disposal of their waste by January 1, 1996 would have been required to take title to and possession of the waste and be liable for damages incurred due to the state's failure to take possession of the waste.<sup>142</sup>

b. Relevant Constitutional Provisions Discussed  
by the Court

In analyzing the Tenth Amendment issue, the Court noted that the relevant questions were (1) "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution," or (2) "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment."<sup>143</sup> The Court explained that under the LLRWPA, where there was a "division of authority between federal and state governments, the two inquiries are mirror images of each other."<sup>144</sup> Thus, if Congress was granted an express power in the Constitution, the Tenth Amendment could not be used to show that power was reserved to the states.<sup>145</sup> Likewise, "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."<sup>146</sup>

The Court concluded that the statute must be examined to determine whether "an incident of state sovereignty is protected by a limitation on an Article I power."<sup>147</sup> In terms of the balance of power between the federal and state governments, the Court noted that the Commerce Clause gives the federal government a broad range of powers and that the Supremacy Clause<sup>148</sup> helps tip the balance of power in favor

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141. *See id.*

142. *See* 42 U.S.C. § 2021e(d)(2)(C) (1988).

143. *New York v. United States*, 112 S. Ct. at 2417.

144. *Id.*

145. *See id.*

146. *Id.*

147. *Id.* at 2418.

148. *See* U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the

of the federal government.<sup>149</sup> However, the Court noted that petitioners were not arguing that the United States could not, pursuant to the Commerce Clause, directly regulate the disposal of radioactive waste.<sup>150</sup> Instead, the petitioners were asserting that Congress could not require states to regulate in a specific manner.<sup>151</sup>

In addressing the claims put forth by the petitioners, the Court offered a brief history of federalism under the Articles of Confederation and the Constitution.<sup>152</sup> Under the Articles of Confederation, Congress was to regulate only the states and not the people directly.<sup>153</sup> During the Constitutional Convention, the framers considered two governmental plans.<sup>154</sup> The first plan was known as the "Virginia Plan" which would give Congress the power to regulate individuals directly and the second was the "New Jersey Plan" which would follow the procedure in place under the Articles of Confederation.<sup>155</sup> The Virginia Plan was the one ultimately adopted by the framers.<sup>156</sup>

The Court then turned to a discussion of the methods available to Congress to urge states to enact specific legislation. The Court noted that there were "a variety of methods" available but chose to discuss only the Spending power and the doctrine of preemption.<sup>157</sup> With regard to the Spending power, the Court determined that Congress may use the receipt of federal funding as a way to "influence a State's legislative choices" provided certain requirements were met.<sup>158</sup> Congress may also give the states the option of passing legis-

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supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

149. *See New York v. United States*, 112 S. Ct. at 2419.

150. *See id.* at 2420.

151. *See id.*

152. *See id.* at 2421-22.

153. *See id.* at 2421.

154. *See New York v. United States*, 112 S. Ct. at 2422.

155. *See id.*

156. *See id.* at 2422.

157. *See id.* at 2423-24.

158. *See id.* 2423. The requirements for the conditioning of federal funding were set out by the Supreme Court in *South Dakota v. Dole*, 483 U.S. 203

lation that meets federal standards or having the federal government preempt state legislation with federal law.<sup>159</sup> Again, however, the Court noted that other methods were available even though the Court chose not to discuss them.<sup>160</sup>

The Court concluded that the ultimate choice should be left to the citizens of each state. Under the two methods discussed, for instance, the states would decide which is more important.<sup>161</sup> The Court proposed that when Congress uses its Spending power, the citizens could decide that the federal funding is not worth giving up their authority to address local interests when such interests are inconsistent with federal policy.<sup>162</sup> Likewise, when Congress uses preemption, the states may decide that federal law does not go far enough and opt to accept the minimum federal requirements in exchange for the power to enact stricter regulations.<sup>163</sup>

The Court reasoned that if Congress attempts to force states to enact legislation rather than providing choices, both the United States and the states themselves are not properly held accountable to the citizens.<sup>164</sup> To explain, the Court stated that citizens put into office those people who will further their interests.<sup>165</sup> If states are forced to regulate according to Congress' wishes, the Court was concerned that the people might blame their state government for failing to carry out the proper policies while the federal government was shielded from displeasure of the people of the affected state.<sup>166</sup> According to the majority, this would not happen if

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(1987). See *infra* section II.D.2 of this Comment for a discussion of *South Dakota v. Dole*.

159. See *New York v. United States*, 112 S. Ct. at 2424.

160. See *id.* (stating that "[b]y either of these two methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply") (emphasis added).

161. See *id.*

162. See *id.*

163. See *id.*

164. See *New York v. United States*, 112 S. Ct. 2424.

165. See *id.*

166. See *id.*

the federal government directly legislated on the particular issue.<sup>167</sup>

c. Application of the Analysis to the LLRWPA

The Court turned its attention to the statute at issue. Before applying the analysis, the Court recognized that the petitioners and the federal government interpreted the LLRWPA in two different ways.<sup>168</sup> The petitioners pointed to the phrase “[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste . . .” and determined that this was a direct mandate.<sup>169</sup> The United States, however, took the LLRWPA as a whole and argued that it was really a set of incentives.<sup>170</sup> The Court, acknowledging the acceptability of both constructions, adopted the latter.<sup>171</sup> The two reasons given for this decision were (1) to avoid “upset[ing] the usual constitutional balance of federal and state powers”<sup>172</sup> and (2) adopting the incentive construction would allow the Court to adhere to a canon of statutory construction requiring them to construe a statute in such a way as to avoid “serious constitutional problems.”<sup>173</sup>

Following this discussion, the Court addressed the surcharge provisions of the LLRWPA.<sup>174</sup> These provisions involved the authorization of the surcharges, the placing of the money in an escrow account, and the repayment to the states upon reaching the statutory milestones.<sup>175</sup> The Court quickly dispensed with these provisions noting that they were permissible exercises of Congress’ powers to “authorize the states to burden interstate commerce”, enact a tax on in-

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167. *See id.*

168. *See id.* at 2425.

169. *See New York v. United States*, 112 S. Ct. at 2425 (quoting 42 U.S.C. § 2021c(a)(1)(A)).

170. *See id.*

171. *See id.*

172. *Id.* (quoting *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991)).

173. *Id.*

174. *See New York v. United States*, 112 S. Ct. at 2425-27.

175. *See id.*

terstate commerce, and condition federal spending, respectively.<sup>176</sup>

The second set of incentives addressed by the Court was the access provisions.<sup>177</sup> Under these provisions, the Court held that Congress was permissibly exercising its power to allow states to discriminate against interstate commerce.<sup>178</sup> The Court held that Congress could give sited states the power to refuse to accept out-of-state or out-of-compact waste.<sup>179</sup>

The third set of incentive provisions, the "take title" option, was the one that caused the Court trouble. In declaring this "option" to be invalid, the Court concluded that there was no independent constitutional provision allowing Congress to force states to take title to radioactive waste.<sup>180</sup> Furthermore, the majority noted that the only way to avoid taking title to the waste was to enact legislation in the manner specified and within the schedule set out in the statute.<sup>181</sup> Since these two options, standing alone, would be unconstitutional, the Court held that offering them in the alternative was unconstitutional as well.<sup>182</sup> The Court later noted that, even if state officials had agreed to the conditions set out in the language of the statute, the constitutional problem was not eliminated.<sup>183</sup>

#### d. The Guarantee Clause<sup>184</sup> and the Issue of Severability

At the end of its opinion, the majority addressed the petitioners' Guarantee Clause claims.<sup>185</sup> In construing the Guar-

176. *See id.* at 2425-26.

177. *See id.* at 2427.

178. *See id.*

179. *See New York v. United States*, 112 S. Ct. at 2427.

180. *See id.* at 2428 (noting that "the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution").

181. *See id.*

182. *See id.* at 2428.

183. *See id.* at 2431-32.

184. *See supra* note 135 for the text of the Guarantee Clause.

185. *See New York v. United States*, 112 S. Ct. at 2432-33.

antee Clause, the Court indicated that this portion of the Constitution was applicable when states are forced to forfeit control over their legislative agendas.<sup>186</sup> Since the Court had already dispensed with the take title provisions of the LLRWPA, the Court only considered the first two sets of incentives. These provisions, concluded the majority, “do not pose any realistic risk of altering the form or the method of functioning of New York’s government.”<sup>187</sup> They merely had the result of denying New York its share of federal funding or denying access to out-of-state disposal sites.<sup>188</sup>

The last issue addressed by the Court was the severability of the offensive “take title” provisions.<sup>189</sup> The Court concluded that since Congress did not address the issue of severability, there was no presumption against severability.<sup>190</sup> According to the majority, the rest of the statute served a legitimate congressional purpose and operated to encourage the states to adopt Congress’s plan.<sup>191</sup> Finally, the Court stated that the fact that a state may “encounter considerable internal pressure” to deal with radioactive waste did not render the statute entirely invalid.<sup>192</sup>

## 2. The Spending Power and Its Limitations - *South Dakota v. Dole*<sup>193</sup>

As noted by the majority in *New York v. United States*,<sup>194</sup> a challenge to Congress’ use of federal funding as an incentive for states to regulate according to a national plan must pass the test set out by the Supreme Court in *South Dakota v. Dole*.<sup>195</sup> In *Dole*, the State of South Dakota questioned the power of Congress to condition the receipt of federal highway funds on the enactment of state legislation raising the mini-

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186. *See id.* at 2433.

187. *Id.*

188. *See id.*

189. *See id.* at 2434.

190. *See New York v. United States*, 112 S. Ct. at 2434.

191. *See id.*

192. *See id.*

193. 483 U.S. 203.

194. 112 S. Ct. 2408.

195. *See New York v. United States*, 112 S. Ct. at 2423.

mum drinking age to twenty-one.<sup>196</sup> The state cited both the Spending Clause<sup>197</sup> and the Twenty-first Amendment<sup>198</sup> to the Constitution in support of its claims.<sup>199</sup>

In ruling that Congress's actions were constitutional, the Court declined to hold that the federal statute withholding five percent of federal highway funds from those states refusing to raise their drinking ages offended the Twenty-first Amendment.<sup>200</sup> Instead, the Court stated that if Congress's actions were consistent with the Spending Clause then the statute was constitutional regardless of whether the Twenty-first Amendment allowed federal regulation of the drinking age.<sup>201</sup>

The Court examined the relevant precedent and concluded that case law had established four limitations on the congressional spending power.<sup>202</sup> First, Congress may only spend "in pursuit of 'the general welfare.'"<sup>203</sup> However, the Court noted that Congress's judgment as to whether this requirement is met should be accorded great deference.<sup>204</sup> Second, Congress must make its intentions clear so that states may make an informed choice.<sup>205</sup> Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"<sup>206</sup> In a footnote, the Court recognized that it had no guidance as to whether the relationship must be direct or in-

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196. See *South Dakota v. Dole*, 483 U.S. 203. South Dakota had enacted a law allowing persons who were at least nineteen to purchase beer that contained no more than 3.2% alcohol. See *id.*

197. See *supra* note 7 for the text of the Spending Clause.

198. The relevant portion of the Amendment reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

199. See *Dole*, 483 U.S. at 205.

200. See *id.*

201. See *id.* at 206.

202. See *id.* at 207.

203. See *id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937); *United States v. Butler*, 297 U.S. 1 (1936)).

204. See *Dole*, 483 U.S. at 207.

205. See *id.*

206. See *id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

direct, but concluded that the drinking age and safe highways were directly related anyway.<sup>207</sup> Fourth, the Court noted that there can be no other independent constitutional bar to Congress's conditions.<sup>208</sup>

In discussing the Tenth Amendment in relation to federal spending, the Court referred to *Oklahoma v. United States Civil Service Commission*.<sup>209</sup> In *U.S. Civil Service Commission*, the Supreme Court held that it was constitutional for the federal government to withhold certain federal funds if a state refused to remove one of its officials even though directly ordering the removal would be an invasion of the state's sovereignty.<sup>210</sup> The *U.S. Civil Service Commission* Court specifically determined that the Tenth Amendment could not be used to overturn Congress's decision to withhold federal funds.<sup>211</sup> Neither the petitioners nor the Court raised the question of whether the Spending Clause prohibited the withholding of funds in this case.

The *Dole* Court quickly determined that Congress' conditions on the federal highway funds met the first three requirements, specifically noting that "one of the main purposes for which highway funds are expended" is public safety.<sup>212</sup> Turning to the fourth requirement, the Court, relying on cases such as *Oklahoma v. United States Civil Service Commission*, decided that the statute at issue in *Dole* was not limited by the Twenty-first Amendment.<sup>213</sup> There would be an independent constitutional bar if Congress was using the funds to encourage the states to act unconstitutionally themselves.<sup>214</sup> Finally, the Court recognized that Congress is capable of structuring legislation such that states are not

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207. *See id.* at 208 n.3.

208. *See id.* at 208.

209. 330 U.S. 127 (1947).

210. *See id.* at 143.

211. *See id.*

212. *See Dole*, 483 U.S. at 208.

213. *See id.* at 210 (noting that "the independent constitutional bar' limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly").

214. *See id.* at 210-11.



encouraged, but forced, to act; however, the Court cautioned against confusing the concepts of temptation and coercion.<sup>215</sup>

### III. *The Courts Decide the Constitutional Issues*

#### A. Constitutional Issues Raised by the Parties and *Amici* in the Judicial Review Action Brought by the Commonwealth of Virginia

##### 1. Virginia's Arguments

Virginia made two constitutional arguments in its brief. First, Virginia claimed that the judicial review provisions of CAA section 502(b)(6)<sup>216</sup> violate the Tenth Amendment of the United States Constitution.<sup>217</sup> Virginia argued that Congress is effectively forcing the states to amend their jurisdictional statutes in violation of state sovereignty.<sup>218</sup> First, Virginia maintained that the state court system is one of the cornerstones of state sovereignty and sovereign immunity.<sup>219</sup> Virginia asserted that since the Tenth Amendment, as interpreted by the Supreme Court in *New York v. United States*,<sup>220</sup> forbids Congress from forcing states to legislate, the judicial review provisions of the CAA are unconstitutional.<sup>221</sup> Virginia then argued that Congress has offended the principles of federalism because states no longer can legislate as they wish and state legislators risk being booted out of office while the federal government escapes unscathed.<sup>222</sup>

The second constitutional attack on the CAA concerned the use of highway sanctions to encourage states to submit approvable permit programs. Virginia noted that the judicial

215. *See id.* at 211.

216. CWA § 502(b)(6), 42 U.S.C. § 7661a(b)(6).

217. *See* brief of Petitioner at 24, *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (*Virginia III*) (No. 95-1052) [hereinafter brief of Petitioner].

218. *See id.* at 25.

219. *See id.* at 26.

220. 112 S. Ct. 2408. *See* section II.D.1 of this Comment for an extensive discussion of *New York v. United States*.

221. *See* brief of Petitioner, *supra* note 217, at 26-29.

222. *See id.* at 29-30.

review provisions should be struck down because the sanction method used in the CAA has not been judicially approved.<sup>223</sup>

Virginia suggested that courts have permitted Congress to encourage state participation in two major ways. First, Virginia stated that Congress may allow states to choose between adopting the federally sanctioned method of legislation or having state law preempted.<sup>224</sup> Second, Congress can use federal funding as a means of encouraging state cooperation.<sup>225</sup> Virginia claimed that the first of these two methods was improperly used in this situation because the CAA “does not establish a preemption arrangement . . . [since] [p]articipation by the States is mandatory.”<sup>226</sup> Virginia also noted that an EPA-established federal permit program is designed to be used only until the state submits an approvable program.<sup>227</sup> According to Virginia, the second method is not properly used since the use of federal funds as an incentive to states must be “directly and reasonably related to the purpose of highway spending: safe interstate travel.”<sup>228</sup> Virginia concluded that since courts have not suggested that a combination of the two methods is permissible, this type of incentive is unconstitutional.<sup>229</sup>

## 2. The EPA’s Reply to Virginia’s Constitutional Arguments

The EPA maintained that the CAA provisions challenged by Virginia were consistent with the Constitution as written and interpreted. The EPA argued that, in seeking to remedy the states’ past failure to combat air pollution, the Amendments established a series of incentives to encourage state participation, namely the withholding of certain Title 23 highway funds and the imposition of 2:1 offsets in nonattain-

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223. *See id.* at 30-33.

224. *See id.* at 31.

225. *See id.*

226. *See* brief of Petitioner, *supra* note 217, at 31.

227. *See id.*

228. *Id.* at 33 (citing the Supreme Court in *South Dakota v. Dole*, 483 U.S. 203). *See supra* section II.D.2 of this Comment for an analysis of *South Dakota v. Dole*.

229. *See* brief of Petitioner, *supra* note 217, at 33.

ment areas.<sup>230</sup> In fact, the EPA claimed, the decision in *District of Columbia v. Train*,<sup>231</sup> which acknowledged this method, was noted in the legislative history to the 1977 Clean Air Act Amendments as support for the use of sanctions to encourage state action.<sup>232</sup> The EPA also noted that Virginia was confused as to its position. In its brief, Virginia took the inconsistent positions that states are directly commanded to enact the "offensive" legislation and that Congress has established a series of incentives, *albeit* strong ones.<sup>233</sup>

In refuting the claims advanced by Virginia, the EPA first noted that the court was obligated to avoid any constitutional problems by construing the statute as employing incentives rather than directly mandating state legislation.<sup>234</sup> The EPA then countered Virginia's interpretation of *New York v. United States*<sup>235</sup> and claimed that Congress has simply presented states with a constitutional alternative to legislating as described in CAA section 502(b).<sup>236</sup> The EPA noted that Congress has the power under the Necessary and Proper

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230. See brief of Respondent at 35, *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (*Virginia III*) (95-1052)[hereinafter brief of Respondent].

231. 521 F.2d 971 (D.C. Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977). In *District of Columbia v. Train*, the D.C. Circuit addressed the responsibilities of states under federal environmental regulatory programs. The court rejected an attempt by the EPA to force states to enact legislation regulating sources of air pollution. See *id.* at 986. The court also held that the states could not be forced to administer a regulatory program promulgated by a federal agency. See *id.* at 992. Although the court refused to allow the federal government to directly meddle in state lawmaking, it acknowledged that Congress had not provided any incentive for the states to enact or administer an acceptable regulatory plan. See *id.* In a footnote, the court recognized the practice of using federal funding as a means of coaxing reluctant states into voluntarily implementing federally-sanctioned regulatory programs. 521 F.2d at 992-93 n.26.

232. See brief of Respondent, *supra* note 230, at 35-36 n.22.

233. See *id.* at 36.

234. See brief of Respondent, *supra* note 230, at 37-38.

235. See *supra* notes 201-03 and accompanying text for Virginia's interpretation of *New York v. United States*.

236. See *id.* at 41.

Clause<sup>237</sup> to use the Commerce and Spending Clauses to encourage states to enact air pollution control legislation.<sup>238</sup>

The EPA claims that Virginia is trying to force courts into a “slippery concept” analysis of the difference between “effective coercion” and “indirect compulsion.”<sup>239</sup> Virginia’s professions of adverse “local economic impacts” are not enough to support a finding of unconstitutionality, maintained the EPA.<sup>240</sup> The EPA countered that if Virginia is unhappy with the requirements of the CAA, it can seek to amend the legislation.<sup>241</sup>

The EPA supported the use of federal highway fund limitations and increased offsets in nonattainment areas.<sup>242</sup> The use of highway funds in the CAA passes constitutional muster under the Supreme Court’s reasoning in *New York v. United States* according to the EPA.<sup>243</sup> Since the withholding of Title 23 federal highway funds reasonably relates to the goal of cleaner air,<sup>244</sup> federal highway funding and the goals of the CAA go hand in hand, maintained the EPA.<sup>245</sup> In addition, the EPA noted that the offset provisions operate directly on the sources, not on the states.<sup>246</sup> Therefore, the EPA ar-

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237. Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

238. See brief of Respondent, *supra* note 230, at 42-43.

239. See *id.* at 43.

240. See *id.* at 44 (citing the Supreme Court holding in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1982)).

241. See *id.* at 45-46 (citing the Supreme Court in *Garcia v. San Antonio Metro. Transit. Auth.*, 469 U.S. 528 (1985)).

242. See brief of Respondent, *supra* note 230, at 46-55.

243. See *id.* at 47.

244. See *id.* at 48. The EPA notes specifically that only projects that would tend to increase use of motor vehicles and exasperate the problem of air pollution are subject to withholding of funds. Any projects that are safety related or result in a decrease in air pollution will continue to be funded regardless of the use of CAA § 179. See *id.* at 49.

245. See brief of Respondent, *supra* note 230, at 51.

246. See *id.* at 42. The offset sanctions actually operate directly on the sources in a rather indirect manner. Although CAA § 179(b)(2), 42 U.S.C. § 7509(b)(2), states simply that “the ratio of emissions shall be at least 2 to 1,” the EPA’s own regulations impose this sanction in a different manner. See 40 C.F.R. § 52.31(e)(1)(i) (1995). The language in the regulation provides that

gued that the offset provisions are a constitutional exercise of Congress' Commerce powers.<sup>247</sup>

### 3. Constitutional Arguments of Amici

#### a. Chesapeake Bay Foundation, Inc.

The Chesapeake Bay Foundation (CBF), a non-profit environmental organization, filed an amicus curiae brief supporting the respondent EPA.<sup>248</sup> The CBF first noted that, since the requirements of CAA section 502(b) can have multiple interpretations, the court is obligated to presume constitutionality and adopt the interpretation that would avoid the constitutional problem.<sup>249</sup> The crux of the CBF's Tenth Amendment argument was that the judicial review provisions are constitutional because they were enacted pursuant to Congress' power under the Commerce Clause and do not mandate state action in violation of the Tenth Amendment.<sup>250</sup> The CBF declined to read the Supreme Court's decision in *New York v. United States*<sup>251</sup> as voiding the relevant

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"[t]he State shall apply the emission offset requirements . . . at a ratio of at least two units of emission reductions for each unit of increased emissions . . ." *Id.* However, if the State refuses to enforce the new offset requirements, under CAA § 505, the EPA must disapprove any permit which does not meet the requirements of the CAA and issue the permit itself. See CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); see also *supra* notes 73-81 and accompanying text for a discussion of the EPA's role in the granting of permits.

247. See *id.*

248. The CBF claims that about 20,000 of its members live in the state of Virginia. See brief of amicus curiae Chesapeake Bay Foundation, Inc. at 1, *Virginia v. Browner* (4th Cir. 1995) (No. 95-1052) [hereinafter Brief of CBF]. The CBF has an interest in the outcome of the case in question since air quality in Virginia will directly affect the quality of the water in the Chesapeake Bay. See *id.* at 2.

249. See brief of CBF, *supra* note 248, at 5, 10-11. CBF noted in its summary of the argument, though not in the body of the argument itself, that CAA language that the states "shall" submit approvable Title V programs can be interpreted as either a direct mandate or as a use of incentives. Thus, the court is bound by canons of statutory construction to adopt the latter interpretation. See *id.* See *supra* notes 149-54 and accompanying text for a discussion of this issue by the Court in *New York v. United States*.

250. See brief of CBF, *supra* note 248, at 13-14.

251. See *supra* section II.D.1 of this Comment for a discussion of *New York v. United States*.

provisions in the CAA as unconstitutional.<sup>252</sup> Even if Congress was trying to force the states to legislate, the CBF argued that there are no enforcement provisions in the CAA that the EPA could use against a state.<sup>253</sup> In its brief, the CBF concluded that the states are offered a real choice in the matter of operating permit programs and that the methods employed by Congress do not infringe upon state sovereignty.<sup>254</sup>

In analyzing the sanction provisions in light of the Spending Clause, the CBF determined that the test set out by the Supreme Court in *South Dakota v. Dole*<sup>255</sup> is met by the language of the CAA.<sup>256</sup> The CBF recognized that Virginia's main argument is that the use of highway fund sanctions do not relate to air pollution,<sup>257</sup> but cited several ways that the two do relate, particularly that the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA),<sup>258</sup> which is codified partially in Title 23, states that the national policy is to create an environmentally sound transportation system.<sup>259</sup> The CBF also argued that if the court finds any of the sanctions to be unconstitutional, the offensive section should sim-

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252. See brief of CBF, *supra* note 248, at 15-19.

253. See *id.* at 20. The CBF demonstrated that the CAA's enforcement section (CAA § 113, 42 U.S.C. 7413) can only be used against a pollution source and not a regulating authority. See *id.* at 21. Case law and legislative history of CAA § 113 are used to bolster the CBF's interpretation of CAA enforcement options. See brief of CBF, *supra* note 248, at 21-22.

254. See *id.* at 22-28.

255. See *supra* section II.D.2 of this Comment for discussion of *South Dakota v. Dole*.

256. See brief of CBF, *supra* note 248, at 31-32.

257. See *id.* at 28.

258. 105 Stat. 1914 (1991).

259. See brief of CBF, *supra* note 248, at 29. The CBF and the EPA both fail to mention the fact that ISTEA was not the first time the CAA and highway funding were linked together by Congress. The Federal-Aid Highway Act of 1970 specifically stated that "[t]he Secretary [of Transportation], after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended." Federal Highway-Aid Act of 1970, Pub. L. 91-605, § 136(b), 84 Stat. 1713, 1735 (codified as amended in various sections of Title 23).

ply be discarded with the remaining portions of the CAA remaining in effect.<sup>260</sup>

#### b. Washington Legal Foundation

The Washington Legal Foundation (WLF), a non-profit organization involved in public interest law issues, submitted a brief in support of Virginia.<sup>261</sup> The WLF is involved in issues dealing with state sovereignty and advocates against excessive environmental regulations by the federal government.<sup>262</sup> The WLF's position was that the EPA's interpretation of the judicial review provisions under CAA section 502(b)(6) should be rejected in order to avoid an unnecessary analysis of constitutional claims.<sup>263</sup> The WLF echoed Virginia's argument that the use of sanctions does not fit neatly into any of the Congressional incentive options discussed in *New York v. United States*.<sup>264</sup>

#### c. Virginia Manufacturers Association

The Virginia Manufacturers Association (VMA) is an organization comprised of Virginia businesses, many of whom fall under the CAA's definition of "major source" and, therefore, would be required to obtain Title V permits.<sup>265</sup> The VMA participated in the creation of Virginia's judicial review statute and commented on the EPA's proposal to disapprove of Virginia's operating permit program.<sup>266</sup> The VMA claimed that the EPA's decision to disapprove Virginia's submission places its members in operational limbo, unable to expand or

260. See brief of CBF, *supra* note 248, at 33.

261. See brief of the Washington Legal Foundation as Amicus Curiae in Support of Petitioner at 2, *Virginia v. Browner* (4th Cir. 1995) (No. 95-1052) [hereinafter Brief of WLF].

262. See *id.*

263. See *id.* at 10. Virginia has challenged both the EPA's interpretation of CAA § 502(b)(6) and the constitutionality of that section. See generally, Brief of Petitioner, *supra* note 217. By finding the EPA's interpretation to be arbitrary and capricious, the Fourth Circuit could avoid the constitutional issues altogether.

264. See brief of WLF, *supra* note 261, at 11.

265. See brief of Amicus Curiae Virginia Manufacturers Association at 1, *Virginia v. Browner* (4th Cir. 1995) (No. 95-1052) [hereinafter Brief of VMA].

266. See *id.* at 1.

modify its facilities and facing the possibility of unreasonable permit fees.<sup>267</sup>

The VMA challenged the constitutionality of the judicial review requirements of the operating permit program using arguments similar to those employed by Virginia. First, the VMA asserted that Congress is unconstitutionally compelling states to enact federal standards.<sup>268</sup> According to the VMA, both the offsets and limitations on highway funding are impermissible coercion rather than incentives.<sup>269</sup> The VMA argued that offset sanctions would severely hinder Virginia businesses' chances of competing with out-of-state facilities and discourage other businesses from coming to the state.<sup>270</sup> The VMA also maintained that highway sanctions would hold nearly 100 percent of federal highway funding hostage until Virginia submits an approvable program.<sup>271</sup> The second constitutional point in the VMA's brief is that, as argued by Virginia, federal highway funds "are not rationally related to the purposes of the CAA."<sup>272</sup>

d. National Independent Energy Producers and  
Ogden Martin Systems<sup>273</sup>

The National Independent Energy Producers (NIEP) and Ogden Martin Systems (OMS) are engaged in the business of

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267. *See id.* at 2-3. One of the reasons the EPA gave for proposing to disapprove Virginia's operating permit program was the failure of the plan to provide for adequate permit fees to sustain the program. 59 Fed. Reg. 31,183 (1994). Virginia's code and rules provide for collection of permit fees of up to \$25 per ton of pollutant. *See* VA. CODE ANN. § 10.1-1322.1 and Rule 8-6 (Michie 1993). The CAA, on the other hand, requires that state permit fees should not be less than \$25 per ton. *See* CAA § 502(b)(3)(B)(i), 42 U.S.C. § 7661a(b)(3)(B)(i). The EPA claimed that Virginia's fee schedule, while adequate to cover the direct costs of implementing the permit program, did not provide enough funds to cover any indirect costs of running the program. 59 Fed. Reg. 31,183, 31,185 (1994). Therefore, The EPA determined that the requirements of 40 C.F.R. 70.9(b) were not met. *See id.*

268. *See* brief of VMA, *supra* note 265, at 30-34.

269. *See id.* at 34-37.

270. *See id.* at 35.

271. *See id.* at 36.

272. *See id.* at 37-38.

273. An amicus curiae brief was submitted on behalf of the National Independent Energy Producers, Ogden Martin Systems of Montgomery, Inc.,



selling electricity and steam for utilities.<sup>274</sup> Together, the NIEP and OMS claimed that the EPA's interpretation of the CAA will result in problems with permit programs in Virginia and across the country.<sup>275</sup> In addition to challenging the reasonableness of the EPA's interpretation of the CAA, the NIEP and OMS argued that the EPA's interpretation of the CAA results in an "unconstitutional invasion of state sovereignty."<sup>276</sup> The NIEP and OMS concluded that Congress's intention to alter the balance of power between states and the federal government is ambiguous, thereby offending constitutional law as interpreted in *Gregory v. Ashcroft*<sup>277</sup> by the Supreme Court.<sup>278</sup>

### B. *Virginia v. Browner*

The first constitutional issue addressed by the Fourth Circuit was whether Congress had a constitutional basis for including the sanction provisions in the CAA in the first place.<sup>279</sup> In answer to this inquiry, the court determined that the authority for the highway sanctions can be found in both the Spending Clause,<sup>280</sup> which permits Congress to provide for the "general welfare" of the country, and the Commerce

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Ogden Martin Systems of Fairfax, Inc., Ogden Martin Systems of Lancaster, Inc. and Ogden Martin Systems of Alexandria/Arlington, Inc. See *infra* note 274.

274. See brief of *Amicus Curiae* National Independent Energy Producers; Ogden Martin Systems of Montgomery, Inc.; Ogden Martin Systems of Fairfax, Inc.; Ogden Martin Systems of Lancaster, Inc.; Ogden Martin Systems of Alexandria/Arlington, Inc. at 1, *Virginia v. Browner* 8 F.3d 869 (4th Cir. 1995) (No. 95-1052) [hereinafter Brief of NIEP].

275. See *id.* at 1-2.

276. See *id.* at 17-18.

277. See 501 U.S. 452 (1991).

278. See brief of NIEP, *supra* note 274, at 19-20. In *Gregory v. Ashcroft*, the Supreme Court, ruling on an equal protection claim, discussed the balance of power between federal and state governments. See *Gregory v. Ashcroft*, 501 U.S. 452, 457-64 (1991). The Court noted that a "healthy balance of power" was necessary to "reduce the risk of tyranny or abuse" from either State or governments. See *id.* at 458. Noting that the balance of power tends to tip in favor of the federal government due to the Supremacy Clause, in order for Congress to alter the existing balance, it must make its intentions to do so perfectly clear. See *id.* at 460.

279. See *Virginia III*, 80 F.3d at 880-81.

280. See *supra* note 7 for the text of the Spending Clause.

Clause,<sup>281</sup> which allows Congress to regulate commerce between the states.<sup>282</sup>

The Fourth Circuit quickly dismissed Virginia's contention that the judicial review requirements in CAA section 502(b)(6) unconstitutionally force states through, *inter alia*, the judicial review requirements to give up control of their courts to the federal government.<sup>283</sup> The court recognized that a state cannot be commanded to open up its courts to federal claims, but reminded that existing state courts must hear federal claims under the Supremacy Clause.<sup>284</sup> The Supremacy Clause states that the "Constitution[] and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."<sup>285</sup> Virginia's claim was determined to be without merit, because a state need not expand its standing statute if the EPA instituted a permit program where judicial review could be had in federal court.<sup>286</sup> The court went on to state that the Congress may use its constitutional powers to coax states into legislating or regulating in a certain way.<sup>287</sup> Although the Fourth Circuit recognized that the power to persuade cannot be stretched so far as to place a stranglehold on the states, the court pointed out that "[n]o court [] has ever struck down a federal statute on grounds that it exceeded the Spending Power."<sup>288</sup>

With regard to the highway sanctions, the court gave two reasons why that provision of the CAA does not amount to unconstitutional coercion.<sup>289</sup> First, the court noted that the sanctions only apply to nonattainment areas and that funds may still be obtained for projects that are outside nonattain-

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281. See *supra* note 8 for the text of the Tenth Amendment.

282. See *Virginia III*, 80 F.3d at 881.

283. See *id.* at 880-81.

284. See *id.* at 880. See *infra* note 285 and accompanying text.

285. U.S. CONST. art VI, cl. 2.

286. See *Virginia III*, 80 F.3d at 881.

287. See *id.*

288. *Id.*

289. See *id.*

ment areas.<sup>290</sup> Second, the court pointed to the fact that safety projects and projects designed to reduce air pollution could still be funded with federal dollars while the sanctions are in effect.<sup>291</sup> To round out its analysis, the court cited several cases in which a total ban on funding was found not to violate the Spending Clause.<sup>292</sup> In response to Virginia's argument that it would have to manipulate other sources of funding to cover any affected projects, the court replied that the states were given plenty of time to plan their approach to CAA compliance.<sup>293</sup> In concluding its brief discussion of the constitutionality of the highway sanction, the court decided that, due to the comprehensive nature of the CAA, there was a rational relationship between highway funding and the reduction of air pollution.<sup>294</sup> The court did not come to this conclusion through a rigorous analysis using *South Dakota v. Dole*,<sup>295</sup> but merely stated its findings in a rather conclusory fashion.<sup>296</sup>

While the Fourth Circuit dealt with the constitutionality of the highway sanctions in a mere six paragraphs, it took even less time to decide that the offset sanctions also did not offend the Constitution. The simple reasoning given by the court was that offsets are imposed directly on the sources themselves rather than on the state.<sup>297</sup> For this reason, the court concluded that Virginia is not being regulated as a government and, in fact, is not being regulated at all.<sup>298</sup> There-

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290. See *id.* at 881.

291. See *Virginia III*, 80 F.3d at 881.

292. See *id.* at 881-82 (citing *New York v. United States*, 112 S. Ct. 2408; *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. den.* 493 U.S. 1070 (1990); *Oklahoma v. Schweiker*, 655 F.2d 401 (D.C. Cir. 1981); *Nebraska Dep't of Roads v. Tiemann*, 510 F.2d 446 (8th Cir. 1975)).

293. See *id.* at 882.

294. See *id.*

295. 483 U.S. 203.

296. See *infra* section III.C for a discussion of the Eastern District of Missouri's slightly more probing constitutional analysis.

297. See *Virginia III*, 80 F.3d at 882. See *infra* notes 326-27 and accompanying text.

298. See *id.*

fore, the court concluded that the offset sanctions do not violate the Tenth Amendment.<sup>299</sup>

For the final topic of its discussion, the court turned its attention to the federal operating permit program (FOPP) provisions in the CAA.<sup>300</sup> The court compared the FOPP provisions to the threat of a federal regulatory program in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*<sup>301</sup> and concluded that the situations were practically identical.<sup>302</sup> The Fourth Circuit reasoned that since the Supreme Court declared in *Hodel* that Congress may use its powers of preemption as an incentive for states to regulate in the area of surface mining, that same power is applicable in the context of the CAA.<sup>303</sup> The Fourth Circuit then noted that even though Congress had previously tried to use mandatory language with regard to state promulgation of SIPs, those provisions were judicially challenged and were severely criticized by the court and eventually amended prior to resolution of that challenge.<sup>304</sup> The *Virginia III* court found the current language which merely threatens the states with federal preemption to be "less drastic" and well within constitutional bounds.<sup>305</sup>

There were several issues that the court did not address, even though such issues were raised in the briefs of either the parties or their respective amici. First, the court did not discuss whether it was compelled to find a way to construe the sanctions provisions in a constitutional manner, as suggested by the EPA<sup>306</sup> and the CBF.<sup>307</sup> Second, the court did not analyze whether, as asserted by Virginia,<sup>308</sup> the combination of sanctions violated the Constitution even if each sanction alone was permissible. Finally, the court devoted a mere sen-

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299. *See id.*

300. *See Virginia III*, 80 F.3d at 882-83.

301. 452 U.S. 264. *See supra* note 126 for a summary of the *Hodel* decision.

302. *See Virginia III*, 80 F.3d at 882.

303. *See id.* at 882-83.

304. *See id.* at 883.

305. *See id.*

306. *See supra* text accompanying note 234.

307. *See supra* text accompanying note 249.

308. *See supra* text accompanying note 223.

tence to the issue of accountability of federal and state government officials.<sup>309</sup>

### C. *Missouri v. United States*

The state of Missouri raised many of the same constitutional arguments in a United States district court action<sup>310</sup> based on the EPA's finding that the state failed to submit several required SIP revisions.<sup>311</sup> First, Missouri charged that highway sanctions violate both the Spending Clause and the Tenth Amendment.<sup>312</sup> Second, Missouri claimed that the offset sanctions violate the Tenth Amendment.<sup>313</sup> The state requested a declaration of unconstitutionality and a permanent injunction against the use of the two sanctions.<sup>314</sup> After discussing the EPA's motion to dismiss for lack of subject matter jurisdiction and concluding, by distinguishing *Virginia I*, that a district court had jurisdiction over Missouri's claims, the court turned its attention to the constitutional arguments.<sup>315</sup>

The court began its discussion of Missouri's constitutional claims by dealing with the question of whether the claims were ripe for determination. Ripeness was an issue for the court because the offset sanctions went into effect after the complaint was filed and the highway sanctions had

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309. See *Virginia III*, 80 F.3d at 883 (quoting *New York v. United States*, 112 S. Ct. at 2424, by stating that "[i]f sanctions are imposed, it will be 'the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.'").

310. Although successful in convincing the United States District Court for the Eastern District of Virginia that a constitutional claim coupled with a challenge of EPA action belonged in a United States Court of Appeals, EPA was not able to persuade the United States District Court for the Eastern District of Missouri that a district court did not have jurisdiction over Missouri's constitutional attack on the CAA sanction provisions. See *Missouri v. United States*, 918 F. Supp. 1320, 1328 (E.D. Mo. 1996). Missouri's complaint followed EPA's threat of sanctions for Missouri's failure to submit required SIP revisions; however, the opinion of the Eastern District of Missouri is devoid of any indication that Missouri brought anything other than pure constitutional claims. See *id.*

311. See *id.*

312. See *id.* at 1326.

313. See *id.*

314. See *Missouri*, 918 F. Supp. at 1326.

315. See *id.* at 1327-28.

not gone into effect at the time the court's decision was rendered.<sup>316</sup> To decide the ripeness issue, the court analyzed the Tenth Amendment claims separate from the Spending Clause claims.<sup>317</sup> The court quickly concluded that since the offset sanctions had been imposed and highway funding sanctions were imminent<sup>318</sup> and the issues involved were purely legal, the Tenth Amendment challenges to both sanctions were ripe.<sup>319</sup>

While characterizing Missouri's Tenth Amendment claims as purely facial attacks on the CAA, the court determined that the Spending Clause arguments were both facial and as-applied claims which needed to be addressed independently.<sup>320</sup> Missouri's argument that the highway sanctions are not "rationally related to the purpose of highway spending" was a purely facial challenge, according to the court, and, as such, was ripe for the same reasons that the Tenth Amendment claims were ripe.<sup>321</sup> However, Missouri's argument that the highway sanctions were so burdensome that they violated the Spending Clause was characterized by the court as an unripe, as-applied claim since it was unclear how individual projects would be affected by the funding restrictions.<sup>322</sup>

Although it found the as-applied challenge to the highway sanctions to be unripe, the court still expressed its opinion on the merits of such a claim.<sup>323</sup> Citing, inter alia, the United States Supreme Court, the Eastern District of Missouri voiced its doubt that a state would be able to successfully argue that a court should undertake an intensive investigation of the state's finances and conclude that Con-

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316. *See id.* at 1328-29 (noting that ripeness is determined at time the court considers the issue, rather than at the time of filing).

317. *See id.*

318. The court noted that the highway fund sanctions were due to go into effect on July 6, 1996, if Missouri failed to comply with the CAA requirements by that date. *See id.* at 1329.

319. *See Missouri*, 918 F. Supp. at 1329.

320. *See id.*

321. *See id.*

322. *See id.*

323. *See id.* at 1329-30.

gress' decision to withhold certain federal funds would have such an adverse effect on the state's economy as to be unconstitutional.<sup>324</sup>

After resolving the ripeness issue, the Eastern District of Missouri addressed the merits of Missouri's facial attack on the highway and offset sanctions of the CAA.<sup>325</sup> The court quickly disposed of Missouri's challenge to the offset sanctions by pointing to the fact that, under the Commerce Clause, Congress may impose restrictions on air pollution sources directly or prevent a state from issuing a permit to a pollution source when the permit does not comply with the CAA.<sup>326</sup> The court further noted that CAA section 113(a)(5)<sup>327</sup> gave the EPA the power to prevent construction or modification of major sources of air pollution in contravention of the CAA requirements and prohibitions.<sup>328</sup> Therefore, the court concluded, the EPA could impose 2:1 offsets itself regardless of whether a state is implementing a new source review or permit program.<sup>329</sup>

In contrast to the simple resolution of the constitutionality of the offset sanctions, the court launched into a more detailed Spending Clause analysis to resolve the controversy over the highway sanctions.<sup>330</sup> Since the main question was the relationship between the purpose of highway funding and the withholding of that funding in cases where states do not comply with the CAA, the court focused its attention on this issue. Rejecting Missouri's argument that highway funding must directly relate to air pollution for the highway sanctions to pass constitutional muster, the court cited *New York v.*

324. See *Missouri*, 918 F. Supp. at 1330 (citing *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989) as supporting the argument that states are always able to raise funds by taxing their own citizens).

325. See *id.* at 1330-36.

326. See *id.* at 1332.

327. See CAA § 113(a)(5), 42 U.S.C. § 7413(a)(5). This provision of the CAA states that if a state is not complying with any requirements imposed upon new or modified sources, EPA may "issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies." *Id.*

328. See *Missouri*, 918 F. Supp. at 1332.

329. See *id.*

330. See *id.* at 1332-36.

*United States*<sup>331</sup> when it concluded that there need only be “some relationship” between federal funding and any condition imposed on receipt of that funding.<sup>332</sup> According to the court, this relationship existed based on stated purposes of both the Intermodal Surface Transportation Efficiency Act and the CAA.<sup>333</sup>

After finding that a sufficient relationship existed between highway funding and the CAA conditions, the court addressed Missouri’s argument that the sanctions were irrational because they would have a negative effect on the state’s air quality.<sup>334</sup> This claimed adverse effect was that the failure to fund highway projects in the state would lead to greater traffic congestion and higher emissions.<sup>335</sup> The court rejected this rationale based on the enumerated exceptions to the highway sanctions, noting in a footnote that Missouri was not entitled to the funds and could not place its own conditions on their receipt.<sup>336</sup> The court further articulated that the judiciary “should not substitute its judgment for that of Congress” and that it was sufficient that the sanctions were reasonably calculated to further the common good and control air pollution.<sup>337</sup> The court refused to consider this relationship based on Missouri’s own economic condition and transportation needs by characterizing this as an as-applied analysis which it had already determined to be unripe.<sup>338</sup>

After considering the sanctions separately, the court proceeded to address whether a combination of sanctions was unconstitutional.<sup>339</sup> The court answered this question in the negative.<sup>340</sup> The reason given was that the Supreme Court, in *New York v. United States*,<sup>341</sup> did not articulate that such a

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331. See 112 S. Ct. 2408.

332. See *Missouri*, 918 F. Supp. at 1333.

333. See *id.* at 1333-34.

334. See *id.* at 1335.

335. See *id.*

336. See *id.* at 1335 & n.20.

337. *Missouri*, 918 F. Supp. at 1336.

338. See *id.*

339. See *id.* at 1336-37.

340. See *id.*

341. See 112 S. Ct. 2408.



combination would violate the constitution.<sup>342</sup> The *Missouri* court reasoned that even though a state may face the possibility of double sanctions and even federal regulation, it still had a choice to exercise.<sup>343</sup>

The court concluded its opinion by rejecting Missouri's argument that the sanctions are unconstitutional because they place an undue burden on state legislators who will be wrongly blamed for the adverse action against the state.<sup>344</sup> The court specifically pointed to Missouri's own legislation enacting a CAA program which stated that "[t]his [certification] cost is mandated by your United States Congress."<sup>345</sup> Thus, the final theory for finding the statutes unconstitutional was rejected, slamming the lid on all of Missouri's facial attacks on the CAA.

#### IV. ANALYSIS

By merely studying the arguments raised by the parties and amici, the constitutional claims addressed to the Fourth Circuit and the Eastern District of Missouri may seem quite complex and incapable of a simple solution. The states and supporting amici have made impassioned arguments about state sovereignty and the fall of federalism. Highway funding limitations and offset provisions are characterized as a method of torture rather than as an incentive. Fortunately, as reasoned by the Fourth Circuit, resolution of these claims turns on a simple analysis of the methods Congress employed to convince the states to enact an approvable program. Unfortunately, the analysis presented by the Fourth Circuit was too simple and ineffective in many respects.

While the Eastern District of Missouri partially makes up for the lack of analysis on the Fourth Circuit's part, the latter, more powerful court seems to have passed up a golden opportunity to resolve a major issue through rigorous analysis. On the other hand, perhaps the Fourth Circuit knew ex-

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342. See *Missouri*, 918 F. Supp. at 1336.

343. See *id.* at 1337.

344. See *id.*

345. *Id.*

actly what it was doing. Virginia blitzed the judicial system with multiple constitutional and administrative law arguments in a two-front war in the Eastern District of Virginia and the Fourth Circuit. The two Virginia federal courts properly focused the issues into one tribunal and proceeded to take the easiest route possible to reach the result necessary to maintain some stability in the realm of environmental law. Maybe the Fourth Circuit's decision is yet another example of how one should be careful of what he asks for since it could backfire.

The remainder of this section sets forth a more rigorous analysis of the constitutional issues and provides some additional factual and policy reasons supporting the ultimate findings of the *Missouri* and *Virginia III* courts. The main purpose is to fill in gaps left by the decisions and fortify any questionable reasoning.

#### A. Clarification of the Constitutional Issues

As the Fourth Circuit properly noted, there is no need to discuss whether Congress can force Virginia to expand its jurisdiction statute since case law has firmly established that federal government cannot require states to legislate.<sup>346</sup> However, this is not really an issue. The CAA does not require states to grant Article III standing.<sup>347</sup> The CAA, like the LLRWPA, merely uses a series of incentives to persuade the states to enact a program which meets minimum federal standards, including Article III standing. In fact, it can be argued that Congress could not have meant for the permit program to be a direct mandate since, as the CBF indicated,<sup>348</sup> the method of last resort is preemption and not some type of enforcement mechanism. Therefore, the constitutional question is not whether requiring states to provide Article III standing violates the Tenth Amendment, but whether Congress can use the threat of CAA section 179 sanctions to encourage states to legislate accordingly. *New*

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346. See *supra* notes 301-05 and accompanying text.

347. See *supra* note 8 for a discussion of Article III standing.

348. See *supra* note 253 and accompanying text.

*York v. United States* is directly on point, but neither the Fourth Circuit nor the Eastern District of Missouri used this powerful case to its fullest potential by actually comparing the statutes at issue in both cases. Such a comparison may serve to demonstrate that the CAA sanctions are not as drastic as they might initially appear.

#### B. Comparing the CAA Sanction Provisions with the Incentives Used in the LLRWPA

In many respects, the CAA operating permit program is quite similar to the Low-Level Radioactive Waste Policy Act Amendments (LLRWPA) at issue in *New York v. United States*.<sup>349</sup> In both statutes, Congress acknowledged that the situation it sought to address was national in scope but required cooperation between the federal government and the states in order to effectively solve the problem. Air pollution, like disposal of low-level radioactive waste, can have devastating effects on the environment yet, at the same time, it is unrealistic for businesses to completely stop generating either form of pollution. Due to the business and ecological characteristics unique to each state, Congress acted properly in encouraging states to deal directly with both problems.

Similarly, Congress recognized that states needed strong incentives to regulate in controversial areas such as radioactive waste disposal and air pollution control. The result was, respectively, the LLRWPA and the CAA operating permit program.

In both statutes, Congress conditioned the receipt of federal monies on state legislative actions. Under the LLRWPA, return of the funds placed in escrow with the Secretary of Energy was conditioned upon compliance with the statute. Similarly, under the CAA, the granting of certain federal highway funding is contingent upon submission of an approvable operating permit program.

Congress also provided for restrictions on business operations under both the LLRWPA and the CAA. According to

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349. See 112 S. Ct. 2408. See *supra* section II.D.1 of this Comment for an extensive discussion of *New York v. United States*.

the LLRWPA, businesses could have access to disposal sites drastically reduced or even denied completely. Likewise, under the CAA, new or modified stationary sources could become subject to 2:1 offsets before obtaining a construction permit. However, the similarity between the incentives in the two statutes ends there. Under the LLRWPA, Congress went too far and attempted to require states failing to enact federally sanctioned legislation to take title to waste generated within their borders and assume liability for damages related to the disposal of that waste. The CAA, on the other hand, employs the judicially sanctioned method of federal preemption as its final incentive for states to participate in the operating permit program.

Unlike the statutory scheme of the LLRWPA, each of the incentives in the CAA can be shown to pass constitutional muster under the reasoning in *New York v. United States*. Since there is no doubt that federal preemption of state law is constitutional,<sup>350</sup> only the offset sanctions and the highway funding restrictions require further constitutional analysis.

### C. Analysis of the CAA incentive program under *New York v. United States* and *South Dakota v. Dole*

The first set of CAA incentives, the offset provisions, meet the test of independent constitutionality set out by the Supreme Court in *New York*. As the EPA pointed out in its reply brief and the *Missouri* and *Virginia III* courts acknowledged in its opinions, the offsets are imposed directly to the sources themselves when applying for a construction permit.<sup>351</sup> This is an example of direct regulation by a federal agency through Congress' Commerce power and nothing more can be argued on this point.

The second set of CAA incentives, the highway fund restrictions, is a constitutional exercise of the congressional Spending power. The controlling case regarding Congress' authority under the Spending Clause is *South Dakota v.*

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350. See *supra* notes 159, 301-05 and accompanying text.

351. See *supra* text accompanying notes 246, 297, and 326-29.

*Dole*<sup>352</sup>. Although the *Virginia III* court mentions *Dole* when discussing the Spending Clause as a source of Congressional power, it neglects to address the *Dole* test in any meaningful manner. The *Missouri* court purports to perform a *Dole* analysis but fails to completely satisfy the need for a clear application of the test.

As the *Missouri* court indicates, in order for the use of highway sanctions to be constitutional, this provision must meet each of the four requirements set out in *Dole*.<sup>353</sup> First, Congress must be spending for the general welfare.<sup>354</sup> Second, conditions placed on the funding must be clear enough to give states enough information to make an informed choice.<sup>355</sup> Third, the spending must relate to the national interest Congress seeks to further.<sup>356</sup> Finally, there cannot be an independent constitutional bar to the action Congress seeks to encourage.<sup>357</sup>

Although not discussed by either the *Missouri* or *Virginia III* courts, the first two prongs of the *Dole* test are easily met, the *Virginia III* and *Missouri* courts agree. First, highway funding, without a doubt, benefits the general public. Safe, efficient highways are necessary in today's mobile society. Second, the condition that the CAA places on receipt of that funding, namely that states enact an approvable permit program, is unambiguous. If the EPA disapproves of a state's submission, a decision which, as is the case with *Virginia*, is subject to judicial review, the eighteen-month sanction clock begins to tick. The fact that the EPA must provide a list of reasons for disapproval in its proposal<sup>358</sup> effectively places the state on notice regarding what action it must take to meet CAA requirements.

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352. See 483 U.S. 203. See *supra* section II.D.2 of this Comment for a discussion of *South Dakota v. Dole*.

353. See *Missouri v. United States*, 918 F. Supp. at 1332.

354. See *supra* note 203 and accompanying text.

355. See *supra* note 205 and accompanying text.

356. See *supra* notes 206-07 and accompanying text.

357. See *supra* note 208 and accompanying text.

358. See *supra* note 59.

With regard to the third requirement that the conditions relate to the purpose of the funding, both Missouri and Virginia had argued that this requirement was not met.<sup>359</sup> The *Virginia III* court cited the comprehensiveness of the CAA as justification for finding that the third prong of the *Dole* test was met.<sup>360</sup> The *Missouri* court delved slightly deeper but limited its analysis to whether there was "some" relationship between the condition and the funding.<sup>361</sup>

This third *Dole* condition concerning the relationship between the funding and Congress's national policy can, however, be more definitely satisfied.<sup>362</sup> The *Dole* Court stated that the conditions might be unacceptable if they are not related to the given federal purpose.<sup>363</sup> The Court then proceeded to conclude that creating a uniform drinking age was sufficiently related to "one of the main purposes for which highway funds are extended - safe interstate travel."<sup>364</sup> This language in suggests a rather broad construction, perhaps providing some justification for the Fourth Circuit's conclusory examination of the issue.

The situation in the present case appears to be the reverse of that in *Dole*. Although the *denial* of federal highway funding is directly related to air pollution control since creating bigger highways will arguably increase volume on those highways and contribute to increases in air pollution, *Dole* could be interpreted to mean that it is only the *purpose of the funding* itself and not the purpose of the denial of such funding that must relate to the specified condition. Therefore, to

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359. See *supra* notes 294 and 332 and accompanying text.

360. See *supra* note 294 and accompanying text.

361. See *supra* notes 332-33 and accompanying text.

362. At least one commentator, William J. Klein, has proposed that the CAA highway sanctions arguably do not meet this third requirement. See William J. Klein, Note, *Pressure or Compulsion? Federal Highway Sanctions of the Clean Air Act Amendments of 1990*, 26 RUTGERS L. J. 855, 866-68 (1995). Klein claims that the reduction of air pollution does not relate to highway safety so the sanction provisions of the CAA do not pass the *Dole* test. See *id.* at 868. However, Klein concedes that the Court would probably conclude that enough of a relationship existed to justify the conditions given the "relatively low relatedness standard" set by the Court. See *id.*

363. See *supra* note 206 and accompanying text.

364. See *supra* note 207 and accompanying text.

allow the CAA program to stand, a purpose of granting of federal highway funds must be to reduce air pollution.

The relationship between denying highway funding and promoting cleaner air has been met by legislative enactments under the Title 23 of the United States Code. The CBF points specifically to the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), which is codified in various parts of the United States Code, as an example.<sup>365</sup> As pointed out by the CBF, one of the main purposes of this act is to create a transportation plan that is environmentally-friendly. However, the fact that the ISTEA was enacted subsequent to the CAA weakens this argument.

Fortunately, the ISTEA was not the first time that Congress evinced its intention to link highway funding to the CAA. As mentioned previously, the Secretary of Transportation has been required to take the CAA air quality standards and SIPs into account since 1970.<sup>366</sup> The Federal-Aid Highway Act of 1970<sup>367</sup> expressly directed the Secretary of Transportation to consult with the EPA and promulgate guidelines which would require that highway programs be "consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended."<sup>368</sup> Thus, Congress long ago decided that it wanted a highway system which would promote cleaner air.

The relationship between the CAA and highway funding is further strengthened by the fact that Congress has not empowered the EPA to require the withholding of funds specifically aimed at reducing air pollution, such as construction of HOV lanes and trip reduction programs.<sup>369</sup> Congress recognized that the control of air pollution cannot displace high-

365. See *supra* notes 257-59 and accompanying text.

366. See *supra* note 259.

367. Federal-Aid Highway Act, Pub. L. No. 91-605, 84 Stat. 1713 (1970) (codified in various sections of Title 23 of the United States Code).

368. *Id.* § 136(b) (codified as amended at 23 U.S.C. §109(g)).

369. See *supra* notes 73-81 and accompanying text for specific examples of environmentally sound construction projects which may continue to be funded notwithstanding imposition of CAA § 179 sanctions.

way safety programs by providing CAA section 179 exemptions for highway safety programs.<sup>370</sup>

The *Dole* Court merely stated that the conditions *might* be unconstitutional if they are not related to the federal purpose. This very language indicates that the Court would be receptive to creative uses of federal funding incentives. The strong policy reasons, discussed below, favor the statutory federal-state interaction set out in the CAA and should serve to sway a reluctant court. Thus, there is a reasonable relationship between certain federal highway funds and the withholding thereof and air pollution control. This relationship is certainly strong enough to satisfy the Supreme Court's test in *Dole*.

The CAA highway sanctions also satisfy the final prong of the *Dole* analysis. *Dole* recognized that, under *Oklahoma v. United States Civil Service Commission*, the Tenth Amendment cannot act as a constitutional bar to conditions on federal spending unless Congress attempted to encourage the states to act unconstitutionally themselves.<sup>371</sup> This is not the case here. Virginia would not be violating the Constitution by allowing those individuals who meet the requirements of Article III standing an opportunity for judicial review of final permit actions. Therefore, Virginia cannot claim that the highway fund restrictions are invalid under the Tenth Amendment since all four requirements of *Dole* are met.

Having established that each of the incentives for states to enact an acceptable operating permit program are independently constitutional, it should follow that the CAA passes the test set out in *New York v. United States*. Virginia and Missouri complained, however, that Congress should only be able use one incentive at a time while the CAA highway funding and offset sanctions remain in place even if the EPA is required to implement a federal program. Although the *Virginia III* court does not even address this argument, the *Missouri* court does. As the Eastern District of Missouri

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370. See *supra* note 72 and accompanying text.

371. See *supra* notes 209-11 and accompanying text.



points out,<sup>372</sup> putting two constitutional actions together does not necessarily make the result unconstitutional. The *New York v. United States* Court specifically noted that preemption and the Spending power were not the only methods Congress could employ to encourage states to legislate according to federal policy. Thus, it appears the Court left the door open for more creative solutions.

The current set-up combining the sanctions and federal preemption is, in fact, necessary. The CAA imposes sanctions eighteen months after the expiration of the deadline for program submissions and implements a federal program after twenty-four months. Under this scheme, sanctions are only in place for six short months before the federal program takes effect. This is hardly an incentive for states to develop an approvable program. Since states are better able to juggle their own policy concerns and the needs of local businesses, the sanctions must remain in place even while a federal program is being implemented to provide as much incentive as possible. The desired result is state administration but federal preemption alone may not be a strong enough inducement.

An additional justification for using a federal program in conjunction with the sanctions is that, as the *Virginia I* court pointed out, the sanctions clock may be stopped and reset even while the preemption clock ticks on.<sup>373</sup> It may be possible that a state could avoid the sanctions for three years following an EPA finding of failure to submit a required program or revision by merely submitting, in the seventeen month after the EPA finding, a complete program which it suspects will fall short of the CAA requirements. In such a case, the finding of completeness resets the sanction clock to zero, requiring an additional eighteen month term before sanctions will be imposed.

It is proper for courts to resist attempts to establish a slippery slope upon which to judge federal regulatory programs. Since each state would be affected quite differently by each of the incentives, it makes sense to draw the line at con-

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372. See *supra* notes 339-43 and accompanying text.

373. See *supra* notes 68-69 and accompanying text.

stitutionality rather than some arbitrary point at which the individual state cannot take the pressure. The court in *New York v. United States* took the former position. In *New York v. United States*, there was no discussion as to whether an individual state would be arguably more affected than the rest by disposal site surcharges or access restrictions. Nor would the *New York v. United States* Court allow the unconstitutional take title provision to stand in the face of state acceptance. The Constitution was the standard by which to measure the incentives. To be consistent with the letter and spirit of *New York v. United States*, the determination of independent constitutionality for each of the sanction provisions should be the end of the issue. The policy concerns are best left to the legislatures and not the courts.

Unfortunately, the *Missouri* and *Virginia III* courts both dropped the ball with respect to the establishment of a slippery slope. The *Missouri* court left the door open for future discussion of this issue by dismissing Missouri's as-applied claims without prejudice. The *Virginia III* court failed to even address this important issue. The Fourth Circuit should have put the question to rest rather than ignoring it.

In summary, while the results reached by both the Fourth Circuit and the Eastern District of Missouri were correct, the decisions themselves were not what they could have been. The Fourth Circuit in particular failed to address many important issues raised by the parties and their amici. In the end, however, this may be best for the United States, which got the answer it was looking for in a rather concise manner. However, given the recent CWA regulations which again bring the issue of Article III standing in state courts to the forefront, one can only wonder if a new controversy is ripe for development. While the CWA provides no real incentive for states to enact an SPDES program, it is possible that Congress, pleased with results in *Virginia III* and *Missouri*, might see fit to amend the CWA to dangle a carrot or two in front of the states. If Congress does so amend the CWA or if another state decides to challenge the CAA sanctions, the new question becomes whether the decisions of the Fourth Circuit and the Eastern District of Missouri are strong

enough to withstand another attack. While the policy is certainly there, the reasoning given in the opinions is not on solid ground.

## V. CONCLUSION

Although the *Virginia III* and *Missouri* decisions are a wake-up call to the states that the federal government is serious about which entities should administer environmental statutes, the two decisions should also cause industry groups like VMA and NIEP to reconsider their positions. These groups fail to realize that attacking the current set-up will not benefit them, but could ultimately result in federal preemption, or worse. As pointed out above, the Supreme Court appears willing to accept new methods of encouraging states to legislate according congressional plan.

Although business is concerned about the burdens that the program appears to place on them, some of these concerns are misplaced. For example, although VMA complains about permit fees,<sup>374</sup> the imposition of fees in order to run the program is an external cost which would likely be passed on to customers anyway. Second, business is complaining about being held hostage pending resolution of the case, but does not consider the fact that the federal government can, and eventually must, step in to regulate in face of the state's failure to do so properly. A state agency, placed in power by that state's citizens, will arguably be more receptive to the concerns of local business than the EPA Administrator selected by the President. Furthermore, since the EPA has oversight authority with regard to all permits that are issued, any person who meets the requirements of Article III standing can challenge the permit simply by petitioning the EPA to veto it and then seeking judicial review if the EPA declines. Although the scope of review of the EPA's decision not to veto a permit may not be as comprehensive as review of a state agency's decision to issue a permit, industry still remains unsure of its obligations regardless of whether judicial review is available in state court. However, Congress took great pains

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374. See *supra* note 267 and accompanying text.

in drafting the 1990 Amendments to minimize or eliminate uncertainty regarding compliance. The current system is far better than the pre-1990 CAA given the fact that it is unlikely that environmental regulation will disappear any time soon.

State government also benefits from administering the program. Jobs are created for state residents. The program is funded by the permittees. States concerned with their businesses' ability to compete in interstate commerce can enact the minimum program elements. Private citizens and businesses alike decide among themselves how to balance the competing interests. Finally, the federal government, having done the job required of it by all citizens by providing the proper guidance, steps back, retaining only oversight authority, to deal with other problems of national concern. This is cooperative federalism at its best.

The Fourth Circuit and the Eastern District of Missouri correctly concluded that Congress has properly exercised its Commerce and Spending powers and has not run afoul of the Tenth Amendment. Declaring the operating permit program to be unconstitutional could have serious ramifications both economically and environmentally.

It is clear that the states are the proper vehicles for pollution control regulation. Each state is unique in its geography and business climate. States are ultimately responsible to their own citizens while the federal government is responsible to all citizens of the United States. Although the businesses submitting amicus briefs fear that the broad reach of Article III standing will unduly burden the permit process, these same businesses should be wary of what they are asking. The individual needs of businesses and state citizens could easily get lost in the bureaucratic mess that would result if the EPA was forced to implement an operating permit program in each individual state. The fact that so many states have voluntarily submitted programs that substantially or fully comply with the requirements of the CAA<sup>375</sup> is

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375. See *supra* note 103 for a discussion of the status of state submission of operating permit programs.

evidence that state officials recognize their important role in protecting the interests of local industries and the health and safety of their citizens.

While the individual needs of the state are important, it is also necessary to guard against nonuniformity in dealing with air pollution. If Congress were not allowed to provide for certain minimum elements of an operating permit program, states would be given broad power to choose between regulating air pollution and attracting businesses. Given this power, a financially strapped state would almost certainly regulate as little as possible and create a bureaucracy which is favorable to business and hostile to public participation. Voters would be forced to choose between breathing cleaner air or losing their jobs because companies will opt to do business in states where they are least likely to face numerous citizen suits.

While it might be argued that it is the state's citizens who elect the officials that will ultimately make that policy choice, air pollution is a national problem and will continue to be national in scope for the simple reason that air pollution does not recognize state boundaries. People living in adjacent states cannot shut themselves off from upwind pollution. Likewise, people traveling interstate cannot shield themselves from the pollution assented to by another state's citizens. Everyone must recognize that it takes the particularized knowledge of the states and the broad powers of the federal government to give everyone, including businesses, a chance to prosper economically in a healthier environment. Therefore, we must think very carefully about what we ask for, since we just might get it.