

Toward Responsible State Regulation of Air Pollution: Oregon's Mandatory Inspection/Maintenance Program

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INTRODUCTION

The Federal Clean Air Act¹ calls for state and local solutions to the national problem of air pollution. The Act requires states to devise State Implementation Plans (SIP's),² in which strategies for controlling pollution sources are to be proposed for the purpose of bringing that state's air quality within EPA air quality standards. These Plans must be submitted to the

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1. 42 U.S.C. §§ 7401-7626 (1976).

2. *Id.* § 7410.

EPA for its approval.³ Certain states, which contain areas in which levels of pollutants associated primarily with motor vehicles exceed national standards, are also required to submit Transportation Control Plans (TCP's) for those areas as part of that state's SIP.⁴ Although fifty states have submitted SIP's,⁵ local solutions to mobile source air pollution, as envisioned by the Act, have, for the most part, not been forthcoming.⁶

Because of the states' traditional control over motor vehicle registration, the states are best equipped to play the major role in controlling and reducing mobile source air pollution. The apparent failure of the states to assume the primary role in controlling vehicular air pollution has prompted major litigation raising constitutional issues which go to the heart of the federal system.⁷ This litigation has brought into question the traditional notion

3. *Id.* § 7410(a)(1), (2). "The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such a plan or each portion thereof. . . ." *Id.* § 7410(a)(2). The Act also required EPA approval of any revision of a SIP. *Id.* § 7410(a)(3)(A).

4. The EPA has compiled a list of such areas for which TCPs are required. See note 103 *infra*.

The Clean Air Act Transportation Control Plans have been defined by EPA regulations as "the summation of individual actions (transportation control measures) that will, when taken collectively, reduce concentrations of carbon monoxide and photochemical oxidants in the atmosphere from those achieved by the Stationary Source Control Program and the Federal Motor Vehicle Control Program (FMVCP) to the level prescribed by the National Ambient Air Quality Standards." 40 C.F.R. § 51.1(r) (1975). Current Federal regulations require that Plans shall contain "[a] description of enforcement methods including, but not limited to, procedures for monitoring compliance with the selected traffic control measures, procedures for handling violations, and a designation of enforcement responsibilities (i.e., air pollution control agency, State police, State Department of Motor Vehicles, State Registrar of Motor Vehicles, etc.)." 40 C.F.R. § 51.14 (a)(2)(i) (1977). See also, *id.* § 51.14 (a)(2)(ii),(iii),(iv). 42 U.S.C. § 7408(f)(1) (1976) suggests appropriate transportation control measures to include motor vehicle emission inspection and maintenance programs, programs for improved public transit, programs to establish bus and carpool lanes, programs to control on-street parking, programs to construct bicycle lanes, and retrofit programs.

5. 40 C.F.R. §§ 52.50.2827 (1977).

6. Congressionally authorized extensions have given many states the opportunity to postpone attainment of air quality standards. 42 U.S.C. § 7410(e)(1), (2) (1976). For example, Oregon was given a twelve-month extension. 40 C.F.R. § 52.1981 (1977). Kentucky was given a two-year extension. *Id.* § 52.922. Colorado was given a 3-1/2 year extension for attainment of national carbon monoxide standards in the Metropolitan Denver Intrastate Air Quality Region. *Id.* § 52.322(b). Congressional or administrative indulgence was not the only reason for state delay. Both the states and the EPA Administrator experienced considerable difficulty in developing adequate plans. For example, California's proposed TCP was disapproved by the Administrator on May 31, 1972, because it contained no provisions for the control of photochemical oxidants. Thereafter, the EPA itself was unable to develop an adequate Plan for California within the time required by the Act. 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.03, at 2-90.6 (1977). This sequence of events fostered the case of *Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (D. Cal. 1972), a citizen suit which was brought to compel the Administrator to carry out his non-discretionary duty to promulgate a locally adequate implementation plan. The eventual EPA-imposed plan led to the lower court case of *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975). See notes 15, 16 and 17 *infra*.

7. For a discussion of the reasons for state and local resistance to Clean Air Act mandates and resulting litigation, see Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating*

that the states have the exclusive right to register, and hence control, motor vehicles owned by their residents. The EPA has sought through such litigation to impose, among other things, vehicle emission inspection and maintenance (I/M) programs where states have failed to promulgate suitable TCP's.⁸ Although an I/M program is no panacea for controlling air pollution from motor vehicles, the EPA has long maintained that an I/M program linked to registration of in-use vehicles can be the most effective method available to the states to reduce pollution from the automobile.⁹

A few states have recognized the utility of I/M programs in abating air pollution. A good example is the I/M program which has been implemented by the State of Oregon in the Portland metropolitan area as part of Oregon's TCP.¹⁰ Oregon's I/M program was designed to identify, prior to motor vehicle registration or re-registration, those motor vehicles which fail to meet pollution emission standards and to ensure that remedial maintenance or adjustments are performed on such vehicles. Using the Oregon program as a model, this article will discuss the reasons favoring state level adoption and implementation of an I/M program as part of a Transportation Control Plan called for under the Federal Clean Air Act. It will assess the relationship between the EPA and the states to help identify their respective obligations within the context of the Act. Then, the choices available to states in fashioning unique and effective programs will be discussed in light of the Oregon experience. Finally, the ability of states to regulate interstate mobile source pollution will be evaluated.

State Implementation of National Environmental Policy, 86 YALE L.J. 1196, 1202-05 (1977) [hereinafter cited as Stewart].

8. See, e.g., *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975); cases cited note 15 *infra*. For a description of the EPA-imposed I/M program for Maryland, see 40 C.F.R. § 52.1089 (1977).

9. The EPA's position is that inspection and maintenance programs are "the most important of the transportation control measures currently enforced. . . ." 42 Fed. Reg. 30,504, 30,505 (1977) (to be codified in 40 C.F.R. § 52). See also note 108 *infra*.

10. ORE. REV. STAT. 481.190. Other components of Oregon's TCP include mass transit improvements, traffic flow improvements, and improvements resulting from the Federal New Motor Vehicle Program. OREGON DEP'T. OF ENVIRONMENTAL QUALITY, STATE OF OREGON CLEAN AIR ACT IMPLEMENTATION PLAN (1972). Noteworthy among those states and metropolitan areas with presently active I/M programs are: Arizona (restricted to Maricopa and Pima counties, begun in January, 1976), ARIZ. REV. STAT. §§ 36-1771 to 1780 (West 1974 & Supp. 1978); California (restricted to six counties within the South Coast Air Basin) CAL. BUS. & PROF. CODE §§ 9889.50-.61 (West 1975 & Supp. 1978); The City of Chicago (voluntary since June 1, 1973), CHICAGO, ILL. ORDINANCE 17-2A; The City of Cincinnati (mandatory in part, not comprehensive), CINCINNATI, OHIO MUN. CODE §§ 504-24 to 41 (ordinance 105-1974, eff. Mar. 27, 1974); Nevada (restricted to Las Vegas area), NEV. REV. STAT. §§ 455.610-.710 (1973), as amended by ch. 463, 1977 Nev. Stats.; New Jersey (statewide mandatory I/M program commenced in 1974) N.J. STAT. ANN. §§ 26:2C-8.1 to .4 (West Supp. 1978), id. § 1, 39:3-70.1 to .2 (West 1973 & Supp. 1978); New York, N.Y. [VEH. & TRAF.] LAW §§ 301-309-e (West 1970 & Supp. 1978); Pennsylvania, PA. CONS. STAT. ANN. §§ 4523, 4531-4532, 4701-4702 (Purdon 1977). Colorado has recently enacted a vehicle emissions law restricted to specified counties, to be implemented by Jan. 1, 1980. 1977 Colo. Sess. Laws, Ch. 564, at 1901-12.

THE EPA AND THE STATES: A DELICATE BALANCE

The Clean Air Act of 1970 and all subsequent amendments reflect a congressional concern that the states have not fulfilled their role in abating air pollution.¹¹ To this end, the 1977 Clean Air Act Amendments give the EPA Administrator authority to identify non-attainment areas which are areas where levels of identified pollutants continue to exceed national air quality standards.¹² The 1977 Amendments set new deadlines for the submission or revision of SIP's for states which have such areas.¹³ The Administrator is given power by the 1977 Amendments to make appropriate findings which can, commencing July 1, 1979, lead to the curtailment of EPA grants and curtailment of certain highway monies¹⁴ to any area which has not attained federal air quality standards.

The ability of the EPA Administrator to otherwise enforce the provisions of the Act upon the states has been addressed in the group of cases collectively known as *Brown v. EPA*.¹⁵ In the *Brown* cases, the EPA sought generally to compel state officials through Clean Air Act enforcement provisions to implement relevant portions of their TCP's, including vehicle I/M pro-

11. For example, Justice Rehnquist, in his opinion in *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975), observed the 1970 Amendments to the Clean Air Act as "amounting to taking a stick to the states."

12. 42 U.S.C. § 7501(2) (1976) defines a "non-attainment area" as an area which, for any air pollutant which is shown by monitored data or which is calculated by air quality modeling or other reliable methods determined by the EPA Administrator, exceeds any national ambient air quality standard for such pollutant. *Id.* § 7407(d)(1) provides that the states shall, within 120 days after Aug. 7, 1977, submit to the Administrator a list identifying air quality control regions or portions thereof which do not meet certain national primary or secondary ambient air quality standards.

The EPA has recently released a list of areas which have not attained required standards. "The listing shows that out of 3,215 total counties in the U.S., 606 counties or portions thereof are violating standards for photochemical oxidants . . . ; . . . 190 counties are violating standards for carbon monoxide; A county may be violating more than one pollutant standard, so the same county may be counted in more than one category in the above totals." EPA, Press Release, *Environmental News* 2 (Feb. 24, 1978).

13. 42 U.S.C. § 7052(a)(2) (1976) provides for plans calculated to achieve attainment of national primary ambient air quality standards for photochemical oxidants or carbon monoxide by Dec. 31, 1987. *Id.* § 7502(c) requires that a plan revision shall contain enforceable measures to assure attainment of the applicable standard not later than July 1, 1987. *Id.* § 7502(b)(11)(B) provides that the plans which make a demonstration pursuant to *id.* § 7502(a)(2) establish, among other things, "a specific schedule for implementation of a vehicle emission control inspection and maintenance program."

14. 42 U.S.C. § 7506(a) (1976). In addition, *id.* § 7506(b) prohibits the EPA from making any grants under the Clean Air Act in areas of a state where state or local officials are not implementing required transportation control measures.

15. *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975); *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975). A decision upholding regulations pertaining to Pennsylvania was not before the *Brown* court. *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974). In addition, Virginia and the District of Columbia filed separate petitions for certiorari from the District of Columbia case. 426 U.S. 904 (1976).

grams.¹⁶ At the Supreme Court level, the EPA abandoned the idea that it could compel the states to enact I/M legislation and the attendant regulations, among other things.¹⁷ However, two circuits have indicated that the Administrator could impose I/M requirements through appropriate injunctive proceedings.¹⁸ An injunction could, for example, prohibit a state from registering any vehicle which does not meet federal pollution standards.¹⁹

Because an I/M program is nearly impossible to administer efficiently unless somehow linked to vehicle registration, and because states are the sole registrars of most motor vehicles, all EPA enforcement with respect to I/M programs will necessarily involve compulsion of state action. A possible impediment to such compulsion through direct federal regulation of private passenger cars or through injunctive relief is found in the case of *National League of Cities v. Usery*.²⁰ In *Usery*, the Supreme Court held that the 1974 Amendments to the Fair Labor Standards Act,²¹ setting federal minimum wage and maximum hour requirements, constituted an impermissible interference with important state and local governmental functions and

16. The EPA sought to compel the states to enact regulations and laws through enforcement sanctions provided in 42 U.S.C. § 7413 (1976). The Ninth Circuit *Brown* decision involved EPA regulations directing state compliance with a number of TCP measures, including an inspection and maintenance program. 40 C.F.R. § 52.242 (1977). The Ninth Circuit held that the Clean Air Act did not authorize the imposition of such sanctions for any failure of the State of California to comply with the directions contained in these regulations, among others. The basic contention of the states challenging the EPA enforcement regulations was that the commerce power of Congress does not allow Congress to require states to enforce federal regulatory laws, that the states are guaranteed a republican form of government by the Constitution so as to allow them to provide state laws concerning matters of strong local interest and that to so require the states to become mere enforcement arms of the Federal government would be to "reduce the states to puppets of a ventriloquist Congress" and pave the way for the "utter destruction of the State as a sovereign political entity." *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975). For an analysis of decisions in other lower court cases, see Stewart, *supra* note 7; Gordon, *When Push Comes to Infringement of State Sovereignty: Implementation of EPA's Transportation Control Plans*, Wis. L. Rev. 1111 (1976) [hereinafter cited as Gordon]; Hostetter & Sale, *Protection of the Environment and Protection of the States: The Constitutional Issue Raised by EPA Action Under the Clean Air Act*, 7 Env. L. Rev. 383 (1977).

17. *EPA v. Brown*, 431 U.S. 99 (1977). "The [Government's] position now appears to be that, while the challenged transportation plans do not require the enactment of state legislation, they do now contain, and must be modified to eliminate, certain requirements that the state promulgate regulations. See Government Reply Brief, at 14, n.22" *Id.* (emphasis in original).

18. In *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975), the District of Columbia Circuit indicated that "the commerce power does enable the federal government to prohibit the states from registering non-conforming vehicles" Moreover, in *Brown v. EPA*, 566 F.2d 665, 670 n.4 (9th Cir. 1977), the Ninth Circuit, on remand, indicated that Congress intended to provide injunctive relief which, if feasible, could provide "for Federal implementation and enforcement of the program (including Federal licensing of private I/M centers . . . and imposing Federal inspection fees)"

19. See *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975).

20. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

21. Pub. L. No. 93-259, 88 Stat. 55 (amending 29 U.S.C. §§ 202-208, 210, 212-214, 216, 255, 260, 630, 633a, 634).

thereby contravened principles of federalism implicit in the Tenth Amendment.²² *Usery* recognized that there are "attributes of sovereignty attaching to every state government which may not be impaired by Congress."²³ However, Justice Blackmun, in his concurring opinion, pointed out that the Court's decision "adopts a balancing approach, and *does not outlaw federal power in such areas as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.*"²⁴

Going further, the collection of cases known as *Friends of the Earth v. Carey*²⁵ has arguably clarified Justice Blackmun's concurring opinion in *Usery* to the extent that, if a state does promulgate and submit a TCP which is approved by the EPA, private citizen action to enforce such a Plan against the state will not constitute federal intrusion into essential state functions.²⁶ The spectre of federal intervention through economic sanctions or

22. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

23. *Id.*

24. *Id.* at 856 (emphasis added).

25. This collection of cases originated as private citizen suits, authorized under Section 304 of the Clean Air Act, 42 U.S.C. § 7604 (1976). In *Friends of the Earth v. EPA*, 499 F.2d 1118 (2d Cir. 1974) (*Friends I*), the Second Circuit Court of Appeals, while approving the TCP for metropolitan New York City, denied immediate implementation of the plan. In *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976) (*Friends II*), the Second Circuit held that, pursuant to Section 110 of the Clean Air Act, "a plan, once adopted by a State and approved by the EPA becomes controlling and must be carried out by the State." *Id.* at 169. The Circuit Court therefore ordered implementation of the plan. *Friends II* was remanded to the District Court for the Southern District of New York. On remand, Judge Duffy held that, in light of the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), Congressional use of the Commerce Clause to compel New York City to enforce the plan against others would violate the City's rights under the Tenth Amendment. See *Friends of the Earth v. Carey*, 552 F.2d 25, 29 (2d Cir. 1977) (*Friends III*). The plaintiffs appealed Judge Duffy's ruling and obtained a reversal in *Friends III*. *Id.*

26. In *Friends III*, the Second Circuit stressed that implementation of the Transportation Control Plans at issue would "not amount to the kind of injury found to be impermissible in *National League of Cities*, since the essential policy choices involved in creating the program were entirely within the control of the State and the participating City agencies, and not imposed by the federal government." *Id.* at 38. The court in *Friends III* awarded coercive relief against state officials because the TCP had been devised by the state rather than by the EPA. *But see Stewart, supra* note 7, at 1205, for a criticism of this reasoning.

The *Friends III* court followed the tests formulated in *Usery* because "there was (1) a serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall, (2) a carefully drafted program designed for very limited interference with states' freedom, and (3) a program that 'displaced no state choices as to how governmental operations should be structured' [citations omitted]." *Friends of the Earth v. Carey*, 552 F.2d 25, 39 (2d Cir. 1977). In light of these tests, it is probable that the federally promulgated I/M programs for Maryland and California would have been constitutionally objectionable had the EPA not conceded in *Brown v. EPA*. See note 17 and accompanying text *supra*. Direct federal compulsion of local or state officials to implement a program which had not been previously promulgated or submitted to the EPA by state officials might have been held to be an impermissible and disruptive interference with state governmental functions proscribed by the Tenth Amendment. Such "heavy handed" enforcement attempts would be

injunctive proceedings, in addition to private citizen suits brought to enforce a state-enacted TCP, should prompt a state to act responsibly to control air pollution and thereby prevent the erosion of its traditional control over motor vehicles.

Although the prospect of federal judicial intrusion into what would otherwise be a state's internal affairs looms over a state's failure to take action, the Federal Clean Air Act clearly indicates a congressional intent to encourage cooperation, not only among the states but between the states and the federal government.²⁷ The EPA Administrator has not been given sole authority to deal with problems of air pollution.²⁸ Congress envisioned the proper role of the EPA in a smoothly functioning federalist system as that of providing assistance, both financial and technical, to states which are designing, implementing and enforcing TCP's.²⁹ The states are to retain the power to control mobile source pollution through the innovative exercise of their traditional power to regulate the automobile. It is in the exercise of this power that the states will prevent federal interference.

STATE INTERESTS IN IMPLEMENTING I/M

For some time, means have been available to states to reduce mobile source pollution through their own motor vehicle laws.³⁰ However, a major reason for state delay in utilizing these means has been the reluctance of state legislators to undertake the control of air pollution through the politically unpopular avenue of further regulation or restriction of use of automobiles owned by their constituents.³¹ Delay may also be due to an

even more unjustified in light of new alternative enforcement procedures available to the EPA. See notes 12, 13 and 14 and accompanying text *supra*.

27. 42 U.S.C. §§ 7401(b) and 7402(a), (b) (1976).

28. "The 1977 Amendments reaffirm Congressional intent that States be the prime decision-makers on air pollution policy, and EPA intends to reflect this attitude. Although EPA cannot legally tolerate a situation where human health standards are continuously violated, we intend to allow States all the flexibility the law allows in meeting their clean air goals." EPA Press Release, *supra* note 12 (quoting EPA Administrator Douglas Costle).

See also 42 U.S.C. § 7402(a) (1976), providing for cooperation between the Administrator and state and local governments; *id.* § 7407(e)(2), providing for redesignation of air quality control regions by Governors with approval of the Administrator; *id.* § 7504, providing for state and local planning with respect to revised implementation plans in regions where national primary ambient air quality standards for CO and photochemical oxidants will not be attained by July 1, 1979.

29. 42 U.S.C. § 7401(b)(2), (3) (1976).

30. An example of pre-1970 efforts by states to reduce automobile pollution is OR. REV. STAT. §§ 483.800-825 (1977), which prohibits the removal or alteration of a factory-installed motor vehicle air pollution control system. See also H.R. REP. NO. 728, 90th Cong., 1st Sess. reprinted in [1967] 2 U.S. CODE CONG. & AD. NEWS 1959, which discusses congressional awareness of California willingness to set standards, for which Congress established the "California waiver," allowing states to adopt California's emission standards for new motor vehicles in lieu of Federal new motor vehicle standards. 42 U.S.C. § 7543(b) (1976).

31. "Trying to take the automobile from car-loving Americans is like attempting to rescue Fay

unwillingness to appropriate money for an apparently unpopular program. The reluctance of state officials to face such an unpopular decision may be based upon the premise that if they do not impose additional restrictions on their constituents' automobiles, the EPA eventually will, thus shifting political accountability for such interference elsewhere.³² Moreover, such regulation is commonly perceived as a deterrent to economic growth and the creation of more jobs; indeed, economic benefits may result if a state appears to be a pollution haven for auto-intensive business.³³

These political and economic beliefs have been cited as reasons for the enactment of federal measures to compel state action to achieve national air quality goals.³⁴ However, the validity of these beliefs is questionable. As will be discussed, an I/M program for most motorists entails little more regulation than that which now exists under state motor vehicle registration laws; and the expense to both a state and its motorists is minimal. Passage of I/M legislation, if handled properly, need not be politically unpalatable to state legislators. Furthermore, no evidence of any mass movement of auto-intensive industry away from areas with I/M has been found. Even if businesses did move to unregulated pollution havens, their gains would be temporary at best because of the EPA's present ability and willingness to impose economic and legal sanctions.

If a state refuses to deal responsibly with its own pollution problem, then it justifiably invites EPA interference. Such interference may result in certain negative consequences which state officials and local legislators may find difficult to explain to their constituents. Centralized EPA policy-making might reflect a lack of sensitivity to local needs, institutions and prejudices. One example of such policy-making is an EPA announcement that San Franciscans had to cut annual auto mileage by 97% and the resul-

Wray from the arms of King Kong: it has to be done, but nobody wants to do it." Gordon, *supra* note 16 at 1111.

32. "State officials have few strong incentives to assume the administrative and political burdens of carrying out environmental policies dictated by federal agencies." Stewart, *supra* note 7, at 1201-02.

33. "Many states failed or refused to adopt SIPs with automobile emissions controls adequate to meet the federal ambient standards because the necessary restrictions on parking and automobile use were strenuously opposed by downtown merchants, commuter, and others dependent upon automobile use and access. There was also bitter resistance by developer interests to EPA efforts to secure state adoption of restrictions on new 'indirect sources' of pollution, such as shopping centers, large parking facilities, sports complexes and highways, which would attract a heavy concentration of automobiles." *Id.* at 1203-04. "Given the mobility of industry and commerce, an individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards." *Id.* at 1212.

34. Stewart, *supra* note 7, at 1196-1204, 1211-22.

tant hostility generated by this announcement.³⁵ Another example is found in one of the *Brown* cases, where the EPA sought to require Maryland to submit legally adopted regulations to implement such EPA requirements as "inspection of all . . . motor vehicles at periodic intervals no more than one year apart"³⁶ Such a requirement failed to consider the conceivably burdensome conflicts with Maryland's motor vehicle registration laws and presupposed the availability of funds for the program.³⁷ At the very least, state legislators should immediately examine their motor vehicle registration laws to determine the compatibility of those laws with EPA requirements for vehicle I/M programs. As discussed later, appropriate legislation can be enacted to structure a vehicle registration system which will not be disrupted by any I/M program required by the EPA.

Even assuming that EPA officials will consult with and invite extensive cooperation from local officials in formulating an I/M program, the EPA's major interest will be achievement of national air quality standards. The needs, desires and opinions voiced by the citizenry of the area regarding methods of achievement will be of only secondary concern.³⁸ Even if eventual EPA imposed programs are similar or even identical to what the local government would have fashioned itself, local citizen debate and idea input will have been lost or diluted.³⁹ This means that, in ceding the decision-making to a federal agency, the state has undermined to some extent its control over its own tax revenues and the voting power which its electorate might have exercised in determining the outlines of the I/M program.⁴⁰

In sum, even though required to be approved by the EPA, a state initiated I/M program preserves: existing state control over motor vehicles reg-

35. 38 Fed. Reg. 31,244 (1973); Stewart, *supra* note 7, at 1204.

36. *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975). The requirement was contained in 40 C.F.R. § 52.1095 (1977).

37. *Maryland v. EPA*, 530 F.2d 215, 224 (4th Cir. 1975). See, 40 C.F.R. § 52.1089(c)(1), (d) (1977). The EPA regulations required Maryland not to register non-complying vehicles.

38. "Once a substantial program of environmental protection is launched, these federal bureaucracies' very size, professional orientation, and remoteness also makes them comparatively less sensitive to public discontent when the economic and social costs of such programs become apparent, particularly if these costs fall disproportionately on a few regions. For analogous reasons, public protests, especially if localized, will have less impact on federal judges and legislators than on their state and local counterparts." Stewart, *supra* note 7, at 1218.

39. "Decisions about environmental quality have far-reaching implications for economic activity, transportation patterns, land use, and other matters of profound concern to local citizens. Federal dictation of environmental policies depreciates the opportunity for and value of participation in local decisions on such matters. The impairment of local self-determination is considerably aggravated when (as in transportation control context) local fiscal resources and governmental powers are conscripted by federal agencies." *Id.* at 1220-21.

40. The lower court in *Brown v. EPA*, 521 F.2d 827, 840 (9th Cir. 1975) observed that "voters of other states, acting through their representatives in Congress, would dilute the strength of voters of the state whose revenues would be spent as Congress directs" and that such a result would not promote harmonious federalism.

istered by that state, existing state control over allocation of state revenues, and the right of state residents to determine, through their vote, the nature and scope of the state's I/M program. It reserves to a state's citizens the right to modify and adapt the program as local requirements change. Oregon's I/M program exemplifies how one state has preserved these traditional functions for itself and its citizens while achieving a substantial reduction in air pollution levels throughout the Portland metropolitan area.

A STATE'S ABILITY TO ACHIEVE RESULTS: THE OREGON EXPERIENCE

A. VOLUNTARY PROGRAM

Because of the number of violations of federal primary ambient air standards occurring in the Portland metropolitan area,⁴¹ Oregon's Environmental Quality Commission (EQC), the agency charged with establishing air quality policies,⁴² recommended in 1972 that a vehicle I/M program be initiated in the four Oregon counties comprising this area.⁴³ Pursuant to the recommendations of the EQC, a voluntary compliance program was instituted in early 1974.⁴⁴ Over 105,000 voluntary emission tests were conducted from February, 1974 through June, 1975.⁴⁵

This voluntary program had several advantages. Test results obtained during the voluntary phase were used to establish inspection program pass/fail criteria for each and every type of automobile subject to the inspection requirement.⁴⁶ The standards, designed to promote proper emission maintenance of vehicles, incorporated the various maintenance

41. In 1970, CO levels at downtown Portland monitoring sites exceeded Federal primary ambient air quality standards on 88 days. OREGON ENVIRONMENTAL QUALITY COMMISSION, REPORT TO THE OREGON LEGISLATURE ON THE MOTOR VEHICLE EMISSION TESTING PROGRAM, app. G-1 (1977) [hereinafter cited as EQC REPORT].

42. ORE. REV. STAT. § 6468 (1977).

43. Householder, *Oregon's Motor Vehicle Emission Control Inspection Program*, in REPORT OF THE FOURTH NORTH AMERICAN MOTOR VEHICLE EMISSION CONTROL CONFERENCE 341 (1975) [hereinafter cited as Householder, MVECC IV].

44. EQC REPORT, *supra* note 41, app. C-1.

45. Householder, MVECC IV, *supra* note 43, at 349.

46. *Id.* at 348, 349. "These standards, unlike the City of Chicago standards used during the voluntary program, account for differing vehicle designs and thus are more equitable, while still capable of achieving significant reductions." EQC REPORT, *supra* note 41, app. C-3. The ability of states to determine their own emission standards is illustrated by the differing approach taken by Oregon from that of the City of Chicago. The Oregon approach sets emission standards for each type of vehicle, with the objective of encouraging proper vehicle maintenance. A state which adopts uniform emissions standards, regardless of the type of vehicle, would seek to encourage maintenance to a lesser degree and discourage ownership of high emission types of vehicles. Such opportunities for states to choose a diversity of standard setting techniques was recognized by Justice Rhenquist in *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975), where he noted that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2)"

requirements of the manufacturers.⁴⁷ The voluntary phase also afforded Oregon's Department of Environmental Quality (DEQ), which was given primary responsibility for administration of the program under policies established by the EQC,⁴⁸ the needed lead time to confirm the reliability of the chosen equipment and allowed DEQ inspection personnel to gain experience.⁴⁹ In addition, it gave the Legislature time to determine the exact boundaries of the area where I/M was most needed. During 1974, the Legislature established July 1, 1975 as the startup date for mandatory inspection⁵⁰ and restricted the area of the program to the boundaries of the Metropolitan Service District (MSD),⁵¹ which includes the city of Portland and most of its significant suburbs. Finally, the voluntary phase provided the DEQ with the opportunity to educate the public about the program and its benefits. As a result of the voluntary inspections and DEQ public relations efforts, most motorists became familiar with the inspection requirement prior to July 1, 1975.⁵²

B. MANDATORY PROGRAM

Since July 1, 1975, all motor vehicles registered within the MSD, with certain exceptions, must pass a standard idle emission test for carbon monoxide (CO) and hydrocarbons (HC) as a pre-condition for Motor Vehicles Division registration.⁵³ Certification is required for most in-use vehicles, which are required to be re-registered every two years from the date of initial registration by the state.⁵⁴ While there are no direct sanctions for failing the inspection, a vehicle which fails to meet the prescribed standard for that make and model of vehicle cannot be registered until it does meet such standard.⁵⁵ Vehicle HC and CO emissions are measured by gas analyzing

47. Householder, MVECC IV, *supra* note 43, at 349.

48. For the current codification of DEQ's responsibilities relating to I/M, see OR. REV. STAT. § 468.390(2) (1977).

49. OREGON HOUSE TASK FORCE ON AUTO EMISSION CONTROL, REPORT TO THE OREGON LEGISLATURE 19, 21 (1976) [hereinafter cited as ORE. TASK FORCE REPORT].

50. OR. REV. STAT. § 481.190 (1970).

51. *Id.* The MSD is defined in *id.* § 268.020(2).

52. See Householder, MVECC IV, *supra* note 43, at 340, 347, 348. In addition to voluntary testings, the DEQ invited citizen reports on smokey vehicles, and 20,000 bumper stickers were distributed.

53. OR. REV. STAT. § 481.190(2) (1977) requires dating of certification within 90 days prior to motor vehicle registration or renewal of registration date.

54. *Id.* § 481.135, provides for a registration or renewal of registration period of 24 consecutive calendar months for most vehicles.

55. *Id.* § 481.190(2). Approximately 70% of all cars taking the test have passed the first time. ORE. TASK FORCE REPORT, *supra* note 49, at 4. Responses to the most recent DEQ survey indicate that, of those cars failing the initial inspection, 65.5% required repairs costing less than \$10 to pass the test, with 94.8% passing the test after repair. VEHICLE INSPECTION PROGRAM, DEP'T OF ENVIRONMENTAL QUALITY, COST OF REPAIR SURVEY (DEQ/VIP 77341) (1977). Usually, the solution involves some item of routine maintenance that has been neglected or delayed, such as an idle

equipment at the unloaded engine speed while the vehicle is stationary and the accelerator pedal is released (idle speed).⁵⁶ Vehicles which are presently exempt from Oregon's I/M program include new motor vehicles, farm vehicles, special interest (antique) automobiles, vehicles manufactured before 1942, fixed load vehicles, and vehicles operating in interstate commerce.⁵⁷

Oregon's I/M program has been administered and enforced largely by licensed state employees at inspection facilities operated by the DEQ.⁵⁸ However, owners of fleets comprising 100 or more in-use motor vehicles are permitted to conduct their own I/M inspection on their fleets under the supervision of the DEQ, provided DEQ-approved gas analyzing equipment is used, and provided the inspector, who may be an employee, has been qualified by the DEQ.⁵⁹ Owners of large fleets are encouraged to inspect their own vehicles because fleet self-inspection reduces the number of inspections that the state must make and is also convenient to fleet owners.⁶⁰

At present, owners of fleet vehicles must pay a certificate fee of \$2 per vehicle.⁶¹ A fee of \$5 is charged the owner of any vehicle which is inspected at state facilities and which passes the DEQ inspection.⁶² With the exception of startup costs appropriated during the voluntary phase of the program,⁶³ these fees have provided sufficient funds to finance the entire I/M program.⁶⁴

speed fuel mixture or carburetor adjustment or spark plug replacement. *Id.* This survey indicates that approximately 8.3% of the vehicles which fail require repairs or tune-ups in excess of \$50.

56. Or. Ad. Rules § 340-24-305(18) (July 1, 1977). Vehicle emission control test standards adopted in early 1975 by the EQC were used when the program became mandatory for the MSD. DEQ Motor Vehicle Emission Control Inspection Test Criteria, Methods and Standards, Or. Ad. Rules § 340-24-300 to 350 (effective May 25, 1975). Emission allowance standards for CO and HC vary depending on the make and year of the vehicle and, sometimes, the engine size. Exhaust gas concentrations of CO and HC are measured at idle speed and compared to the appropriate standard. Vehicles exhibiting smoke, exhaust gas dilution, excessive idle speed, or faulty factory-installed emission systems will not be issued certificates. Or. Ad. Rules § 340-24-320(1), (2), (3) (July 1, 1977).

57. OR. REV. STAT. § 481.190(3) (1977).

58. EQC REPORT, *supra* note 41, at app. C.

59. Or. Ad. Rules § 340-24-340(1), (8), (9), (10) (July 1, 1977). Thus far, at least fifteen fleets in Oregon have been certified to conduct private inspections. EQC REPORT, *supra* note 41, app. D-2.

60. EQC REPORT, *supra* note 41, app. D-1.

61. *Id.*

62. OR. REV. STAT. § 468.405(1)(b) (1977).

63. The 1973 Legislature approved a \$1 million startup appropriation for the pilot program. 1973 Or. Laws, ch. 771, §§ 2, 8.

64. ORE. TASK FORCE REPORT, *supra* note 49, at 4.

C. RESULTS OF OREGON'S PROGRAM

Since the advent of Oregon's I/M program, there has been a significant reduction of carbon monoxide in the Portland metropolitan airshed. For instance, CO exceeded federal minimums on only 27 days in 1976,⁶⁵ as opposed to 88 days in 1970.⁶⁶ There has been a corresponding decrease in hydrocarbons as well.⁶⁷ The reduction of CO and HC pollutants should have beneficial effects upon the health of the inhabitants of the Portland metropolitan area.⁶⁸ In addition to these health benefits, the reduction of pollutants in the atmosphere should improve what is commonly known as the quality of life for area residents. Refusing to espouse the idea of more business at the expense of clean air, Portland has adopted the attitude that cleaner air improves the quality of life.⁶⁹ It has successfully promoted its present quality of life as an attraction to non-polluting business such as tourism and the convention trade.⁷⁰

In addition to demonstrable improvements in air quality, it is asserted that the maintenance compelled by periodic emission inspection results in decreased gasoline consumption.⁷¹ Several studies have supported this

65. DEPARTMENT OF ENVIRONMENTAL QUALITY, OREGON AIR QUALITY REPORT FOR 1976, AIR QUALITY DATA SUMMARY.

66. See EQC REPORT, *supra* note 41.

67. The EQC has estimated that the I/M program reduced vehicle HC emissions by 2.5% in 1975 and 7% in 1976. *Id.* at app. G-7. Because photochemical oxidants are measured rather than HC, it is difficult to directly measure HC reductions in the airshed. In *Sierra Club v. EPA*, 540 F.2d 114 (D.C. Cir. 1976), the EPA contended that interrelationships among CO, HC, NOx and photochemical oxidants, as well as relationships between increases in those pollutants and deterioration of air quality, are "poorly understood and cannot be determined with any reasonable degree of accuracy . . ." and that "the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." *Id.* at 1130-31.

68. For example, CO retards the flow of blood through the body and, in high concentrations, may have adverse effects upon persons suffering from cardiovascular diseases. HC and nitrogen oxides (NOx), the two other pollutants associated with the automobile, combine with each other and other chemicals in the atmosphere. When exposed to sunlight, they form photochemical oxidants which produce "smog." Studies conducted by the World Health Organization, the American Lung Association and the EPA have demonstrated a direct relation between higher levels of NOx and related photochemical oxidants, and the aggravation of and increase in serious respiratory diseases, eye irritation, and changes in heart and lung functions. See H.R. REP. No. 294, 91st Cong., 1st Sess. *reprinted in* [1977] U.S. CODE CONG. & ADM. NEWS, 2642-72 [hereinafter cited as H.R. REP. No. 294]; ORE. TASK FORCE REPORT, *supra* note 49, at 6-12.

69. "Oregon's quality environment has fostered the substantial development of a tourist trade which infuses several economic sectors (hotel and motel, retail-wholesale, etc.) with large amounts of income." Economic Development Division, Portland Chamber of Commerce, Economic Base of the Portland, Oregon Standard Metropolitan Statistical Area 3 (n.d.).

70. *Id.* B. LIU, PORTLAND NO. 1—AMERICA'S MOST LIVEABLE CITY, 26-29 (pamphlet containing excerpts from MIDWEST RESEARCH INSTITUTE, QUALITY OF LIFE INDICATORS IN THE U.S. METROPOLITAN AREAS) (n.d.).

71. Oregon's DEQ has asserted that the concomitant maintenance and engine tuneups necessitated by inspection certification should improve vehicle fuel economy and result in cost savings to the motorist. EQC REPORT, *supra* note 41, app. K-3; DEQ SECOND ANNUAL ENERGY POLICY

contention.⁷² Data compiled from an EPA study of I/M programs, now being conducted in Portland, should, among other things, clarify whether emission reduction and fuel economy improvements are both achieved by an I/M program.⁷³ The asserted collateral benefits of fuel savings offered by the maintenance aspect of I/M may be used by otherwise reluctant legislators as one justification for their approval of I/M implementation.

REVIEW, attachment I, at 2 (1977). New Jersey's Department of Environmental Protection asserts that a proposal to subject heavier, more fuel inefficient vehicles to stringent emissions standards will result in fuel saving of 25 million gallons in New Jersey by 1980. DEP'T OF ENVIRONMENTAL PROTECTION, STATE OF NEW JERSEY, PROPOSED REGULATION: NOTICE OF PUBLIC HEARING AND ADOPTION OF EMERGENCY RULE, DOCKET No. DEP 032-76-12, at 45, 46 (n.d.) (relating to N.J. Ad. Code 7:27-15.1) [hereinafter cited as NEW JERSEY PROPOSED REGULATION REPORT]. New Jersey's I/M program evidences an initial significant reduction in carbon monoxide levels, with an increase in gas mileage. ORE. TASK FORCE REPORT, *supra* note 49, at 12. An EPA official has made the following contention:

[N]umerous studies have shown that an annual fleetwide decrease in fuel consumption in the range of 2-5% is an additional benefit associated with the implementation of I/M. In some cases, the money saved by the motorist due to increased fuel economy equals or exceeds the testing fee and the amount necessary to repair the failed vehicle.

Letter from Stanley W. Legrow, Asst. Adm'r for Enforcement, U.S. EPA, to the Honorable Jim Chrest, Chairman, Task Force on Auto Emissions Control, Ore. House of Representatives (April 9, 1976), *reprinted in* ORE. TASK FORCE REPORT, *supra* note 49, exhibit D.

72. A study by Sun Oil Company on a random sampling of privately owned cars, using a procedure of (1) visual inspection, (2) exhaust analysis for CO and HC, and (3) instrumental ("electronic") analysis, indicated an average fuel economy improvement of over 13% with "a simultaneous reduction in hydrocarbon and carbon monoxide emissions to levels consistently much lower than existing and proposed state inspection levels." Oberdorfer, *Reducing Fuel Consumption and Emissions by an Optimizing Tuneup*, in REPORT OF THE FOURTH NORTH AMERICAN MOTOR VEHICLE EMISSION CONTROL CONFERENCE 251, 252-65 (1975). Exxon Corporation reported fuel savings when engine malfunctions associated with high CO and HC are corrected. NEW JERSEY PROPOSED REGULATION REPORT, *supra* note 71, at 43. A study conducted by Champion Spark Plug Company indicates similar findings when cars are tuned according to manufacturers' specifications. CHAMPION SPARK PLUG CO., TUNE-UP: ITS EFFECT ON FUEL ECONOMY, EMISSIONS AND PERFORMANCE 3 (n.d.) (results of 1975-76 test program). For a recognition and discussion of the fuel economy benefits associated with state I/M programs, see H.R. REP. No. 294, *supra* note 68, at 2209, 2453-60, 2493-94; Shuttler, *Overview of Inspection/Maintenance (I/M)*, in REPORT OF THE FOURTH AMERICAN MOTOR VEHICLE EMISSION CONTROL CONFERENCE 101, 116 (1975).

73. ORE. TASK FORCE REPORT, *supra* note 49, at 12. For a description of this test, its purposes and procedures, see OFFICE OF AIR AND WASTE MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, MOBILE SOURCE AIR POLLUTION CONTROL FACT SHEET, THE PORTLAND STUDY (1977).

Specifically, the data will be used to determine: (1) the types of engine maladjustments which cause a vehicle to fail a short test (idle test) used by the Portland I/M program; (2) how soon emissions from a repaired vehicle begin to increase; (3) the cost of an average repair; and (4) the effect of different engine maladjustments on emission levels and fuel economy. The study will also examine effects of field conditions such as "the skill of mechanics who service cars which fail, and the precision with which the short test is made on a high frequency basis, and will provide data to determine the optimum frequency of inspection." *Id.* at 2. Although the EPA will be testing until March, 1979, interim reports will be issued and can be obtained by writing U.S. EPA, Characterization and Applications Branch, 2565 Plymouth Road, Ann Arbor, Mich., 48105.

PRESENT CHOICES AVAILABLE TO A STATE IN TAILORING ITS I/M PROGRAM

Implementation of an I/M program at the state level provides the state with the opportunity to make choices in the scope and operation of its program. These choices include: the method of financing, the degree of state involvement in operating the program, the manner in which compliance is compelled, and whether certain vehicles should be exempt. The state must also decide whether to make the program statewide or restrict it to urban target areas within the state. Thus, within this framework of major decisions are opportunities for the state to tailor its program to its particular needs.

A. FINANCING THE PROGRAM

The threshold decision facing a state legislature is the method of financing the program. Oregon chose to appropriate startup funds for equipment and inspection facilities during the program's voluntary phase and has since relied upon inspection fees to pay for the program. States not wishing to fund the program through inspection fees may choose other methods such as increasing gasoline taxes or imposing highway use tolls. Alternatively, the state may leave the funding decision to the voters through initiatives or referendums. In any case, a fundamental consideration will be whether the expense should be borne by citizens statewide or only by those living in the inspection area. A voluntary phase in an I/M program will give the state and local officials time to determine which method of financing will be most appropriate to sustain a mandatory program.

The EPA and some courts have shown indifference as to how a state will raise money necessary to fund various compelled transportation control measures. For example, in *Friends of the Earth v. Carey*, the Court did not address the issue of funding, but was, instead, satisfied that funding for New York City's TCP would be made available by the state.⁷⁴ The Court expressed little concern regarding the effect on other state programs by diversion of monies necessitated by the Court's decision.⁷⁵ Because an I/M program involves relatively little initial expense to the state and can be

74. [W]hile the State and City have . . . expressed reservations about their capability of financing the costs of implementation and we are well aware of the current fiscal crisis in which the City finds itself . . . the chief executives of the State and City have indicated that while financing of the Plan would pose problems in policy choices concerning the allocation of resources, they would take the necessary steps to obtain the financial support required.

Friends of the Earth v. Carey, 552 F.2d 25, 39 n.7 (2d Cir. 1977).

75. The City's claim of federal interference with its . . . budgetary policies, and with other services wholly within its control, is neither substantial nor directed toward an integral governmental function. . . . The necessity of appropriating funds for the construction of toll facilities (from which it will receive revenue) or for the acquisition of private garages under the business district parking reduction plan does not amount to the kind of injury found to be impermissible in *National League of Cities*

Id. at 38.

paid for by the motorist, compelled implementation of an I/M program probably would not seriously impair state finances. In any event, if a state selects an I/M program as part of its TCP, the decisions concerning the method of funding should be made by state and local officials at or prior to that state's implementation rather than allowing the EPA or a federal court to ultimately decide the matter.

B. THE DEGREE OF STATE INVOLVEMENT IN VEHICLE INSPECTION

Oregon has chosen total state control of inspection, with the exception of allowing state agencies and certain qualified businesses to perform self-inspection. Arizona, on the other hand, has contracted with a private testing firm to conduct inspections through a network of inspection facilities constructed, owned, and operated by the private contractor under state supervision.⁷⁶ Aside from the private nature of the inspector, a privately contracted inspection program and a state-conducted inspection program can be substantially identical.⁷⁷

One advantage of private contracting is that it takes the state out of inspection activity and replaces it with private industry, thus preventing increases in bureaucracy while increasing employment in the private sector.⁷⁸ Another advantage is that it need not require initial capital outlay by the state.⁷⁹ The main disadvantage is that, if the contract is of long duration and the terms of the contract allow little leeway to the state to modify the basic provisions of the program as state needs or EPA mandates require,⁸⁰ then the state may not be able to institute needed changes without considerable financial loss.⁸¹

76. Iacobelli, *The Arizona Inspection/Maintenance Program*, in REPORT OF THE FOURTH NORTH AMERICAN MOTOR VEHICLE EMISSION CONTROL CONFERENCE 329 (1975) [hereinafter cited as Iacobelli, MVECC IV]; EQC REPORT, *supra* note 41, app. P-1.

77. See, e.g., *id.* at 332 (I/M is linked to registration; provision for fleet self-inspection; certificate fee of \$5 charged.).

78. EQC REPORT, *supra* note 41, app. 0-2. The Oregon EQC recommended a private contractor approach, especially if the program were converted to annual inspection. *Id.* at 5. Aware of the benefits of a privately contracted I/M program, the Oregon Legislature has directed the EQC to conduct a cost-effectiveness study to determine if a private contract approach would be appropriate for Oregon, and to contract with private firms "[u]pon finding that savings to the public and increased efficiency would result and the quality of the program would be adequately maintained" OR. REV. STAT. § 468.377 (1977).

79. EQC REPORT, *supra* note 41, app. 0-2.

80. Although a state may delegate by contract some of its governmental functions, its police power remains inalienable. Any contract entered into by the state is subject to the state's police power, which transcends contract requirements when the state must respond, changing safety or health policies. See, e.g., *Morris v. City of Salem*, 179 Or. 666, 174 P.2d 192 (1946) (Municipality's contract for installation and operation of parking meters did not deprive city council of right to remove meters in exercise of its inalienable police power, if deemed conducive to public safety or welfare.)

81. When a state, through legislative repeal, seeks to impair an existing contractual obliga-

Rather than utilize either of the above approaches, a state may choose to rely on existing private garages to perform the inspections. Inspection by private garages will require state certification or licensing of mechanics, to assure competency, and state certification of facilities, to assure use of proper equipment.⁸²

The advantages of private garage inspection are the convenience to the public and the fact that no capital outlay will be required by the state.⁸³ However, there is a greater possibility of abuse by both motorists and mechanics, prevention of which may require a state regulatory bureaucracy.⁸⁴ Another disadvantage is that, in requiring proper inspection equipment at facilities, the state may give competitive advantage to those garages which can afford that equipment. Furthermore, state certification may be viewed as a first step to general state licensing of private mechanics as inspectors and, therefore, might generate a great deal of automotive industry hostility.⁸⁵

tion, such legislation must be both reasonable and necessary to serve an important purpose in light of alternative means to achieve the same ends. See *U.S. Trust of New York v. New Jersey*, 431 U.S. 1 (1977). Thus, it would behoove state officials to draft a contract which, when appropriate, will allow for foreseeable program modifications.

82. *E.g.*, 1977 Colo. Sess. Laws, ch. 564, § 3, at 1902-05 (to be codified at COLO. REV. STAT. §§ 42-4-307(III)(3), 42-4-310) gives the Air Pollution Control Commission broad responsibility to adopt rules and regulations concerning licensing of private emission inspection stations and certification of their equipment, as well as licensing of private or state employed emission inspectors.

83. But note, Arizona considered the private garage approach and rejected it because of the high capital investment required of the private garages. Iacobelli, MVECC IV, *supra* note 76, at 332.

84. For example, if there is an independent state supervised check on the quality of repair, then abuse by mechanics is reduced, as was experienced in New Jersey. EQC REPORT, *supra* note 41, at app. 1-10. Colorado provides for a referee emissions inspection program to protect the consumer. 1977 Colo. Sess. Laws, ch. 564, § 3, at 1903 (to be codified at COLO. REV. STAT. § 42-4-309(4)). An Oregon Automobile Dealers Association (OADA) survey indicated that over 80% of their members responding stated that their mechanics believed that "a vehicle set to DEQ standards does not get as good gas mileage and does not run or idle as well as it did before being adjusted to meet the test." ORE. TASK FORCE REPORT, *supra* note 49, at 14. This belief is shared by many motorists, who readjust their engines after passing the inspection. *Id.* at 15. These attitudes are misguided because DEQ inspection standards are based on the manufacturers' specifications. As the standards, and benefits of the program, become widely known, these public and service industry misconceptions will become less prevalent. However, given initial public hostility coupled with misinformed mechanics, the need for a state regulatory agency to closely supervise private inspection is apparent.

85. In view of this possibility, the proposal for licensing mechanics as qualified emissions inspectors should be entirely voluntary. For example, Colorado provides for voluntary training programs for mechanics at educational facilities, "oriented toward basic motor vehicle air pollution control systems installed in motor vehicles by the manufacturers. . . ." 1977 Colo. Sess. Laws, ch. 564, § 10, at 1911-12 (to be codified at COLO. REV. STAT. § 25-7-128(2)). Presumably, these educational programs will make clear to automotive mechanics that increasing competence in, and understanding of, correct automotive servicing results in lower emission levels, better fuel economy, and more business for the automotive service industry.

Because local legislators will doubtless be sensitive to the attitude of the service industry to certification requirements necessitated by private garage inspection, they should decide which approach or combination of approaches will produce the most effective result in their state.

C. *INCORPORATING I/M INTO EXISTING STATE REGISTRATION REQUIREMENTS*

Oregon requires biennial inspection for most vehicles because this approach coincides with Oregon's biennial registration system. This approach produces the desired incentive to comply, since the motorist whose vehicle fails the inspection cannot register his vehicle and will face criminal penalties if he operates that unregistered vehicle on the public highways.⁸⁶ After initial registration, vehicles are required to be re-registered at two-year intervals, commencing two years from the month of initial registration.⁸⁷ This registration produces a "staggered" effect and thus evens out the administrative workload both for licensing personnel and DEQ inspectors. For ease of administration, states whose vehicle registrations fall due at one time should consider appropriate legislative changes to produce a staggered effect.

Nevertheless, Oregon has experienced two drawbacks with its biennial registration system. First, more registrations fall due in even years than in odd years.⁸⁸ A greater number of daily ambient air violations occurred in 1977 because fewer vehicle re-registrations fell due that year.⁸⁹ Secondly, because available data suggest that the benefits of an I/M inspection deteriorate rapidly,⁹⁰ air quality would be improved with more frequent inspection. In this regard, one purpose of the EPA study⁹¹ is to determine the optimum frequency of inspection. Data gathered by this study is likely to confirm the EPA's contention that inspection should be made at least every

86. OR. REV. STAT. § 481.105(4)(a) (1977) requires an applicant for auto registration to give his true address. *Id.* § 481.105 allows denial or cancellation by the Motor Vehicles Division of registration or certificate of title for falsification. *Id.* § 481.990(9) prohibits false swearing or certification of any MVD application. *Id.* § 843.805 prohibits operation of a vehicle without a certificate of emissions compliance. *Id.* § 483.820(1) prohibits falsification of the certificate of compliance. *Id.* § 483.825 prohibits tampering with emission control systems. Such sanctions, when combined with major repair costs which the owner is unable to afford, create a hardship on the poor. States may choose to give appropriate rebates or other forms of assistance. Professor Stewart notes that imposition of environmental policy often results in sacrifices imposed upon the poor for the sake of the "elite's vision of a better society." Stewart, *supra* note 7, at 1221-22.

87. OR. REV. STAT. § 481.135 (1977).

88. EQC REPORT, *supra* note 41, app. C-3. All existing vehicles were required to be registered for the first time on a biennial basis in 1974 and thus were not required to be re-registered until 1976. The only vehicles registered in 1975 were new vehicles and vehicles registered in Oregon for the first time.

89. This was predicted by the EQC. *Id.* at app. G-3. In 1977, 33 violations occurred as opposed to 27 violations in 1976. See note 65 *supra*.

90. EQC REPORT, *supra* note 41, at app. I-10 to 17.

91. See note 73 *supra*.

twelve months.⁹²

D. REASONS FOR EXEMPTING CERTAIN VEHICLES

The major reason states should consider exempting certain vehicles from inspection is that exemptions serve to minimize waste of funds and facilities upon those vehicles for which inspection is cost effective. The basis for granting exemptions to certain classes of vehicles should be examined and Oregon's program serves to illustrate.

There are certain vehicles for which inspection costs, either to the state or to the vehicle owner, would greatly outweigh the pollution reduction benefits gained from those inspections. In Oregon, heavy construction ("fixed load") vehicles and vehicles licensed as farm equipment are exempt for this reason.⁹³ A state may also find it desirable to exempt vehicles which are few in number, such as antique vehicles, or for which standards would be difficult to set, such as motorcycles and heavy duty diesel motor vehicles. These particular classes of vehicles are exempt in Oregon for these reasons.⁹⁴ But this would be ill-considered in light of predictable public hostility. Recent Oregon legislation requires that those vehicles owned and operated by the state and its political subdivisions, previously exempt from inspection, undergo annual I/M inspection.⁹⁵

92. EQC REPORT, *supra* note 41, at app. I-17.

93. OR. REV. STAT. § 481.190(3)(c), (e) (1977). Fixed load vehicles include asphalt spreaders, earth moving equipment, road graders and special construction equipment. *Id.* § 481.272(2), (3).

94. OR. REV. STAT. § 481.190(3)(b), (d) (1977). These subsections exempt vehicles manufactured prior to 1942 and special interest vehicles (maintained as collectors' items). Administrative emission test criteria established on May 25, 1975, provided no emission standards for vehicles exceeding a combined manufacture weight and maximum load of 8,400 pounds. Or. Ad. Rules § 340-24-305(17). Electric vehicles were presumed to comply. Or. Ad. Rules § 340-24-320(7). Motorcycles were unregulated due to the absence of motorcycle emission control requirements and reliable testing techniques. DEQ, Memorandum of Vehicle Inspection Program 2 (Feb. 10, 1977) (Accompanying proposed rules relating to standards for gasoline powered heavy duty vehicles). New emission control standards have been developed for heavy duty gasoline motor vehicles in excess of 8,500 pounds. Or. Ad. Rules § 340-24-305(16), 340-24-315, 340-24-325, 340-24-335 (July 1, 1977). However, heavy duty diesel motor vehicles are still administratively exempt from testing. See note 119 *infra*.

95. OR. REV. STAT. § 481.190 (1977). Government owned vehicles are required to be registered only once. *Id.* § 481.125. The DEQ plans on an annual notification procedure for each agency with follow-up surveillance in conjunction with the Motor Vehicles Division. Memo to EQC, Authorization for Public Hearing to Consider Amending Vehicle Emission Testing Rules to Cover the Testing of Publicly Owned Vehicles (EQC Agenda item No. L, Nov. 18, 1977). Objections to the proposed rule changes were voiced at hearings on Jan. 16, 1978, by fire agencies, citing high engine restyle costs and length of "down time" necessary to inspect emergency vehicles. School district personnel voiced similar objections, and suggestions were made to amend the definition of fleets (100 or more vehicles) to allow smaller agencies to self-inspect. Oregon Journal, Jan. 17, 1978, at 3, col. 3.

A major decision facing states desiring to implement a comprehensive I/M program is whether or not to exempt certain heavy duty vehicles engaged in interstate commerce. Present licensing arrangement for such vehicles afford a trucking company a great deal of flexibility in locating and relocating its home state ("base plate") truck registrations.⁹⁶ For this and other reasons, Oregon, for the moment, has chosen to exempt such vehicles from I/M certification requirements.⁹⁷

Finally, states must exempt from inspection new motor vehicles because the Federal Clean Air Act specifically prohibits state inspection of new motor vehicles prior to their initial sale, titling, or registration.⁹⁸ Nevertheless, as a means of protecting its consumers, a state could conduct an I/M inspection for the limited purpose of determining whether or not a vehicle complies with manufacturers' emission warranties required by the Federal Clean Air Act.⁹⁹ If the ultimate purchaser's new vehicle failed the

96. Oregon's reciprocal proration of registration fees enabling legislation, OR. REV. STAT. § 481.620-.730 (1977), defines three locations where a vehicle may be properly registered: (1) the jurisdiction where the person registering the vehicle legally resides; or (2) any jurisdiction where a commercial firm registers a commercial vehicle (operated for compensation), provided the vehicle is controlled or operated from that firm; or (3) any jurisdiction where, by agreement between two or more jurisdictions, the commercial vehicle is required to be registered by that jurisdiction. *Id.* § 481.620(8)(a),(b),(c). Base state ("base plate") is defined under the reciprocity agreement entered into by Oregon, as follows: "(a) in the case of a commercial vehicle the State from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated, or otherwise controlled, or also in the case of a fleet vehicle the State to which it is allocated for registration under statutory requirements." WESTERN HIGHWAY INST., UNIFORM VEHICLE REGISTRATION PRORATION AND RECIPROCALITY AGREEMENT § 14(a) (rev. ed. 1974) [hereinafter cited as WESTERN UNIFORM COMPACT].

97. 1977 Or. Laws, ch. 787, § 2(f). One reason the Oregon Legislature may have excluded vehicles operating in interstate commerce from I/M requirements is the fact that complete authority for the registration of fleet vehicles operating under reciprocity agreements with neighboring states is contained in OR. REV. STAT. § 481.620-.730 (1977) (specifically 481.730(1)), without any reference to motor vehicle I/M statutory requirements contained elsewhere in Oregon Revised Statutes. Prior to statutory exemption of commercial vehicles operating in interstate commerce, the DEQ had not formulated administrative regulations concerning these vehicles. Currently, the DEQ inspects all vehicles with a gross weight in excess of 8,000 pounds bearing a "T"-prefixed license plate and registered within the MSD. The DEQ does not inspect commercial vehicles bearing a "Y"-prefixed license plate because those vehicles are subject to interstate "apportionment" under reciprocity agreements. "T" indicates a vehicle whose license fee is not apportioned. "Y" indicates a vehicle whose license fee is apportioned among various states pursuant to a reciprocity agreement.

98. Section 209(a) of the Clean Air Act states:

No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any) or registration of such motor vehicle, motor vehicle engine, or equipment

42 U.S.C. § 7543(a) (1976) (emphasis added).

99. It provides for a warranty of a new motor vehicle emission device to the ultimate purchaser. It also provides for state testing after the date of sale to assure compliance with this warranty and provides that the manufacturer shall remedy any non-conformity within the specified warranty period. *Id.* § 7541(h)(2), (3). See H.R. REP. NO. 294, *supra* note 68, at 2681.

inspection, a state would still be obligated to issue vehicle registration.¹⁰⁰ The purchaser, however, could require repair of the emission device at the manufacturer's expense.¹⁰¹

A legislature may appropriately exempt the classes of vehicles enumerated above either to maintain the cost effectiveness of its I/M program or because it lacks authority to require inspections. However, state legislators should be aware that exemptions should be based upon sound legal or economic reasons in order to minimize the likelihood of EPA disapproval of a Transportation Control Plan.¹⁰²

E. CHOOSING IN-STATE PROGRAM BOUNDARIES

Another method available to state legislatures to conserve state funds and facilities, to minimize bureaucracy, and to optimize public cooperation without undermining air quality, is to target the program to geographic areas of demonstrable need. Target areas will necessarily be areas of dense population.¹⁰³

The boundaries should include not only urban but also suburban areas which generate a large amount of commuter traffic into and out of urban centers. If the lines are drawn too narrowly, the excluded suburban commuter traffic will render the program ineffective. If the lines are drawn too broadly, persons who contribute no pollution to the target area or indeed have no relationship at all to the urban center will be unfairly included. In establishing boundary lines for an I/M target area, the legislature should also be guided by the geography and wind patterns of the airshed area, as well as by population growth and relocation trends. Ultimately, the effectiveness of the program will be determined by the percentage of vehicles regularly driven in the target area which can be made subject to inspection.¹⁰⁴

Whether a target area approach or a statewide approach is chosen will, of course, vary from state to state. States which have dense population evenly distributed throughout much of the state, such as New Jersey, could justifiably consider their entire state as a target area.¹⁰⁵ States in which

100. This interpretation that a state could not impose I/M testing as a precondition to registration or titling was voiced by Mr. Mike Scibinico, U.S. EPA, Mobile Source Division, at a "207(b) workshop" held on September 30, 1977, in Portland, Ore.

101. 42 U.S.C. § 7541(h)(1), (2) (1976).

102. In those states where the EPA has proposed its own I/M program, an exemption has been granted for only "classic or antique vehicles." See 40 C.F.R. §§ 52.242(c), .1089(c) (1977) (California and Maryland respectively).

103. H.R. REP. No. 294, *supra* note 68, at 2436-37, lists twenty-nine metropolitan areas that are now subject to transportation control requirements.

104. Important considerations for the establishment of inspection within the MSD boundaries were vehicle registration distribution by county, and passenger car and truck traffic patterns in the Portland Region. EQC REPORT, *supra* note 41, at app. L.

105. See note 10 *supra*; Elston, *New Jersey's Auto Emission Inspection program: An As-*

population is concentrated in distinct areas, such as Oregon, should consider the target area approach.¹⁰⁶

The decisions concerning the program boundaries should be made at the state rather than at the local level. State control over vehicle registration gives the state the capability to include areas which otherwise might not participate. For example, the Oregon Legislature may soon consider EQC recommendations to create new target areas in the downstate Salem, Eugene and Medford metropolitan areas because violations of primary ambient air standards are occurring with increasing frequency there.¹⁰⁷ Since Oregon's I/M program is linked to statewide vehicle registration, the Legislature can very easily make vehicle owners in these three metropolitan areas subject to the precondition of I/M certification by merely redefining the inspection areas.

The flexibility offered by a target area approach linked to state vehicle registration should be attractive to those states which do not have evenly distributed population. For many of these states, the inspection of vehicles within their selected target areas should produce such a reduction in air pollution from motor vehicles that other, perhaps more extreme, transportation control measures will be unnecessary.¹⁰⁸

CAPABILITY OF STATES TO INSPECT OUT-OF-STATE COMMUTER TRAFFIC OR TRUCKING ENGAGED IN INTERSTATE COMMERCE

Even though an I/M program linked to vehicle registration can achieve substantial improvements in air quality, there exist "non-attainment" areas which, because of their location near interstate borders, would continue to experience difficulty achieving the desired air quality if the state were merely to require inspection of vehicles registered within that state.¹⁰⁹ A

essment of One Year's Mandatory Operation, in REPORT OF THE FOURTH NORTH AMERICAN MOTOR VEHICLE EMISSION CONTROL CONFERENCE 281 (1975).

106. Arizona, Colorado, and Nevada also restrict their I/M programs to target area counties. See note 10 *supra*.

107. EQC REPORT, *supra* note 41, at app. H. The problem of ambient CO violations is most serious in the Medford area. Oregon's "non-attainment" area includes Portland, Salem, Eugene, and Medford. Letter from H.M. Patterson, Mgr., Air Pollution Control, to Mr. Schultz, EPA Region 10, Seattle, Wash. (March 6, 1978).

108. For example, the estimated actual reduction of CO from the I/M component of Oregon's TCP was 14%, while that from traffic flow improvements was 22%, during the period 1970-1976. Estimated actual reduction of HC for the same period for Multnomah County was 7% for the I/M component and 8% for all other components. See EQC REPORT, *supra* note 41, app. G-2, G-6. Other measures more burdensome to both the motorist and to the state, might include gas rationing, retrofit programs and large scale relocation of downtown parking facilities.

109. Portland, as evidenced by its thirty-three violations occurring in 1977, continues to experience difficulty in attaining acceptable air quality standards despite implementation of its I/M program and other transportation control measures. Its location on the Oregon-Washington border, placing it at a cross-road of north-south interstate traffic and east-west interstate and intrastate

state enactment requiring inspection of vehicles registered outside the jurisdiction of that state presents legal and political problems wholly separate and apart from considerations involving the scope of an I/M program within a state.

A. *NEGOTIATIONS AMONG THE STATES TO ACHIEVE COOPERATIVE STATE ACTION*

A state may find that a TCP developed for metropolitan areas in that state is compromised because of unregulated vehicular traffic from urban areas outside that state's jurisdiction. The Oregon EQC has estimated that Oregon's I/M program as it exists is reduced to 90% of its full effectiveness by pollution from unregulated traffic.¹¹⁰ One area which generates a great amount of unregulated traffic and thus contributes a major portion of vehicular air pollution in Portland is Clark County, Washington, which includes the city of Vancouver.¹¹¹

If the problem can be so narrowed to an identifiable out-of-state area, such as Vancouver, Washington, then the first step that a "suffering" state should consider is discussion between its representatives and representatives of the "offending" state. Such discussions, encouraged by the Federal Clean Air Act,¹¹² can be useful to the involved states as a forum for

traffic, thus limits the effectiveness of its current program, which can reach only vehicles owned by MSD residents.

110. EQC REPORT, *supra* note 41, at 3 and app. L.

111. Of a total of 181,450 average daily traffic counts (ADT) made of traffic coming into and going out of the MSD for all roads, Clark County, Wash., accounts for 25.2% of the ADT through the MSD. *Id.* at app. L-7 to L-10.

In 1977 we estimate there were 192,000 (approximately) people employed in the city; of this total 103,000 live in Portland and the remainder in the four-county area, including Clark County, Washington. Since 97% of all commuter traffic from Clark County is auto traffic, we conclude this is having an impact on the quality of the Portland Airshed. . . . [T]he City of Portland requests that the [EQC] direct the [DEQ] to undertake a study. . . . We would hope that a possible outcome of this work would be the expansion of the inspection program to include all vehicles registered in Clark County. . . .

Testimony from [Portland] Mayor Neil Goldschmidt Regarding Implementation of Senate Bill 832, submitted to DEQ, at 2-3 (Jan. 16, 1978). It should be noted that the EPA has recently designated the entire Portland-Vancouver Air Quality Maintenance Area as a non-attainment area, over the objection of the Washington Department of Ecology. U.S. E.P.A., Region X News Advisory (Feb. 1978).

112. Prior to the 1977 Amendments, an interstate conference procedure was provided for under 42 U.S.C. § 1857d (1970). This procedure was repealed by section 114 of the 1977 Amendments, 42 U.S.C. § 7415 (1976). The Administrator is now authorized to encourage cooperative activities by states and local governments to enact improved and, "so far as practicable in the light of varying conditions and needs, uniform state and local laws relating to the prevention and control of air pollution; and encourage the making of agreements and compacts between States. . . ." *Id.* § 7402(a). Cooperative interstate planning among the governors and local elected officials with respect to the revision of implementation plans is encouraged in those areas of non-attainment where national primary ambient air quality standards for CO or photochemical oxidants will not be attained by July, 1979. *Id.* § 7504.

airing disputes, identifying current areas of agreement and disagreement, and exploring ways of resolving existing conflicts. Where agreements are reached by states sharing an air quality control region, interstate compacts, subject to congressional approval, may be entered into by the states sharing that designated air quality control region.¹¹³

The opportunity for self-determination, and the possibility of federal regulation of local private transportation if such self-determination is not exercised, are selling points which can be raised by a state attempting to obtain the cooperation of an "offending" state. Moreover, I/M programs are inexpensive, are fairly easy to incorporate into existing motor vehicle statutes, and achieve immediate, significant results with little interference with private transportation.

If these arguments fail to persuade a neighboring state to implement I/M, the state or the affected metropolitan area might suggest that it will consider judicious use of its taxing power to complement that state's TCP. The "suffering" state or municipality could threaten to impose a tax, levied on out-of-state employees commuting to work in that state's affected area, and justify such a tax as a return to the state for the costs of controlling the pollution which those commuters' vehicles create.¹¹⁴ Whether or not such

113. 42 U.S.C. § 7402(c) (1976). Air quality control regions are defined in *id.* § 7407(b), (c), and may include interstate "non-attainment" areas as determined by the Administrator. *Id.* § 7501(2).

114. The validity of a so-called commuter tax has been upheld in *American Commuters Ass'n v. Levitt*, 405 F.2d 1148 (2d Cir. 1969) (New York City income tax of 1% levied on persons living outside the City who earned all or substantially all of their income in New York City). See also, *Non-Resident Taxpayers v. Philadelphia*, 341 F. Supp. 1139 (D.N.J. 1971), *aff'd* 406 U.S. 951 (1972). Cf. *Austin v. New Hampshire*, 420 U.S. 656 (1975), where the Supreme Court invalidated a 4% tax on all amounts earned by non-residents in New Hampshire because no similar tax was imposed on New Hampshire residents and the tax was therefore violative of the Privileges and Immunities Clause of Art. IV, § 2, of the U.S. Constitution.

If a tax similar to the one described is challenged as violative of Privileges and Immunities or Equal Protection principles, a court would have to balance the degree of interference with the asserted constitutionally or federally protected right (cleaner air), as opposed to the perceived interference with the same and other rights when considering possible legislative alternatives (enlarging suffering state's I/M target area; more frequent inspection) to achieve the same end. See generally, *Austin v. New Hampshire*, 420 U.S. 656 (1975); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

A proposed tax could be waived upon a showing by the working commuter that his vehicle has passed the taxing jurisdiction's I/M inspection. The tax should be large enough to prompt substantial compliance with inspection. If the tax is so small that it would be easier to pay it than to pass an inspection, the tax will be ineffectual. If it is so large that it in essence amounts to unreasonable discrimination against non-resident employees, then such a tax would not be upheld as a valid air pollution control measure. *Austin v. New Hampshire*. Assuming a proper tax is achieved, that tax should likewise be applied to all in-state commuters whose vehicles are registered outside the program's boundaries. Exemptions should be given to those working commuters who do not use their own automobiles to commute to work.

a tax is eventually enacted by a "suffering" state, the threat of such a tax could be used as a bargaining point in interstate negotiations.

Lastly, the "suffering" state could threaten to seek EPA intervention.¹¹⁵ While such intervention, or threat of intervention, would undoubtedly put pressure upon the "offending" state, the "suffering" state should be cognizant of risks involved in EPA intervention.¹¹⁶ In short, the EPA Administrator or, for that matter, a federal court, would be reluctant to intervene on behalf of a "suffering" state if the problem could more easily be solved by an appropriate change in that state's own TCP.

Local taxing measures or other legislation with extra-territorial legal effect, as well as EPA or judicial intervention, will not have to be resorted to if the states involved act responsibly through cooperative efforts to solve their shared mobile air pollution problems.

B. INSPECTION OF HEAVY DUTY TRUCKING: A RESPONSIBILITY THAT SHOULD BE SHARED

States in which mobile source air pollution problems cannot be identified with one or more out-of-state areas should consider the possibility of inspecting vehicles as they enter the jurisdiction. However, air pollution legislation designed to reach all out-of-state vehicles, including private passenger cars, would probably result in intolerable cost burdens on everyone,¹¹⁷

115. See, e.g., 42 U.S.C. § 7413(a)(2) (1976).

Bargaining among states to minimize the losses occasioned by such spillovers is costly . . . and may do little to improve the lot of states in a weak position (such as those in a downwind or downstream location). These states are likely to favor federal intervention to eliminate the more damaging forms of spillover. If spillover losses are sufficiently significant and multidirectional then all states may gain (to a greater or lesser degree) from centralized determination of environmental policies.

Stewart, *supra* note 7, at 1216.

116. While a forced revision of both the "offending" and "suffering" states' Implementation Plans could conceivably result, either one or both states would, in any event, be required to submit a plan revision if they have "non-attainment areas." Revised plans must include evidence that state and local governments "have adopted by statute, regulation, ordinance . . . the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan . . ." 42 U.S.C. § 7502(b) (1976). Even if the EPA's enforcement of such a requirement is viewed by the Supreme Court as an unconstitutional coercive intrusion into a state's integral functions, under the tests set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), a citizen lawsuit to compel a state to enact such laws or regulations might be distinguishable. In an action brought under the citizen suit provision, the court in *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), concluded that the city had waived a possible constitutional claim because of local and state participation in promulgating the plan, and held the plan enforceable against the state. Hence, the effect of private citizen lawsuits to force a revision of a "suffering" state's plan accomplishes the same result as direct EPA intervention without weakening the accountability of federal officials. See also, Stewart, *supra* note 7, at 1241.

117. For example, OREGON STATE HIGHWAY DIV., OFFICIAL PUB. NO. 77-1, TRAFFIC VOLUME TABLES (1977) [hereinafter cited as TRAFFIC VOLUME TABLES] show an average daily traffic count for 1976 of 93,644 (both directions) at the interstate bridge on Interstate 5, separating Portland from Vancouver. Approximately 43.9% of the passenger cars were out-of-state vehicles. A court might

including the state seeking to enforce such a law, and might constitute an infringement on the right of private persons to freely travel from state to state.¹¹⁸ This is especially true if neighboring states do in fact implement I/M and, therefore, inspection of passenger vehicles entering the jurisdiction becomes duplicative, uneconomical and unproductive.

However, an unregulated heavy duty gasoline truck can emit as much hydrocarbon as eighteen automobiles and as much carbon monoxide as forty-five automobiles.¹¹⁹ Also, states have traditionally had greater freedom to regulate heavy duty vehicles.¹²⁰ Moreover, state facilities already exist for the purpose of inspecting such vehicles.¹²¹ Therefore, it might be appropriate to initially limit inspection to heavy duty trucks engaged in interstate commerce.

Interstate reciprocity compacts afford, among other things, great flexibility to trucking firms to determine the states where they will base-plate actual registration of any of their trucks.¹²² Therefore, linking emission inspection to the actual registration requirements for such vehicles would be unproductive.¹²³ Because interstate trucking agreements such as the Western Regional Compact deal exclusively with registration reciprocity as well as prorated or apportioned license and registration fees,¹²⁴ these agreements leave the contracting states free to determine such matters as weight limitations, safety requirements,¹²⁵ or perhaps pollution emission stand-

find enforcement of Oregon's newly enacted "smokey car law," OR. REV. STAT. § 483.760-.773 (1977), a less burdensome and more suitable alternative to check visible emissions from passenger autos registered outside the MSD.

118. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) *United States v. Guest*, 383 U.S. 745 (1965).

119. H.R. REP. No. 294, *supra* note 68, at 2481. Heavy duty diesel engines emit relatively low levels of HC and CO. *Id.* at n.4. Because of this fact, a state might consider directing its initial CO and HC inspection efforts at heavy duty gasoline powered vehicles only.

120. *Cf. South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185-89 (1939) (holding that local regulatory matters which also affected interstate commerce to some degree may be upheld in the absence of congressional action if they are a rational means of dealing with the problem, do not impose too great a burden on interstate commerce and do not discriminate against interstate commerce).

121. For example, states such as Oregon have enacted vehicle weight and size limitations and methods of enforcement at weigh stations. OR. REV. STAT. § 483.502-.545(1977).

122. See note 96 *supra*.

123. *Id.*

124. WESTERN UNIFORM COMPACT, *supra* note 96, § 34. Section 34 concerns Statutory Vehicle Regulations. It provides that "[t]his agreement [the compact] shall not authorize the operation of a vehicle in any contracting State contrary to the laws or regulations thereof, except those pertaining to registration and payment of fees; and with respect to such laws or regulations, only to the extent provided in this agreement."

125. Oregon and other states have qualifications in addition to vehicle registration which must be met. For example, in Oregon all carriers, interstate and intrastate, must obtain operating authority from the Oregon Public Utility Commission (PUC). ORE. REV. STAT. §§ 767.105, .145, .150, .155 (1977). A fuel permit must be obtained from the Motor Vehicles Division on any diesel

ards.

Because of potential conflicts with these interstate reciprocity agreements, as well as with the Federal Commerce Clause, legislation to inspect interstate heavy duty trucking should be carefully drafted. It must be designed to control only those areas of traditional concern to that state which are not otherwise regulated by a valid federal statute¹²⁶ and which do not infringe on rights of private citizens from other states. Whether local I/M legislation regulating out-of-state heavy duty commercial trucking would violate the Commerce Clause depends upon: (1) whether the law achieves its stated purpose;¹²⁷ (2) whether the effects of the law discriminate against interstate commerce;¹²⁸ and (3) whether the interference with interstate commerce is minimal or substantial, considering the ends to be achieved and the alternative means available to achieve those ends.¹²⁹

State legislation would most likely meet the first test if it could be demonstrated that environmental as well as purported energy benefits were being achieved from the inspections.¹³⁰ Secondly, the legislation should be totally non-discriminatory. The legislation should require the same frequency of inspection for interstate trucks as it requires for those trucks operating solely within that state's jurisdiction. The classifications of vehicles subject to inspection, the criteria for certification, and the certification fees should be uniform for all commercial vehicles whether their operation is interstate or intrastate.¹³¹ Thirdly, the legislation should not be burdensome

powered vehicle not subject to the Oregon PUC weight mile tax. *Id.* § 319.510-.880. A permit must be secured from the Oregon Highway Division for any vehicle in excess of maximum legal weight and size. *Id.* § 483.528.

126. 42 U.S.C. § 7416 (1976); *Washington v. General Motors Corp.*, 406 U.S. 109, 115 n.4 (1972) ("[s]tates also retain broad residual power over used motor vehicles"). See also, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.")

127. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree.") See also, note 120 *supra*. But cf. *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520 (1959) (statute requiring contour mud guards in conflict with similar statutes of 45 other states held to impose undue burden on interstate commerce due to impediment on trucks entering Illinois from those other states.)

128. See note 125 *supra*.

129. See, e.g., *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177 (1939); note 114 *supra* (regarding a balancing test).

130. Adequate study of the extent to which the I/M program is reduced in effectiveness by out-of-state heavy duty vehicles should form the basis for legislative findings stating that environmental, as well as energy, benefits would likely be achieved by the legislation. Major urban commercial centers such as New York City, Chicago and Cincinnati might find much more significant increases in their programs' efficiency if such legislation were enacted.

131. For example, Oregon requires carriers, both interstate and intrastate, to obtain a permit

on commerce. To this end, a trucker whose vehicle fails the inspection might be issued a temporary pollution permit, valid for a limited time, to enable him to complete his business on that particular trip into the jurisdiction. Temporary permit fees can be greater than the actual cost to the state of inspection, in order to compensate the state for the excess pollution and also to encourage compliance.¹³² Heavy duty trucking subject to certification requirements of other jurisdictions which are as strict or stricter than the requirements of the inspecting state should also be exempt.¹³³ Also, all new trucks inspected under the Federal New Motor Vehicle Program should be exempt until such time as their operation on the highways warrants inspection.¹³⁴

To further minimize burdens on interstate commerce while minimizing administrative costs to the state, inspections should be combined with other required inspections for heavy duty trucks at "points of entry" into the jurisdiction.¹³⁵ To avoid a duplication of inspections and a multiplication of inspection points, a program of I/M inspection in industrial states for heavy duty interstate trucks should be made statewide. A state such as Oregon, whose target area represents a small portion of its total area, might find such a statewide inspection program inappropriate because it would be inspecting many trucks which never travel into or out of the target area. As an alternative, a state in this situation might confine inspection to those trucks which regularly travel to or through the target area. Pursuant to present reciprocity agreements, states have enacted laws requiring truck operators to

for operating authority. See note 125 *supra*. Oregon could compel all such vehicles to submit to a uniform I/M inspection for each type of vehicle as a precondition to the granting of operating permits and empower the PUC to suspend or revoke permits when the owner repeatedly fails to obtain the uniform periodic inspection certification required. Certification fees should be levied uniformly for all types of vehicles, operating both interstate and intrastate.

132. Uniform permit fees for vehicles failing the inspection should be used to offset the cost to the state of the extra manpower and equipment needed to conduct the inspections and the administration of the program. Those trucks passing the inspection should be issued stickers valid for the inspection period so they will not be required to be retested until the sticker expires. A state might also choose to waive the inspection requirement upon payment of the permit fee. For instance, a state could charge \$5 per inspection, whether or not the vehicle passes or fails. It could issue a temporary pollution permit for \$2.50 and waive the inspection. This provision will reduce the actual number of inspections and save time to the trucker. This system would encourage those who make frequent trips into a target area to comply, while not being an undue burden on those who infrequently enter the target area.

133. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (an ordinance requiring dairy inspection to be conducted within 25 miles of the city was disapproved, where the city could rely on certification by inspectors outside that area).

134. See 42 U.S.C. § 7521 (1976). It is not clear when a new motor vehicle ceases to be a "new motor vehicle." See *id.* §§ 7541(n)(3), 7543(a), (d). For this reason, and because of the presumed effectiveness of EPA factory imposed emission inspections, a state should exempt a new, heavy duty motor vehicle from its initial inspection requirement.

135. See Or. Ad. Rules, ch. 860, sub. 5 (rules relating to motor carriers).

file periodic reports showing pro-rated mileage traveled in each state.¹³⁶ Oregon could therefore require I/M inspection for those trucks which travel an established percentage of miles in Oregon and offer an exemption to those truck operators who can demonstrate that their vehicles do not operate in the target area on a regular basis.¹³⁷

While it is legally possible for states to inspect certain classifications of vehicles operating in interstate commerce, state officials should be aware of the potential economic consequences stemming from such inspection.¹³⁸ Some trucking concerns may avoid the target areas or inspecting jurisdictions to eliminate the possibility of inspection and potential fines. Should this occur, complying trucking firms within and outside of the inspecting jurisdiction may grow or increase in number to meet the demand for the transportation of goods into the inspecting jurisdiction. Such relocations of commerce would have greater disadvantageous impact on some jurisdictions than in others. In those jurisdictions where the impact is likely to be severe, it can be expected that state officials will be quite reluctant to impose emission inspection of interstate trucking because of the political repercussions they will face, not only from their constituents but from trucking lobbies.¹³⁹

Assuming, however, that legislation is enacted, it must be determined where the inspection will take place and who will do the inspecting. Considering the heavy volume of truck traffic in many locations, any inspection of interstate trucking at "points of entry" will necessarily be random, because of constraints on the state's budget and manpower.¹⁴⁰ Granting exemp-

136. In Oregon, annual prorate applications must be filed with the Proration and Reciprocity Section of the Motor Vehicles Division. OR. REV. STAT. § 481.645 (1977); OREGON MOTOR VEHICLES DIVISION DEP'T OF TRANSPORTATION, PROPORTIONAL REGISTRATION INSTRUCTIONS, UNIFORM VEHICLE REGISTRATION AND RECIPROCITY AGREEMENT (1978).

137. Such a percentage could be determined either upon the history of the fleet or, for a new carrier, upon areas in which that firm intends to operate. For large fleets, basing the percentage on total fleet miles may be inappropriate. See WESTERN UNIFORM COMPACT, *supra* note 96, at §§ 50, 52. A large fleet may escape inspection because fleet miles in other states greatly exceed fleet miles within the inspecting jurisdiction, even though in-state fleet miles may be substantial. For this reason, inspection should be on a truck-by-truck basis.

138. With regard to possible economic impact to the inspecting state, opinion has been expressed in Oregon that an I/M requirement for interstate commercial vehicles subject to reciprocity agreements might result in retaliation by sister states in the form of abrogation of existing reciprocity agreements with a resulting loss of revenue to the state. Memorandum from Director of DEQ to EQC, Vehicle Emission Testing Rule—Authorization for Public Hearings to Consider Amending Vehicle Emission Testing Rules to Include Gasoline Powered Heavy Duty Vehicles, attachment A (Feb. 10, 1977).

139. The assertion has been made that "[t]hese already weak state agencies are exposed to intensive pressure from politicians, industry, unions, and citizens reacting to the costs (economic and otherwise) of controlling pollution and the possibility of unemployment and curtailment of economic development." Stewart, *supra* note 7, at 1201.

140. Of the average of 93,644 vehicles computed by average daily traffic counts at the

tions to those trucks which have complied with inspection requirements of other jurisdictions will reduce the number of vehicles subject to inspection. A jurisdiction could also provide out-of-state trucking firms an exemption based upon proof of self-inspection if that firm is based in a state having no inspection requirements. But any out-of-state compliance measure would be difficult for the inspecting state to enforce, other than through random inspection of out-of-state trucks.

In addition to the difficulties faced by the inspecting state, hardships may be experienced by truckers who are confronted with dissimilar standards and tests adopted by the various states in which they operate.¹⁴¹ Moreover, such standards may create a burden on interstate commerce which could outweigh the benefits to be gained from such inspections.¹⁴²

Because of the possible political repercussions, the practical constraints facing states desiring to inspect interstate trucking, and the possibility of dissimilar state inspection laws, the inspection of interstate commercial trucking is perhaps an issue which should be addressed by Congress. Congress should act at least to the extent of requiring the EPA Administrator to set uniform inspection standards for each and every make and model of in-use heavy duty vehicle engaged in interstate commerce. At the same time, Congress should authorize the EPA Administrator to prescribe a uniform emission test that can be used by states which choose to inspect such vehicles. Congress could go a step further and allow trucking firms to self-inspect their fleets, utilizing the uniform standards and the uniform test developed by the EPA. Such a program of fleet self-inspection could be supervised by either the EPA or the Department of Transportation. Congress might provide that certification by either of these agencies would exempt any fleet vehicle from any state emission inspection. The net result of such a program, if successful, would greatly reduce the number of inspections that a state wishing to inspect heavy duty commercial trucking would have to conduct.

Such federal decision-making would relieve the political pressure which state and local legislators will experience when and if their states consider the inspection of heavy duty interstate trucking. Federal decision-making would also do much to remove the incentive for trucking firms to

Portland-Vancouver interstate bridge (both directions), 7.3% of the total were heavy duty trucks. See TRAFFIC VOLUME TABLES, *supra* note 117.

141. For example, different jurisdictions might employ a short cycle idle emission test such as a Clayton Key Mode Test, or a 2,500 rpm test, or the Federal 3-Mode Test. For a description of the various short test procedures and varying results obtained, see Dekany, *Development of a Short Test for Section 207(b)—A Status Report*, in REPORT OF THE FOURTH NORTH AMERICAN MOTOR VEHICLE EMISSION CONTROL CONFERENCE 146 (1975).

142. See, e.g., *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520 (1959).

relocate their operations to pollution havens or to avoid entry into areas which require inspection.

CONCLUSION

A mandatory vehicle I/M program such as Oregon's confers benefits by improving overall air quality and may increase fuel economy through encouragement of proper vehicle maintenance. An I/M program is most effective when targeted to specific problem areas. Targeting a program to areas having demonstrable air pollution problems would probably result in the greatest amount of public cooperation and present the fewest legal and economic difficulties.

The states can and should play a major role in developing innovative variations to be used in tailoring I/M programs to the states' specific needs. A state I/M program gives state citizens the opportunity to determine the means by which national clean air goals will be achieved in their own state. Furthermore, I/M programs in general have proved to be minimally burdensome on a state's budget and on the local motorist. These advantages of state action serve to dispel the notion that the success of comprehensive federal air pollution control programs need be gravely compromised by their dependence on state and local governments. Because of its control over the automobile, a state should take the initiative in implementing I/M. State implemented I/M programs have the advantage of preserving local self-determination because the flexibility inherent in an I/M program allows voters to modify the program to meet changing needs as they arise locally, so long as those modifications do not significantly undermine the state's ability to implement its Transportation Control Plan.

States which share a common air pollution problem from the motor vehicle should, through cooperative efforts, seek solutions which are economically and administratively acceptable to the involved states. An I/M program can make a significant contribution to the alleviation of interstate mobile source air pollution.

The inspection of passenger cars should remain the exclusive province of the states. The present constitutional ability of states to inspect heavy duty commercial vehicles engaged in interstate commerce is clear. However, because of practical political, economic and administrative considerations, no state has yet attempted to inspect heavy duty vehicles registered outside its jurisdiction. Congress, assuming it does not wish to preempt control of air pollution generated by heavy duty interstate trucking, can facilitate state inspection by passing laws establishing uniform emission standards and tests for such vehicles.

The Federal Clean Air Act mandates the solution to the national problem of air pollution by calling for action by the states. An I/M program affords the states the opportunity to fulfill this duty without sacrificing any of

their traditional prerogatives. Because of the growing impatience of Congress, the EPA, and certain environmental groups, it is imperative that state officials review with more profound interest their policies regarding implementation of such transportation control measures as I/M.