Let's Clear the Air Once and for All: Municipal Liability for Failing to Comply with Section 110 of the Clean Air Act

G. Nelson Smith
LET'S CLEAR THE AIR ONCE AND FOR ALL: MUNICIPAL LIABILITY FOR FAILING TO COMPLY WITH SECTION 110 OF THE CLEAN AIR ACT

G. Nelson Smith*
Evelio M. Grillo**

Deteriorating air quality is one of this nation's most severe contemporary problems. The country's continued urbanization, economic expansion, and technological progress contribute directly to this growing problem. As a result, the atmosphere over some densely populated urban areas is nearly saturated with air pollutants. Moreover, for more than a generation there has been substantial evidence that air pollution detrimentally affects the health and welfare of the residents in many urban and industrialized communities.

Although the federal government began addressing air pollution concerns as early as 1955, it was not until the Clean Air Amendments of

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* Attorney, San Francisco, California; J.D. University of Virginia 1986; Certificate of Achievement, University of Oslo, 1981; B.S. Howard University (Magna Cum Laude) 1982. Special thanks to my wife, Susan, for her love, patience, and support while I was preparing this Article, and my secretary, Tess, who took the extra time and effort to make this Article a reality.

** Attorney, San Francisco, California; J.D. Harvard University 1985; B.S. University of California - Berkeley, M.P.P. (1980), B.A. (1976). Special thanks to my wife Andrea, and my daughters Saamra and Christina for their love, support, and understanding while I was preparing this Article.


2. See id. (explaining these trends have created both problems with environmental contamination with air pollution and problems with solid waste disposal).


1970\(^6\) ("the Act") that Congress authorized the federal government to implement specific procedures to reduce air pollution.\(^7\) The Act directs each state to take primary responsibility for maintaining its own air quality.\(^8\) Under the Act, Congress mandated that states meet detailed air quality standards within a specified timetable.\(^9\) To meet these air quality standards, the Act requires each state to submit a State Implementation Plan (SIP).\(^10\) The Act provides that a state must meet a specified "ambient air" quality standard within three years.\(^11\) The statute required every state to draft a timetable, and to provide for any other necessary measures to ensure compliance with national air quality standards.\(^12\)

The Act imposes penalties for non-compliance. If a state fails to develop or maintain a SIP, municipal governments suffer because the federal government may ban federal grants used to improve highways and expand answers.\(^13\) Even if a state fails to authorize funding for a municipality to comply with the Act, the federal government still could withhold a municipality's highway and grant funding until the state and/or municipality makes a good faith effort to improve its air quality.\(^14\) This article

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7. § 109, 84 Stat. at 1679.


11. § 110(a)(2)(A), 84 Stat. at 1680 (codified as amended at 42 U.S.C. §§ 7407, 7415-18 (1988 & Supp. V 1993)); see Train, 421 U.S. at 66-67. Ambient air refers to "outdoor air used by the general public." Train, 421 U.S. at 65. The Act required HEW to establish national ambient air quality standards within 30 days after the enactment of the Act. § 109 (a)(1)(A), 84 Stat. at 1679. The Administrator was required to promulgate these standards following a 90 day notice and comment period. § 109(a)(1)(B), 84 Stat. at 1679. Congress prescribed two types of standards: primary standards, considered necessary to protect public health; and secondary standards, considered necessary to protect the public welfare from harmful effects caused by pollutants in the ambient air. Id. § 109(b), 84 Stat. at 1680. The Act allowed each state nine months to submit a proposal to the Administrator to implement and maintain these primary and secondary standards. Id. § 110(a)(1), 84 Stat. at 1680.


14. See id. § 176(b), 91 Stat. at 750; see also 45 Fed.Reg. 81,746 (Environmental Protection Agency 1980). Actions have been brought against states to limit federal funding under § 176. Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pa.,
examines the problems faced by many municipalities attempting to comply with the Clean Air Act. It begins by discussing the historical attempts to control air pollution prior to the enactment of the Clean Air Act. Next, after a background discussion of the Clean Air Act and section 110, the article then reviews the classification of municipalities and the difficulties and confusion municipalities have complying with the Clean Air Act. In addition, the article provides specific examples of municipalities that have encountered specific difficulties with the Act. Lastly, the article discusses problems associated with municipal liability and offers a possible solution.

I. HISTORICAL ATTEMPTS TO CONTROL AIR POLLUTION PROBLEMS IN MUNICIPALITIES PRIOR TO 1970

Air pollution has been a serious problem in urban areas since the industrial revolution. In the United States, twenty-three of twenty-eight cities with a population of greater than 200,000 had enacted air pollution laws by 1912. These early laws, however, were virtually ineffective.

Localized air quality crises in Donora, Pennsylvania and Los Angeles, California during the 1940s forced the nation to recognize that urban smog was a problem. In 1948, in the industrial town of Donora, Pennsylvania, air pollution caused the death of twenty of the town's 14,000 residents, and caused many others to become sick. Furthermore, smog pollution developed into a serious problem in Los Angeles, California in the early 1940s. The cause of the smog was traced to hydrocarbons and nitrogen oxides from automobile emissions. In London in 1952, author-
ities blamed nearly 1,600 deaths on the city's famous "killer smog." 21 Shortly thereafter, it became apparent that serious air pollution problems such as smog affected many major cities. 22

In response, Congress passed the Air Pollution Control Act (APCA) of 1955. 23 Initially, APCA provided encouragement and assistance for the states to tackle air pollution problems. 24 Treating air pollution as a local problem, 25 Congress placed the primary responsibility for implementing air pollution abatement programs on state and local governments. 26 Accordingly, APCA did not provide the federal government with authority over the states in the area of pollution control. 27

Congress originally established APCA as a five-year research and cooperation program beginning July 1, 1955, and continuing until June 30, 1960. 28 Congress authorized up to $5,000,000 annually for the Secretary of Health, Education and Welfare (HEW) to conduct air pollution research. 29 The Secretary was to use the money for grants-in-aid to both local governments and to public and private educational institutions for research to control the nation's air pollution. 30 Congress designed the grants-in-aid to permit state and local agencies to tailor their programs to address the types of air pollution that directly affect their respective communities. 31 Determining the causes and eliminating air pollution was so complicated, however, that Congress recognized the impracticability of designing an immediate solution. 32

Technology, first discovered that automobile exhaust was the foremost cause of smog in Los Angeles. Id. 21. Id. at 67. In 1970, the President's Council on Environmental Quality termed this was considered "[t]he worst air pollution disaster of modern times." Id. 22. Id. at 62. 23. Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955). 24. Id. § 1, 69 Stat. 322; see also Train v. Natural Resources Defense Council, 421 U.S. 60, 63 (1975). 25. See ENVIRONMENTAL QUALITY REPORT, supra note 15, at 67 (placing primary responsibility of controlling air pollution with the states). 26. Id. 27. Id. Congress' policy under the Act was to "support and aid" the States, not to control them. Id.; see also Abramowitz v. U.S. Envtl. Protection Agency, 832 F.2d 1071, 1073 (9th Cir. 1987) (outlining congressional efforts to address pollution problems). 28. § 5(a), 69 Stat. at 322-23. 29. Id. 30. Id.; see also S. REP. NO. 389, supra note 3, at 3, reprinted in 1955 U.S.C.C.A.N. at 2458. 31. See S. REP. NO. 389, supra note 3, at 3, reprinted in 1955 U.S.C.C.A.N. at 2459. Congress was also concerned with protecting the sovereignty of state and local governments. Id. 32. See id. at 2, reprinted in 1955 U.S.C.C.A.N. at 2458 (authorizing a five-year time period because anything shorter would be ineffective for testing theories and completing studies).
After five years of research, Congress determined that air pollution problems in urban areas were primarily the result of automobile exhaust.\textsuperscript{33} As a result, Congress passed a law authorizing the Surgeon General of the Public Health Service to conduct research on the impact of automobile exhaust on human health.\textsuperscript{34} Congress also directed the Surgeon General to determine the level of vehicle exhaust that automobiles could safely discharge in the atmosphere.\textsuperscript{35} These reports were to be submitted to Congress by June 7, 1962.\textsuperscript{36}

In 1963, Congress decided that more federal action was necessary to control, and ultimately eliminate, local air pollution problems.\textsuperscript{37} In that year, President Kennedy, in his special health message, noted that scientific data evidenced a causal connection between air pollution and both aggravated heart conditions and chronic respiratory disease, especially among the elderly.\textsuperscript{38} Moreover, the President noted that damages from air pollution were costing the United States approximately $11 billion dollars each year, with $500 million in agricultural losses alone.\textsuperscript{39} Consequently, to address these and other concerns, Congress passed the 1963 version of the Clean Air Act.\textsuperscript{40} The new legislation replaced the Air Pollution Control Act of 1955,\textsuperscript{41} strengthening the power of HEW in air pollution research and control.\textsuperscript{42} Furthermore, the legislation created several new programs to control air pollution problems at the local and federal levels.\textsuperscript{43}

\begin{footnotes}
  \footnotetext[34]{§ 1, 74 Stat. at 162.}
  \footnotetext[35]{\textit{Id.}}
  \footnotetext[36]{\textit{Id.} § 2. The Surgeon General also was directed to submit any recommendations to further safeguard public health. \textit{Id.}}
  \footnotetext[39]{\textit{Id.}}
  \footnotetext[41]{\textit{Id.; see supra notes 23-32 and accompanying text (discussing the Air Pollution Control Act).}}
  \footnotetext[42]{\textsection\textsection 3-5, 77 Stat. at 394-99 (granting the Secretary of HEW powers to research, supply grants, and generally work with states to abate air pollution).}
  \footnotetext[43]{\textit{See H.R. Rep. No. 508, supra note 37, at 4, reprinted in 1963 U.S.C.C.A.N. at 1262 (listing the two new programs as four years of federal grants to state and local agencies and federal assistance and participation to curtail air pollution); see also \textsection\textsection 4-5, 77 Stat. at 395-99. The 1963 Act appropriated $5 million dollars for the fiscal year ending June 30, 1964 for grants to air pollution control agencies. \textsection 13(a), 77 Stat. at 401. Coupled with the $13 million dollars authorized by ACPA, the total authorized appropriations to be spent on air pollution control equalled approximately $18 million dollars for fiscal year 1964. H.R.}
In 1965, Congress expanded the federal government's authority to regulate automobile exhaust under the Motor Vehicle Air Pollution Control Act.\textsuperscript{44} To further control air pollution, Congress authorized additional grant money.\textsuperscript{45} Congress realized that it needed to be more aggressive in dealing with the problem of air pollution.\textsuperscript{46} Studies indicated that air pollution was worsening in municipalities throughout the country.\textsuperscript{47} Congress believed the only way to stop this downward spiral was to step in and take control by establishing national standards.\textsuperscript{48} In this way, the 1965 Act envisioned a greater role for the federal government in controlling air pollution.\textsuperscript{49}

In 1967, Congress altered this focus in the Air Quality Act.\textsuperscript{50} While the Air Quality Act of 1967 continued all previous major air quality activities under HEW, it also provided the basis for the regionalization of pollution controls.\textsuperscript{51} Congress authorized states to establish air quality standards for their respective regions, and required states to develop and implement plans to meet those standards.\textsuperscript{52} State governments were required to set the maximum concentrations of permissible air pollutants in their


\textsuperscript{45} § 209, 79 Stat. at 995 (appropriating additional funds for support of air pollution control programs in fiscal years 1966-69).

\textsuperscript{46} \textit{See H.R. REP. No. 899, supra note 1, at 3, reprinted in 1965 U.S.C.C.A.N. at 3610.}

\textsuperscript{47} Id. at 4, reprinted in 1965 U.S.C.C.A.N. at 3610-11.


\textsuperscript{49} § 101, 81 Stat. at 485. One year later, Congress passed the Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (1966). Congress acknowledged that the funds available for state and local air pollution patrol programs grew approximately 65% in three years. \textit{HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, H.R. REP. No. 2170, 89th Cong., 2nd Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 3473, 3475.} Moreover, a total of 120 financial awards had been made to states. These awards created 80 new air pollution programs. \textit{Id.} Even though the local, state, and regional levels were making great strides in addressing air quality problems, Congress realized that more improvement was necessary. \textit{Id.} Numerous cities and states still lacked control programs. \textit{Id.} Further, where control programs existed, a number of the programs inadequately enforced and controlled air pollution regulations. \textit{Id.} As a result, in the 1966 Act, Congress continued funding federal grants to spur efforts at the local, state, and regional levels. \textit{Id.}


\textsuperscript{51} \textit{See id. § 107(a), 81 Stat. at 490-91 (requiring the establishment of air quality control regions); see also Train v. Natural Resources Defense Council, 421 U.S. 60, 64 (1974).}

\textsuperscript{52} § 108(c), 81 Stat. at 492.
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respective regions within a certain time period. Moreover, states were to identify the sources of air pollution within their region that needed to be controlled to meet regional air quality standards. HEW assisted the states by disseminating air quality criteria and information on recommended control technology, and determining the adequacy of state standards. Most importantly, the Act gave HEW enforcement powers to insure the development and implementation of air quality standards.

II. The Clean Air Act

A. Background to the Passage of Section 110 of the 1970 Clean Air Act

Shortly after Congress passed the 1967 Act, the Executive Branch became more active in addressing the air pollution problem in urban areas. On May 8, 1969, President Richard M. Nixon established the Cabinet-level Environmental Quality Council. The Environmental Quality Council, chaired by the President, was the first organizational entity with the sole responsibility of addressing environmental problems. President Nixon also advocated the passage of several environmental acts.

On January 1, 1970, the President signed into law the National Environmental Policy Act (NEPA), which established the Council on Environmental Quality (CEQ). NEPA charged the CEQ with coordinating all environmental quality programs as well as reviewing federal programs that affect the environment. NEPA established a national policy on the environment, and required federal agencies to consider environmental factors in their decision-making.

53. Id. (setting a 180-day time limit).
54. See generally id. (requiring states to adopt plans to conform to the national standards).
55. Id.
56. § 108(c), 81 Stat. at 491-94.
58. Id.
60. § 202, 83 Stat. at 854. The establishment of the CEQ and the passage of the Environmental Quality Improvement Act of 1970, Reorganization Plan No. 2 of 1970, abolished the Environmental Quality Council. ENVIRONMENTAL QUALITY REPORT, supra note 15, at 20. The Reorganization Plan, like the CEQ, was established under the Executive Office of the President, as a Domestic Council. Id.
61. See § 204, 83 Stat. at 855 (listing the duties and functions of the Council); ENVIRONMENTAL QUALITY REPORT, supra note 15, at 20-21 (describing the Council's responsibilities).
President Nixon was determined to have the federal government lead the way in cleaning up the environment. For example, on February 4, 1970, the President signed an Executive Order compelling all federal agencies to monitor and reduce their air and water pollution. On February 10, 1970, he submitted a number of legislative proposals, designed to improve the air quality program, that affected federal agencies and the entire nation. Specifically, the President proposed national quality standards, providing states with the option of adopting more stringent standards. It was the President's belief that national uniformity would enhance the enforceability of standards and the potential for developing a workable plan of abatement.

On July 9, 1970, the President delivered a plan to Congress to establish the Environmental Protection Agency (EPA), resulting in the consolidation of environmental pollution responsibilities from differing federal government agencies into one independent agency. The EPA unified five separate programs into one independent cabinet-level agency. The EPA acquired the duties of the National Air Pollution Control Administration and the Federal Water Quality Administration, giving it extensive power to govern air and water pollution. Therefore, the EPA had the

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64. President's Special Message to Congress on Environmental Quality, PUB. PAPERS 94 (Feb. 10, 1970).
65. Id. at 103.
66. Id.
67. Id. Under the President's proposal, states had one year to submit a plan detailing how they would enforce the national standards, including the associated emission standards. Id. In addition, the proposal authorized the federal government to enforce the standards if the air quality in a given state or region fell below the national level. Id. at 104. The President also proposed that the CEQ conduct and direct an extensive research and development program to produce an unconventional, pollution-free vehicle. Id. at 101. To stimulate private developers, the President's proposal included a program for the government to purchase these privately developed unconventional vehicles. Id.
68. ENVIRONMENTAL QUALITY REPORT, supra note 15, at 24. From April 6, 1970, to July 9, 1970, the CEQ established three advisory committees. Id. at 23. The first committee “advised the Council on the impact of current federal, state and local tax structures on the environment.” Id. The second committee, the Legal Advisory Committee, established on April 30th, “advise[d] the Council on a broad range of environmental legal questions.” Id. Moreover, on the same day, the CEQ issued interim guidelines which required each federal agency to promulgate internal procedures for implementing Executive Order No. 1154. Executive Order No. 1154 required that federal agencies monitor their own activities geared toward promoting environmental quality. Finally, on July 9, 1970, a task force convened regarding the development of a non-polluting car. Id. at 23.
69. Id. at 25.
70. Id.
authority to implement both the Clean Air Act and Federal Water Pollution Control Act.\textsuperscript{71}

Despite many of the aggressive approaches taken by the President, the CEQ was not totally satisfied with the efforts to curb pollution.\textsuperscript{72} In 1970, the CEQ estimated that air pollution was causing billions of dollars of annual repair and maintenance costs to property and resources.\textsuperscript{73} Consequently, in August of 1970, the CEQ recommended that the President implement a program to address pollution problems.\textsuperscript{74} It was against this backdrop that Congress passed the Clean Air Act Amendments of 1970.

### B. Section 110 of the Clean Air Act: An Overview

Section 110 of the Clean Air Act originally was intended to prevent one state from foisting its pollution on another.\textsuperscript{75} To do so, the Act required all states to implement stringent air quality standards.\textsuperscript{76} As amended, section 110 provides that states must adopt plans to implement, maintain, and enforce air quality standards promulgated by the EPA within three years after their adoption.\textsuperscript{77}

Section 110 of the Clean Air Act also includes enforceable emission limitations and control measures for compliance.\textsuperscript{78} If a state is relying on

\textsuperscript{71} Id. The EPA's initial budget was approximately $1.4 billion with nearly 6,000 federal employees. Id. The purpose of such a large budget and staff was to address problems that the previously fragmented environmental protection programs failed to manage. Id.

\textsuperscript{72} See id. at 88 (outlining the CEQ's future recommendations).

\textsuperscript{73} Id. at 72.

\textsuperscript{74} Id. at 88. According to the CEQ, the program should designate national air quality standards, tighten enforcement procedures, and establish fines of up to $10,000 a day for a violation. Id. The CEQ also recommended programs to improve state and local control agencies. Id. Specifically, the CEQ stated:

Highest priority should be given to increasing personnel, monitoring, and other control and enforcement activities. The recently developed program of assigning Federal personnel to the agencies is a positive step. But greatly expanded training efforts and higher pay are necessary to provide the personnel needed for effective air quality management.


\textsuperscript{76} Id.


\textsuperscript{78} 42 U.S.C. § 7410(a)(2)(A) (1988 & Supp. V 1993). In addition to the adoption of an implementation plan for primary ambient air quality standards, section 110 requires states to adopt a plan to implement, maintain, and enforce national secondary ambient air quality standards within a reasonable time after promulgation of the standard by the Administrator. § 7410(a)(2)(A)(ii). The secondary compliance plan may be adopted and submitted to the Administrator separately, or as part of the primary plan. § 7410(a)(1).
a local or regional government agency or entity to ensure adequate implementation of the plan, that local entity must provide assurances that the plan will be implemented according to the Act.\textsuperscript{79} State boards and bodies charged with the responsibility of approving permits and enforcement orders must show that they have a "majority of members who represent the public interest," and the members of the permitting board must disclose any conflicts of interest to the EPA.\textsuperscript{80}

Once a plan is determined to be complete the EPA must act on the plan within twelve months.\textsuperscript{81} This required action may take the form of

\begin{itemize}
\item \textsuperscript{79} 42 U.S.C. § 7410(a)(2)(E) (1988 & Supp. V 1993). The programs must contain the emission limitations and control measures specified within the plan and must provide for the regulation and modification of any stationary source to assure that national ambient air quality standards are met. \textit{Id.} The enforcement plan may provide for periodic reports. § 7410(a)(2)(F)(ii) (Supp. V 1993).

As a condition for the issuance of any permit under the Act, the owners and operators of stationary sources must show to the satisfaction of the permitting authority that the technology used to achieve continuous emission reduction will enable the source to comply with the standards, and that any construction or modification, or operation, of the source will be in compliance with other requirements of the Act. The control measures and techniques specified by the statute include fees, marketable permits, the sale of emission rights, and other economic incentives. § 7410(a)(2)(A) (Supp. V 1993). Appropriate monitoring devices, methods and procedures and systems are imperatives of the plan. § 7410(a)(2)(B) (Supp. V 1993). The monitoring system must "monitor, compile, and analyze data on ambient air quality" standards, § 7410(a)(2)(B)(i) (Supp. V 1993), and provide the data to the EPA upon request. § 7410(a)(2)(B)(ii) (Supp. V 1993).

Closely related to the monitoring provisions are Section 110's modeling provisions, which require state implementation plans to provide for air quality modeling as directed by EPA. § 7410(a)(2)(K)(i) (Supp. V 1993). Their purpose is to predict the effect of those emissions for which there is an ambient air quality standard. \textit{Id.} § 7410(a)(2)(F)(i).

In addition, the state plan must adopt non-interference prohibitions on any source or other type of emissions activity within a state, precluding the source from emitting air pollutants in amounts which will either "contribute significantly to nonattainment . . . or interfere with maintenance by any other State with respect to any such national primary or secondary ambient air standard," § 7410(a)(2)(D)(i)(I) (Supp. V 1993), or will "interfere with measures required to be included in the implementation plan for any other State." § 7410(a)(2)(D)(i)(II) (Supp. V 1993). This particular requirement of the plan is a "tall smokestack" prohibition intended to prevent states from exporting emissions to other states by the use of technologies designed to discharge emissions high into the atmosphere.

Additional requirements of the plan call for the states to demonstrate that the state agency will be adequately staffed, funded, and empowered to discharge the federal mandate. \textit{Id.} § 7410(a)(2)(E). Finally, each plan must include retrofit and monitoring requirements for operators of stationary sources. \textit{Id.} § 7410(a)(2)(E)(i) (Supp. V 1993).

\item \textsuperscript{80} 42 U.S.C. § 7428(a)(1)-(2) (1988).

\item \textsuperscript{81} 42 U.S.C. § 7410(k)(2) (Supp. V 1993). Not less than two provisions of Section 110 require the state plan to address emissions from stationary sources. \textit{See} § 7410(a)(2)(K)(i), (F)(i) (Supp. V 1993). These include monitoring and permitting requirements. The monitoring requirements include the installation of monitoring equipment, periodic reporting on the quality and quantity of emissions, and public access to the reports. \textit{Id.} § 7410(a)(2)(F). The permitting provisions of Section 110 also mandate that states require owners of each major stationary source to pay fees to the permitting authority sufficient to
approval, disapproval, or conditional approval.\textsuperscript{82} Plan revisions may also be conditioned on the state's commitment to establish enforceable procedures within one year of the plan revision's approval.\textsuperscript{83} If the state fails to meet the terms of its commitment within the allotted timeframe, the conditional approval is rescinded and the plan will be disapproved.\textsuperscript{84}

cover the costs of issuing the permit, and if issued, to cover the "costs of implementing and enforcing the terms and conditions of any such permit." § 7410(a)(2)(L).

A state implementation plan may be adopted only after reasonable notice and public hearing and consultation with local governments. § 7410(a)(1). Though undefined by section 110, reasonable notice and public hearing has been interpreted by case law to be sufficient when the interested persons are afforded the opportunity to submit comments, data, or other evidence prior to the approval of state plans for implementation of ambient air quality standards. Buckeye Power, Inc. v. Environmental Protection Agency, 481 F.2d 162, 170 (6th Cir. 1973). Though distinct from the public hearing process, section 110 contains requirements for each state plan to incorporate measures to notify the public when the state exceeds any national primary ambient air standard. 42 U.S.C. § 7427 (1988 & Supp. V 1993). A full evidentiary hearing is not required. Buckeye Power, 481 F.2d at 172.

In contrast to the public notice and hearing requirements, the consultation requirements specified by section 110 include consultation with local political subdivisions affected by the state plan, as well as "general purpose local governments, designated organizations of elected officials of local governments and any Federal land manager having authority over Federal land to which the State plan applies ...." 42 U.S.C. § 7421 (1988).

To comply with the requirements of section 110, the state plan also must provide for emergency powers and contain a process for periodic revision. See 42 U.S.C. §§ 7410(a)(2)(g)-(f) (Supp. V 1993). These emergency powers include the authority to abate temporarily any pollution source or combination of sources which present "an imminent and substantial endangerment to public health or welfare, or the environment ..." pending the filing of a civil suit. 42 U.S.C. § 7603 (Supp. V 1993). The temporary abatement may not exceed 60 days. 42 U.S.C. § 7603.

In addition to the periodic revisions of the plan required under Section 110, it contains trade-off provisions which allow the state to eliminate certain requirements, provided the plan is revised to take into account certain policy goals. 42 U.S.C. § 7410(a)(2)(H) (Supp. V 1993). These trade-offs include the elimination of tools in exchange for establishing expanded or improved public transportation needs, as well as transportation measures necessary to establish and maintain ambient air quality standards. 42 U.S.C. § 7410(c)(5) (1988). Other trade-off provisions allow the governor of a state to ask the President to temporarily suspend, for a maximum of four months, any part of the applicable implementation plan because of a national or regional energy emergency. § 7410(f)(1) (Supp. V 1993). To receive a temporary emergency suspension, the governor must find that high levels of unemployment exist in the area of the temporary energy emergency, and that the emergency suspension can alleviate this unemployment. § 7410(f)(2)-(3) (1988).


\textsuperscript{83} § 7410(k)(4).

\textsuperscript{84} Id. In addition to the required completeness findings and action on submitted plans and revisions, the EPA retains discretion to require plan revisions when an "implementation for any area plan is substantially inadequate to attain or maintain the relevant national ambient air quality standard," or to otherwise comply with any other provisions of the Clean Air Act. § 7410(K)(5). The state must submit these revisions no later than eighteen months after receiving notice of the plan's inadequacies. Id. The required findings and notice must be made public. Id.
If a state fails to submit a plan, if a plan or plan revision does not satisfy the Act's requirements, or if the EPA disapproves a plan, the EPA must promulgate a federal implementation plan within six months. The EPA also can correct its own actions without state input on the corrections. If the EPA makes a determination, finding, or disapproval, the EPA may apply sanctions in the form of a prohibition on the awarding of federal highway grants under section 176.

C. Withholding of Grant and Highway Funding When Municipalities Fail to Make Good Faith Efforts to Comply With Section 110

Even if municipalities do not have the legal authority to address the issues associated with the implementation plan, the Administrator may prohibit the Secretary of Transportation from issuing grants or approving projects that fail standards in section 110. The EPA views non-compliance as a result of the state's failure to act. Consequently, the EPA has determined that the state should not benefit from its actions.

There are certain instances, however, when the Secretary of Transportation may provide grants for the construction of sewage treatment works even if the municipal district fails to comply with section 110 of the Clean Air Act. The Secretary of Transportation can fund projects that promote safety and mass transit, and also may fund transportation improvement projects related to air quality improvement or maintenance. Similarly, some sewage treatment works projects may be exempt from the

85. 42 U.S.C. § 7410(c)(1) (1988). Among the limitations on the EPA's discretion to reject a state implementation plan are restrictions prohibiting conditional approval of a plan or a plan requiring a parking surcharge. § 7410(c)(2)-(3). Additional limitations require public hearings in affected areas regarding plans or requirements relating to parking supply or preferential carpool lanes. § 7410(c)(2)(E).
87. See 42 U.S.C. § 7410(m) (Supp. V 1993). These findings may include the failure of a state to submit a complete plan for designated nonattainment areas, disapproval of a submission, or a determination that a state has failed to make a submission that satisfies the minimum criteria as set forth in § 7410(k)(1)(A). See id. § 7509 (Supp. V 1993) Any remedy selected is effective upon the selection by the Administrator of the applicable sanction. Id.
89. See 45 Fed. Reg. 81,746, 81,751 (1980). When San Diego sought to apply for funding separate from California, citing that they did not have the authority to control the appropriations necessary to implement the Clean Air Act, the EPA determined that it was the responsibility of the California legislature to adopt emissions standards. Id. San Diego is represented in that legislature, therefore, they could not apply for funding separately merely because of the legislature's failure to adopt an implementation plan. Id.
90. 45 Fed. Reg. 81,752.
grant prohibition if the EPA determines there is an immediate public health hazard that must be corrected. 92

III. MUNICIPAL LIABILITY

A. Designating Municipal Areas as Non-Attainment Areas and the Problems Associated with Such a Designation

The EPA defines a nonattainment area to include "all the urbanized counties within the metropolitan urbanized area." 93 The census bureau defines an "urbanized county" by determining population density. 94 The definition includes the entire urbanized area because all emissions from the area affect its air quality. 95 Similarly, the air quality of one area may differentiate from another as a result of meteorological and other influences, but the emissions from all counties within a metropolitan area usually affect the ozone problem throughout the area. 96 Generally, counties outside of the urbanized area are not considered because, with their small population size and density, they do not contribute significantly to the air pollution problem. 97

A municipality's designation as a nonattainment area affects its future growth. 98 There have been instances, however, when the EPA sought to place restrictions on counties designated as an attainment area. 99 These

92. 45 Fed. Reg. 81,752. The EPA may also permit the funding of projects "which will improve treatment capability but will not expand usable capacity for future growth." Id. These decisions are made on a case-by-case basis when eligible grantees submit the projects for funding considerations. Id.
93. Id. at 81,755.
94. Id.
95. Id.
96. Id.
97. Id.
99. See 55 Fed. Reg. 26,814, 26,825 (1990). In the Chicago metropolitan area, for example, the EPA designated the counties of Cook, Dupage, Kane, and Lake as nonattainment counties. Id. The EPA sought to place restrictions on the counties of McHenry and Will, counties designated previously as attainment areas. Id. In particular, the EPA placed restrictions on sources which emitted volatile organic compounds (VOCs). Id. When Illinois constructed its Chicago attainment model for its 1979 and 1982 ozone SIP, it recognized McHenry and Will counties' contribution to the ozone problem in the Chicago area by including emission sources located in the respected counties. Id. Thus, the EPA required McHenry and Will counties to meet certain requirements set for nonattainment areas, so that the Chicago metropolitan area could meet the requirements of the Clean Air Act. Id.

The EPA, however, placed the restrictions on only McHenry and Will counties. Id. at 26,826. It refused to place restrictions on the counties of Grudy and Kendall, also located in the Chicago metropolitan area. Id. at 26,825. The agency expressly stated that its refusal to include Grudy and Kendall counties did not mean such restrictions might not be suitable in the future. Id.
restrictions have been implemented in counties with pollution affecting the air quality of the entire metropolitan area. Because of the cost of complying with National Ambient Air Quality Standards, many municipalities believe that they are not the only cause of the municipalities' air pollution problem. Therefore, in some instances, municipalities have challenged their non-attainment designation. On other occasions, municipalities have failed to cooperate with the EPA and to comply with the National Ambient Air Quality Standards.

B. Examples of Municipal Liability Under Section 110

Implementing section 110 of the Clean Air Act has been confusing because municipalities often are unaware of how to comply with section 110, and difficult because they often are not aware of who is responsible for ensuring their compliance with section 110. The following section of this Article will examine the confusion municipalities face under the Clean Air Act. Philadelphia and Pittsburgh are good examples of such problems.

1. Philadelphia and Pittsburgh

Two distinct geographical regions compose the Metropolitan Philadelphia Air Quality Control Region; the coastal plain and the Piedmont Plateau. The Coastal plain is flat and remains less than 220 feet above sea level. The Piedmont Plateau comprises of rolling hills that rise 500 to 600 feet above sea level, and constitutes the majority of the Philadelphia Air Quality Control Region.

As a result of its location near the Delaware Bay and Atlantic Ocean, the Metropolitan Philadelphia Region is subject to moderating influences. The region is exposed to large stagnant air masses, known as Bermuda Highs, which migrate up the coast from the south. They usually last from three to ten days and occur approximately three times per year: late summer, fall, and early winter. These Bermuda Highs result in temperature inversions, and consequently, create air pollution

100. Id.
102. Id.
103. Id. The “fall Line” (sic) divides the two geographical regions. Id. Many waterfalls cropped up along the fall line, and the tributaries follow a path from the inland plateaus to the coastal plain. Id. The natural hydraulic power provided by the falls has encouraged the development of many cities along the area. Id.
104. Id. Generally, therefore, there are no extended cold spells or heat waves although the area is extremely humid during the summer. Id.
105. Id.
106. Id.
The potential for air pollution problems increases in this region with heavy fog, which occurs most frequently during the fall and winter months. Compounding the pollution problem, the fog occurs most often over the low-line coastal areas where many of Philadelphia's industries are located.

The Southwest Pennsylvania Air Quality Control Region, which includes metropolitan Pittsburgh and surrounding areas, is located west of the Allegheny Mountains and inhabits the central portion of the Allegheny Plateau. The Allegheny Plateau extends from central New York to southwestern West Virginia. The three major rivers in the area, the Allegheny, the Monongahela, and the Ohio, created the region's rugged terrain. Pittsburgh is located at the point where the three rivers meet.

Valley walls encase the air pollutants contaminants emitted from mills and factories, therefore, the contaminants do not disperse as quickly as they would in open terrain. Atmospheric stability conditions further exacerbate the problem of disbursing air contaminants. Emissions from steel mills, other stationary sources, and motor vehicles often become ensnared by the lower atmosphere late at night and in the early morning. These emissions remain until sunlight disperses the ground fog

107. *Id.*
108. *Id.*
109. *Id.* Wind speed and direction are very important as well. *Id.* Philadelphia is a region with prevailing westerly winds, which contribute to air pollution because most of the region's industries are located to the west of the city. *Id.*
110. *Id.* at 32,888.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 32,888-89. Specifically, the problems associated with atmospheric stability, in this region, are outlined as:

The Allegheny Plateau, shielded to a large extent from the moderating influence of the Atlantic Ocean by the Appalachian Mountains, is for the most part under the influence of continental polar air masses traveling from Canada by way of the Great Lakes or the Great Plains, although during the summer months the area is frequently overrun by maritime tropical air from the Gulf of Mexico. The Pittsburgh area, lying near the normal storm track for much of the year, is subject to moderately high annual amounts of precipitation and cloudiness. The average mean mixing depths usually range between 1040 meters and 1510 meters during spring and summer months, and 340-730 meters during fall and winter months, when episodes of slowly moving anticyclonic circulations, the so-called 'stagnant highs,' are fairly common. Under these conditions the air becomes very stable, especially at night under clear skies when radiational cooling gives rise to pronounced temperature inversions near the ground.

*Id.* at 32,888.
and restores the higher temperature distribution by wiping out the inversion.\textsuperscript{116} Pollutants concentrated in valleys aggravate this condition. Valleys, due to their shape, deter the dispersion of pollutants and the interaction of sunlight.\textsuperscript{117} The combination of geography, wind condition, fog, and emissions from stationary sources creates frequent river fogs. The concentration of pollutants results in severe air quality problems.\textsuperscript{118}

Soon after Congress enacted section 110 of the Clean Air Act, the cities of Philadelphia and Pittsburgh found themselves litigating the validity of their state implementation plan in Pennsylvania v. Environmental Protection Agency.\textsuperscript{119} Pennsylvania was only one of eight states to submit a control strategy prior to the deadline set forth in the Clean Air Act.\textsuperscript{120} Although the EPA approved Pennsylvania's proposed general strategies, it rejected provisions regarding the implementation of the strategies.\textsuperscript{121} To bring Pennsylvania within compliance, the EPA Administrator proposed regulations to conform the Pennsylvania plan to the Act and to further reduce the emission of pollutants from the Philadelphia and Pittsburgh areas.\textsuperscript{122}

\textsuperscript{116} See id. Moreover, the Pittsburgh area sits at the core of the westerly winds of the Temperate Zone. \textit{Id.} at 32,889. In the Temperate Zone, the rugged topography causes large fluctuations from the mean wind velocity. \textit{Id.} Generally, this topical "roughness effect" reduces the mean wind speed because of frictional forces. \textit{Id.} Simultaneously, the wind is directed along the orientation of the valleys. \textit{Id.} These factors tend to cause a higher density of pollutants in the valley areas with industrial and highway sources. \textit{Id.}

\textsuperscript{117} \textit{Id.} An additional effect, in the Pittsburgh area, tends to increase the region's air pollution. The effect, known as the "mountain and valley breeze," generally suppresses the colder air near the bottom of the valleys during nightfall. \textit{Id.} at 32,888-89. This suppression increases the strength of the temperature inversions, thereby retarding their breakup during the day. \textit{Id.}

\textsuperscript{118} \textit{Id.} at 32,889.

\textsuperscript{119} 500 F.2d 246 (3d Cir. 1974).

\textsuperscript{120} \textit{Id.} at 249.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.} In Pittsburgh and Philadelphia, after public hearings about the proposals, a transportation control plan was implemented for the Southwest Pennsylvania and Metropolitan Philadelphia Air Quality Control Regions. \textit{Id.; see} 38 Fed. Reg. 32,884 (1973). Under the Transportation Control Plan, the EPA required the Commonwealth of Pennsylvania to establish a program to ensure that all pre-1968 automobiles in the Allegheny County and Metropolitan Philadelphia regions would be equipped with an appropriate "airbleed" to intake manifold retrofit device. 40 C.F.R. § 52.2039(c) (1974). "An airbleed to intake manifold retrofit is . . . designed to introduce excess air into the intake system of a motor vehicle; this results in a more complete burning of the fuel and thus reduces the amounts of hydrocarbons (unburned fuel) and carbon monoxide (burned fuel) emitted into the atmosphere." 500 F.2d at 249. In particular, the EPA compelled Pennsylvania to submit a plan with regulations necessary to set up such a program. 40 C.F.R. § 52.2039(c) (1974). The Commonwealth was also required to discontinue registering or allowing automobiles on the streets and highways of automobiles which failed to comply with the established standards. \textit{Id.} § 52.2039(d). The Commonwealth was also required to "submit
Pennsylvania challenged these regulations. The Third Circuit, however, rejected all of the Commonwealth's arguments, stating that the EPA's regulations were based upon a respective study. The court stated that the EPA had considered the social and economic impacts of the regulations adequately, and rejected the Commonwealth's argument that the federal government had no authority to enforce federal laws against states and municipalities. The court stated:

In enacting the Clean Air Amendments of 1970, Congress created an interlocking governmental structure in which the Federal Government and the states would cooperate to reach the primary goal of the Act—the attainment of national ambient air quality standards. Under its provisions, state and local governments retain responsibility for the basic design and implementation of air pollution strategies, subject to approval and, if necessary, enforcement by the Administrator. We believe that this approach represents a valid adaptation of federalist principles to the need for increased federal involvement.

Delaware Valley Citizens' Council for Clean Air v. Pennsylvania provides an example of how confusing and detrimental section 110 of the Clean Air Act Amendments could be to municipalities. In this case, a citizens group filed a suit against the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation, the Secretary of the Pennsylvania Department of Environmental Resources, and the EPA. Pennsylvania had never implemented the inspection and

to the Administrator . . . a detailed compliance schedule showing the steps it [would] take to establish and enforce [the] program.” Id. § 52.2039(f).

123. 500 F.2d at 248. Specifically, the Commonwealth argued that the calculations used to conclude that the retrofit device would decrease emissions by 58% were made without any support from the EPA's own engineering data, and that the EPA failed to consider the economic and social impact of the regulations. Id. at 252. The Commonwealth also argued that the case should have been remanded to the EPA to determine if the program was necessary in light of other regulations. Id.

124. See id. at 252.
125. Id. at 253, 261-63.
126. Id. at 262.
128. Id. at 873. In November, 1973, by virtue of its rulemaking authority under the Clean Air Act, the EPA had devised a new control plan for the problems in the Metropolitan Philadelphia and Southwest Pennsylvania Air Quality Control Regions. Id. at 872-73. The plan was designed to fix the problems associated with the original Pennsylvania plan. Id. Pennsylvania, pursuant to the revision, was required to implement the inspection and maintenance program for the Philadelphia and Pittsburgh areas by May 1, 1975. Id. at 873. Unfortunately, Pennsylvania failed to institute the inspection and maintenance program. See id. at 872-73; see also supra notes 119-26 (discussing the case which upheld the EPA regulations).
maintenance program mandated by the EPA regulations. Therefore, the suit sought "to enforce the Pennsylvania SIP requirement for the implementation of an [inspection and maintenance] program in the Pittsburgh and Philadelphia areas."\(^{129}\)

On August 29, 1978, the Commonwealth of Pennsylvania voluntarily entered into a consent decree with the federal government and the Delaware Valley Citizens' Council for Clean Air.\(^{130}\) Under this decree, the Commonwealth agreed to implement an inspection and maintenance program by August 1, 1980.\(^{131}\) Subsequently, the court denied the Commonwealth's motion for a second postponement on implementation, and approved a court-modified version of the emission inspection and maintenance program to begin operations on May 1, 1982.\(^{132}\)

Meanwhile on October 5, 1981, the Pennsylvania General Assembly passed a statute prohibiting the use of public funds to establish an inspection and maintenance program.\(^{133}\) The Commonwealth then urged the court to stop further implementation of the inspection and maintenance program until the Pennsylvania legislature passed legislation to fund the program.\(^{134}\) The court disagreed with the Commonwealth, initially remarking that the parties had entered into the consent decree voluntarily.\(^{135}\) The court also determined that the Commonwealth was financially capable of complying with the consent decree, but chose not to

\(^{129}\) *Delaware Valley*, 533 F.Supp. at 873. On September 23, 1976, the EPA served the Pennsylvania Governor and the Secretary of Pennsylvania Department of Transportation with notices of violation because Pennsylvania failed to implement its inspection and maintenance program. *Id.* On February 18, 1977, the federal government sued the Commonwealth of Pennsylvania for failing to implement the inspection and maintenance program pursuant to the requirements of Pennsylvania's SIP. *Id.*

\(^{130}\) *Id.* at 873-74.

\(^{131}\) *Id.* On March 7, 1980, the Commonwealth received an extension on the date of implementation to May 1, 1981. *Id.* at 874.

\(^{132}\) *Id.* at 874-75. Unable to meet the extended deadline (of May 1, 1981) the Commonwealth requested a further postponement. On May 20, 1981, the court rejected the Commonwealth's request and ordered the commencement of the inspection and maintenance program. *Id.* The court held that the Commonwealth violated the consent decree, and, as a result, ordered the Commonwealth to file, by June 1, 1981, a plan to immediately begin the inspection and maintenance program. *Id.* at 875. On June 16, 1981, the court refused the Commonwealth's motion for reconsideration, and ordered the plan to commence on May 1, 1982. *Id.*

\(^{133}\) *Id.* at 875.

\(^{134}\) *Id.* at 875-76. The defendants argued that because the legislature denied the expenditure of funds for an inspection and maintenance program, the Executive Branch essentially was prevented from complying with the consent decree. *Id.* at 876. The legislature, therefore, created changes in circumstances "which warrant a stay or modification of the consent decree." *Id.*

\(^{135}\) *Id.* at 876.
do so.\textsuperscript{136} Thus, the court held the Commonwealth in civil contempt and enjoined the Secretary of Transportation from issuing grant funding in the Philadelphia and Pittsburgh areas.\textsuperscript{137}

Shortly after the ruling in Delaware Valley, Scanlon v. Commonwealth,\textsuperscript{138} made it more difficult for Philadelphia and Pittsburgh to understand exactly how to comply with section 110, when the municipality does not control funding. The Supreme Court of Pennsylvania held that the Pennsylvania Department of Transportation (PDOT), as an Executive agency, lacked the authority to establish and implement an auto emissions inspection system when PDOT entered into a consent decree calling for such a program.\textsuperscript{139} Moreover, while legislation was passed in an effort to address the issues set forth by the Third Circuit, the court held that the Executive Branch could not gain such power retroactively.\textsuperscript{140}

2. Los Angeles, California

The Metropolitan Los Angeles Air Quality Control Region, also known as the South Coast Air Basin, includes Orange County and the non-desert portions of Los Angeles, Riverside, Santa Barbara, and San Bernardino counties.\textsuperscript{141} In 1990, the South Coast Air Basin covered a ten-thousand-square-mile area containing a population of twelve million people,\textsuperscript{142} making it the largest industrial region in the country.\textsuperscript{143} Moreover, regional forecasts predict substantial growth for the area.\textsuperscript{144}

The South Coast Air Basin has the highest ozone and NO\textsubscript{2} levels, and arguably the worst PM-10 and CO levels in the United States, due in

\begin{footnotesize}
\begin{enumerate}
\item[136.] Id. at 880-81.
\item[137.] Id. at 881, 883. Specifically, the court found that the Commonwealth possessed the resources to comply with the consent decree because prior to the enactment of H.B. 456, through legislative authorization and administrative action, they approved and funded the implementation of an inspection and maintenance program. Id. at 881. The court, thus, concluded that there was no "legal barrier to the implementation of the consent decree other than H.B. 456." Id. In so finding, the court realized that the actions of the legislative branch prevented the executive branch from complying with the decree. Id. Nonetheless, the court attributed the failure to comply to the Commonwealth as a whole, and found that the Commonwealth and other defendants could properly be held in civil contempt. Id.
\item[138.] 467 A.2d 1108 (Pa. 1983).
\item[139.] Id. at 1112-13. The court specifically noted the separate functions of the legislative and executive branches, stating that the legislative branch adopts the programs, while the executive branch implements them. Id. at 1112.
\item[140.] Id. at 1114-15.
\item[142.] 55 Fed. Reg. 36,464.
\item[143.] Id.
\item[144.] Id. For the years 1985 to 2010, the following growth rates were predicted: 37% in population, 68% in vehicle miles, 46% in housing, 40% in vehicle trips, and 47% in jobs. Id.
\end{enumerate}
\end{footnotesize}
large part to the adverse meteorological conditions, terrain, and high population levels. The Basin's air pollution is unique because the region is geographically and meteorologically enclosed within a circle of mountains. Furthermore, the plentiful sunshine and southern California climate intensify the formation of photochemical smog. To further compound the problem, automobiles are the most prominent form of transportation in the area. An abundance of freeways traverse the Basin, thereby encouraging the use of automobiles. Moreover, in 1973, although population grew at a rate of only 1.7% per year, gasoline consumption nonetheless increased substantially because the growth of car owners was three to four percent per year.

In 1973, the Los Angeles Task Force, established by the EPA, concluded that rationing gasoline was not a feasible solution to the motor vehicle emission problem. In addition, the EPA considered a number of measures to address the air pollution problem, including requiring state and local governments to implement transportation policies favoring bus travel and car pools while disfavoring single-passenger automobile travel. The EPA determined that it was authorized to require government authorities to submit proposals explaining how they would implement these transportation policies. The EPA opined that it could require California, as well as Los Angeles, to discontinue its proposed compliance schedule to encourage the use of mass transit vehicles. The EPA also concluded that if California or Los Angeles failed to submit adequate schedules by a specified date, it could bring an enforcement action under the Act, followed by an administrative compliance order or a civil action.

Despite the EPA's pronouncements, Los Angeles still has a tremendous air pollution problem. In response, in November of 1988, the EPA recommended a plan to clean up southern California's polluted air by

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145. Id.
146. 38 Fed. Reg. 31,239.
147. Id.
148. Id.
149. Id.
150. Id. In 1972 for example, there were over ten million persons and six million vehicles in the area. Id.
151. GENERAL COUNSEL OPINION, entitled, LEGAL AUTHORITY TO REQUIRE STATE AND LOCAL OFFICIALS TO SUBMIT COMPLIANCE SCHEDULES FOR TRANSPORTATION CONTROLS 247 (Apr. 18, 1973) (hereinafter referred to as GENERAL COUNSEL OPINION).
152. Id.
153. Id. at 248.
154. See id. at 247. The EPA decided against this option because it would add a layer of bureaucracy and could cause potential conflicts with other authorities. Id.
155. Id. at 248.
limiting traffic access, closing the region’s economy, and relocating the population elsewhere. One year earlier mirroring the Los Angeles Task Force, the EPA had noted that if every car were taken off the street of Los Angeles, the city still would be unable to meet ozone level requirements. Specifically, the EPA noted that to meet ozone level requirements, the city needed to reduce ozone pollution by seventy percent, however, banning cars would reduce pollution by only fifty to fifty-five percent.

In the case of Abramowitz v. Environmental Protection Agency, a party challenged the EPA’s approval of Los Angeles’ carbon monoxide and ozone control measures without requiring a showing that the measures would satisfy the attainment by the deadline. The EPA asserted that it merely deferred any final approval or disapproval of the attainment provisions until a later date. The court rejected the EPA’s argument, noting that the EPA failed to support its action adequately with statutory or judicial authority. The court also rejected the EPA’s argument that, because Congress planned on extending the time-frame allotted under section 110, the statutory deadline was no longer relevant.

156. EPA Solution on Pollution: Leave Town, CHI. TRI., Dec. 1, 1988, at 18. The executive summary of the EPA’s proposal stated: ‘A plan that provides for attainment [of federal ozone standards] within five years would have to prohibit most traffic, shut down major business activity, curtail the use of important consumer goods and dramatically restrict all aspects of social and economic life. . . . Implementation and enforcement of such drastic measures may well be impossible, and could prevent satisfaction of the basic necessities of life. . . . Indeed, a near term attainment [for] ozone would destroy the economy of the [region], so that most of the population would be forced to resettle elsewhere.’

Id.


158. Id.

159. 832 F.2d 1071 (9th Cir. 1987).

160. Id. at 1074.

161. Id.

162. See id. at 1077.

163. Id. at 1079. Five years after the Abramowitz case was decided, the EPA refused to take the necessary action as required by the Act. In Coalition for Clean Air v. Southern Cal. Edison, 971 F.2d 219 (9th Cir. 1992), cert. denied, 113 S. Ct. 1361 (1993), the plaintiffs sought to compel the EPA to prepare a federal implementation plan, as set forth under the Clean Air Act. Id. at 222-23. The court, in holding that the EPA was required to develop a FIP, relied upon the legislative history of section 110. See id. at 228 (relying on 136 CONG. REC. H2771, H2887 (daily ed. May 23, 1990) (statement of Adm. Reilly)). The court pointed out that the “EPA complained directly to Congress that unless the language of § 110(c)(1) were changed, [the] EPA would have to promulgate FIPs for the South Coast.” Id. Congress, however, “declined to change the language of the statute.” Id.
Because of the problems associated with attempting to correct an air pollution problem as severe as Los Angeles', federal officials avoided taking action in a timely fashion. Such inaction is not a result of an unwillingness to act, rather, it is a direct consequence of the many recognized complications and problems.

3. Sacramento, California

The Sacramento Valley Intrastate Air Quality Control Region (Sacramento Region) is located near the center of northern California. Located west of the Sacramento Region is the Coast Range, while the Cascade lies to the north and east of the region. The Sacramento Region consists of parts of fifteen counties, and covers approximately 21,300 square miles. In 1973, the Sacramento Region also contained 1.2 million people, and 840,000 motor vehicles.

For years, California in general, and Sacramento in particular, attempted to control air pollution. In 1973, jurisdiction for controlling air pollution in the Sacramento Region was dispersed among several local air pollution control districts. As with all of California, while stationary source controls were the responsibility of the local and regional organizations, the California Air Resources Board governed the mobile source controls.

From 1970 to 1972, there were numerous violations of federal and state air quality standards in the Sacramento Region. In 1973, the EPA recognized that the Sacramento Valley, the southern portion of the Sacramento Region, suffered from the most severe air quality conditions. In response, the EPA targeted Sacramento County in a specific control strategy. This control strategy, however, did not produce the desired results. In 1989, the Sacramento Region was one of eighteen regions which exceeded federal smog and carbon monoxide requirements, seven of

165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id. Based on an oxidant reading conducted in 1972 in Sacramento, the region needed a 71% reduction in emissions to meet the national ambient air quality standards for oxidants. Id.
171. Id.
172. Id. The control strategy was to include the three counties surrounding Sacramento County (Yolo, Placer, and El Dorado). Id. Its goal was to achieve the national oxidant standard by 1977. Id.
The Clean Air Act which were located in California. During this time, the Sacramento Region exceeded federal ozone standards on sixteen days, the same as the previous year, and the carbon monoxide violations increased dramatically in 1989, from six days in 1988 to eighteen in 1989.

In *League to Save Lake Tahoe v. Trouday*, the League to Save Lake Tahoe maintained that Nevada felt the air pollution problems of Sacramento had spread to Nevada. Appellants charged that certain administrative actions of the Nevada Department of Human Resources, the state agency with authority to implement air pollution laws, failed to consider relevant portions of the Clean Air Act in Nevada’s SIP by allowing the construction of hotel-casinos.

On August 12, 1974, the appellees applied to the Nevada Department of Human Resources for registration certificates to build two large hotel-casinos. The Director of Human Resources rejected the applications initially, finding that the planned construction would violate ambient air standards for carbon monoxide. Nearly a year later, however, in May and April of 1975, the Director issued the certificates based upon revised applications which changed the construction plans substantially so the facilities would not violate the air standards.

The issuing of the certificates was subject to administrative review by the Nevada State Environmental Commission, however, the appellants bypassed this review mechanism and summarily demanded that the De-

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174. *Id.* Even with this increase in violations, Sacramento still ranked in the “moderate” category. *Id.*
175. 598 F.2d 1164 (9th Cir.), cert. denied, 444 U.S. 943 (1979).
176. *See id.* at 1166 (stating that “mitigation” of environmental pollution from northern California was the basis for the claim).
177. *Id.*
178. *Id.* at 1168. Under the Nevada air quality regulations, an owner of a proposed new “complex” source was required to apply for a registration certificate and must submit an environmental evaluation. Because the appellees’ proposed facilities would have included parking for more than 1,000 motor vehicles, Nevada air quality regulations required that they submit environmental evaluations of the projects and obtain registration certificates from the Department of Human Resources. *Id.* at 1167 n.3. If it was shown “that the source [would] prevent the attainment and maintenance of the State and national ambient air quality standards or [would] cause a violation of the applicable control strategy contained in the approved Air Quality Implementation Plan,” the director was prohibited from issuing a registration certificate. *Id.* at 1167-68 (quoting § 13.1.3 of Nevada Air Quality Regulations).
179. *See id.* at 1168.
180. *Id.* at 1168.
partment of Human Resources withdraw the certificates.\textsuperscript{181} The appellants asserted that the certificates were issued invalidly because the planned construction would violate Nevada air quality regulations, as well as emission limitations under section 304 of the Clean Air Act.\textsuperscript{182} When state officials failed to comply with the appellants’ demand, the appellants sued in the United States District Court for the District of Nevada.\textsuperscript{183} The district court dismissed the suit for failure to state a claim upon which relief may be granted, and the Ninth Circuit Court of Appeals affirmed stating:

\[\text{Appellants have failed to allege facts constituting a violation of a specific emission limitation and, therefore, . . . they have not stated a cause of action upon which relief may be granted under § 304(a) of the Act. Appellants' challenge to the administrative determinations made by the Nevada officials pursuant to relevant provisions of the Nevada plan should have been pursued through the administrative review procedures set forth as part of the plan.}\textsuperscript{184}

In short, air pollution problems continue to plague the Sacramento Valley Air Basin.\textsuperscript{185} As a result, the basin is facing the potential of enforcement actions and fines.

4. Albuquerque/Bernalillo

The EPA’s imposition of sanctions against the state of New Mexico for failure to promulgate an approved SIP further illustrates the confusion inherent in municipal implementation of section 110 of the Clean Air Act.\textsuperscript{186} To facilitate compliance with the Clean Air Act, New Mexico officials divided the state into eight Air Quality Control Regions (AQCRs) to measure the National Ambient Air Quality Standards (NAAQS).\textsuperscript{187} One of the AQCRs comprised Bernalillo County, including Albuquerque, as well as sections of two surrounding counties.\textsuperscript{188}

\textsuperscript{181} Id. The appellants argued that the director had abused his discretion because of an inadequate technical analysis. Id. After recalculation, it was shown that substantial violations would occur if the project proceeded. Id.

\textsuperscript{182} See id.

\textsuperscript{183} Id. The appellants sought an injunction against further construction, stating the certificates were invalid. Id.

\textsuperscript{184} Id. at 1174-75.

\textsuperscript{185} See Mecoy supra note 173 (discussing Sacramento’s failure to meet national standards).

\textsuperscript{186} See New Mexico Envtl. Improvement Div. v. Thomas, 789 F.2d 825, 828 (10th Cir. 1986).

\textsuperscript{187} Id.

\textsuperscript{188} Id.
The EPA classified the Albuquerque/Bernalillo area as a nonattainment area for carbon monoxide. To comply with the Clean Air Act's requirements regarding nonattainment areas, New Mexico submitted a SIP, including a vehicle emission control inspection and maintenance program, for EPA approval. The EPA approved the program, which was operated subsequently by the City of Albuquerque and Bernalillo County. After seventeen months of operation, however, the New Mexico Supreme Court invalidated the program as violative of state law. Soon thereafter, the EPA notified the governor of New Mexico that the state's implementation plan would be disapproved, and sanctions might be imposed. A few months later, in September 1984, the EPA reminded the governor of the agency's intended actions, and published a notice of proposed rulemaking in the Federal Register. Later, the EPA on March 4, 1985, finally disapproved the SIP and imposed sanctions. These sanctions included cutting off Clean Air Act funds acquired directly by Albuquerque and Bernalillo County, as well as withholding a part of the total Clean Air Act funds that New Mexico received, equal to the percentage of New Mexico's population currently located in the Albuquerque/Bernalillo region.

189. Id. A nonattainment area is one in which any air pollutant is calculated to exceed any national ambient air quality standard for that pollutant. 42 U.S.C. § 7501(2) (1988). In areas, such as the Albuquerque/Bernalillo AQCR where the requisite carbon monoxide levels have not been achieved, the Clean Air Act requires that a vehicle emission control inspection and maintenance program be submitted, approved, and implemented as part of the SIP. § 7502(b)(11)(B).

190. Thomas, 789 F.2d at 828.

191. Id. Nevada law permits counties or municipalities to assume authority for administration and enforcement of air quality programs. See id. (citing N.M. STAT. ANN. § 74-2-4 (Michie 1978)). The state, however, remains ultimately responsible for assuring air quality within the entire state. Id. (citing 42 U.S.C. §§ 7407, 7504 (1988); N.M. STAT. ANN. § 74-2-4(B) (Michie 1978)).

192. Id. at 828; see Chapman v. Luna, 678 P.2d 687 (N.M. 1984), cert. denied, 474 U.S. 947 (1985).


194. 49 Fed. Reg. 34,866 (1984). The EPA's notice in the Federal Register explained why New Mexico's SIP was disapproved, detailed possible sanctions, and invited interested parties to comment on the proposed rule. 49 Fed. Reg. 34,866, 34,866-67 (1984). The EPA also held public and private meetings with federal, state, and local officials. Thomas, 789 F.2d at 828. Unfortunately, Albuquerque and Bernalillo County, the entities responsible for implementing the inspection and maintenance program, failed to reimplement a revised program. 49 Fed. Reg. 34,867. Instead, local officials "passed a non-binding resolution asking the state legislature to fund an alternative vehicle testing program." Thomas, 789 F.2d at 828.


196. Thomas, 789 F.2d at 828-29. In this respect, the imposition of sanctions based on a percentage-per-capita basis, without reference to compliance with other prescribed levels of air pollutants under National Ambient Air Quality Standards, may have the unintended
Following the imposition of sanctions, the New Mexico Environmental Improvement Division (New Mexico EID) challenged the EPA's imposition of sanctions as arbitrary and capricious, and as unjustifiably and unlawfully punishing those air quality control regions which had attained the required carbon monoxide levels.\textsuperscript{197} The Tenth Circuit ultimately rejected the New Mexico EID's challenge.\textsuperscript{198}

\textsuperscript{197} Id. at 829.

\textsuperscript{198} Id. at 836. In upholding the EPA's determination, however, the case demonstrates the high degree of discretion afforded to the EPA in implementing the Clean Air Act. Notably, the New Mexico EID challenged the EPA's imposition of sanctions under its informal rulemaking powers. Reviewing the sections of the Clean Air Act, which authorizes judicial review of agency action in light of the standard of review provided by the Administrative Procedure Act, 42 U.S.C. § 7607(b)(1) and (d); 5 U.S.C. § 706(2), the Tenth Circuit determined that under section 7506(a) of the Clean Air Act, an agency is not required to "provide an adjudicatory type hearing when it decides to disapprove a SIP."\textsuperscript{Id.} at 829. The court relied on both the EPA definition of rulemaking and the character of the procedure to determine whether disapproval of the SIP was a rule or an order.\textsuperscript{Id.} The court maintained that a trial-type adjudicatory hearing, with the opportunity to confront witnesses and present evidence, was not required when a state was contesting only the legal conclusions drawn by the EPA, and not the underlying facts upon which those legal conclusions were based.\textsuperscript{Id.} Because the New Mexico EID had been given the opportunity to present its views on the record, no adjudicatory hearing was required.\textsuperscript{Id.} Thus, approval or disapproval of a state implementation plan is informal rulemaking, subject to the arbitrary and capricious standard of review.\textsuperscript{Id.; 5 U.S.C. § 706(2)(A) (1994).}

The imposition of an arbitrary and capricious standard of review on the disapproval of a SIP places a heavy burden on the state seeking to challenge an EPA disapproval of its SIP and the imposition of sanctions. The Tenth Circuit went on to find that New Mexico's imposition of sanctions was not arbitrary or capricious.\textit{Thomas}, 789 F.2d at 833.

The New Mexico/Albuquerque enforcement action is notable in several regards. First, under the Clean Air Act, disapproval of a SIP and the imposition of sanctions is not subject to a full adjudicatory hearing under the APA, and the EPA may proceed under its rulemaking authority.\textsuperscript{Id.} at 829. Thus, a state seeking to challenge the EPA's imposition of sanctions is subject to a much higher standard of review. A second lesson arising out of the Albuquerque action is the imposition by the court of an affirmative duty on states to ensure that their SIPs are adopted in a manner consistent with the intent and purpose of the Clean Air Act.\textsuperscript{Id.} at 832. Under the implementing regulations of the Clean Air Act, "[states have] an affirmative duty to investigate and compile data on the required elements, analyze the data, and consider and incorporate the required elements into the SIP."\textsuperscript{Id.} at 833 (quoting 50 Fed. Reg. 8618 Col. 1 (March 4, 1985)). The Tenth Circuit specifically approved that language from the Federal Register and held that for the purposes of section 7506(a) of the Act, sanctions may be imposed "if the Administrator finds that either such a plan was not submitted, or that reasonable efforts were not being made" to submit such a plan.\textsuperscript{Id.} In short, under the Clean Air Act, as was demonstrated in the New Mexico case, the failure to submit a plan is treated as the equivalent of the submission of an incomplete plan.

Finally, the court left open the issue of illegal discrimination under the EPA's formula for assessing sanctions. In the New Mexico case, the court did not consider the specific issue, finding that the state had waived its right to raise the issue on appeal.\textsuperscript{Id.} at 831.
C. Problems Associated With Municipal Liability Under Section 110 of the Clean Air Act

The fundamental problem with section 110 of the Clean Air Act is in subparagraph (c)(1)(B). Specifically, the 1990 Amendment to the Act provides the following:

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

While the purpose of this section is to encourage states, and ultimately municipalities, to quickly develop state implementation plans, the provision actually has caused greater confusion and problems for both municipalities and states. Even the EPA is affected because it cannot partially approve a state implementation plan without facing the two year deadline alternative of a SIP or the penalty of being under a FIP. As identified throughout this article, it is the states, and ultimately the municipalities, that are abundantly aware of how difficult it is to develop a comprehensive SIP.

A comparison of the Clean Air Act and Clean Water Act better illustrates the complexity of the problems associated with the Clean Air Act. Many of the problems associated with Clean Water Act violations, for example, result from poor or inadequate waste water treatment systems. To remedy such violations, municipalities are primarily faced with the task of upgrading, or retrofitting, the waste water treatment systems. Thus, the central issue in municipal compliance with the Clean Water Act is not one of controlling the pollution sources, but of collecting enough capital to upgrade the systems.

The problems associated with municipal compliance with the Clean Air Act, however, are much more complicated. Municipalities have no control over the geographic regions in which they are located. They cannot

200. Id.
203. Id. at 700-01.
204. Id.
regulate heat waves, which also affect determinations of the NAAQS violations. In addition, while it is believed that municipalities can, to some degree, control the number of cars on their roads by placing restrictions on motor vehicles, attempts to enforce such restrictions would be administratively burdensome, and extremely costly. Furthermore, even if municipalities could control the number of motor vehicles on their highways, it is likely they still would fail to achieve the requisite attainment levels. In short, municipalities face numerous barriers in their attempts to develop workable plans to achieve attainment. Moreover, the Clean Air Act aggravates these barriers because it does not provide guidelines to help municipalities address such concerns.

If a state fails to develop an acceptable plan within two years after a SIP is partially disapproved, section 110(c)(1)(B) of the Clean Air Act requires the EPA to develop a federal implementation plan (FIP). At least one court has ruled that the EPA must develop the FIP within fourteen months. Paradoxically, if municipalities, and ultimately states, cannot develop SIPs within the requisite time period, it is unrealistic to expect the EPA, which often is unfamiliar with the geography, weather conditions, and businesses located within a particular region, to develop such a plan within fourteen months. As a result, municipalities with the most severe air pollution problems have been sued repeatedly by plaintiffs attempting to force compliance with the terms and conditions of section 110. Municipalities such as Detroit, New York, Anchorage, Phoenix, Greater Connecticut, as well as additional municipalities

206. See supra notes 157-58 and accompanying text.
211. Trustees for Alaska v. Fink, 17 F.3d 1209 (9th Cir. 1994).
discussed previously, were challenged by environmental groups trying to comply with the Clean Air Act.

As a practical matter, in many of the lawsuits filed, the environmental groups are correct. Under the Clean Air Act, as currently written, these municipalities and the EPA failed to meet their legal obligations. Yet, neither the environmental groups, the EPA, a particular state, nor a municipality, offered a tailor-made solution to remediate municipal non-compliance with the Clean Air Act. Consequently, while municipalities with less severe air pollution problems developed workable and timely attainment plans, municipalities with severe or extreme air pollution problems often were unable to develop adequate plans. Without adequate plans, municipalities in the latter category could not achieve the requisite attainment levels and, ultimately, found themselves in violation of the Clean Air Act. The practical conclusion is that section 110 of the Act is more harmful than helpful to the serious, severe, and extreme nonattainment areas and therefore, the legislature should consider a new approach to ensure Clean Air Act compliance.

IV. ATTEMPTING TO SOLVE SERIOUS AIR POLLUTION PROBLEMS IN MUNICIPALITIES

The fundamental flaw in section 110(c)(1)(B) of the Clean Air Act is that, when considered in conjunction with all of section 110, it sends contradictory signals. For example, Congress amended the Act in 1990 and recognized that air pollution problems in some cities were much more complicated than other cities. In particular, Congress divided municipalities into several different categories, and for each category provided specific dates for attainment. These attainment dates varied. Clearly, Congress recognized that the air pollution problems in cities such as Los Angeles and New York would be more challenging to remedy than areas such as Memphis and Seattle.

While Congress extended the periods for implementation and resolution of the air pollution problems in seriously polluted cities, it failed to recognize that the greater challenge lies in developing plans to reduce air pollution strategically. Specifically, Congress failed to provide these seriously polluted cities with realistic opportunities to develop workable

214. See discussion supra part III.B.
216. See § 7407 (d)(4) (discussing the nonattainment designations for ozone and carbon monoxide, and particular matter).
plans because Congress viewed the development of state implementation plans as rather simplistic.\textsuperscript{217}

A more practical approach would designate cities and localities as serious, severe, and extreme nonattainment areas to develop interim measures to address air pollution issues, rather than requiring municipalities to develop plans within a certain period of time. Similarly, Congress should allow the EPA to pass certain portions of state implementation plans, without requiring states or municipalities located in serious, severe, or extreme nonattainment areas to develop state implementation plans within two years.

Like the Clean Water Act, Congress should use a "good faith effort to comply" standard to allow municipalities in serious, severe, or extreme nonattainment areas to develop workable plans gradually, by taking into consideration weather patterns, geographical areas, and other unique factors, with which only the municipality would be familiar. Furthermore, Congress should recognize that municipalities, and the EPA's failure to develop timely state and federal implementation plans does not reflect an unwillingness to comply with the Act. Rather, municipalities and the EPA fail to act because of the difficulties associated with developing a strategy to clean the nation's dirtiest air.

It is interesting, and somewhat ironic, that the Clean Water Act considers good faith efforts when applied to assessments of municipal violations. If Congress would allow municipalities and the EPA to approve portions of a municipality's SIP, greater progress in reaching the ultimate goal of attainment would result. In essence, the consequence of not allowing municipalities to develop SIP beyond the two-year period following partial disapproval of a plan by the EPA, is that the EPA, which often is unfamiliar with local zoning and development issues, is then forced to address problems better addressed by state and local entities. Moreover, as evidenced by the federal implementation plan implemented by the EPA in Chicago, the EPA still only addresses the FIP requirement in stages, and still relies upon heavy input by the states. Thus, in essence, all that is created by not allowing municipalities in serious, severe and extreme nonattainment areas to develop plans in stages, is bureaucratic layers. The federal government is thereby decelerating, rather than accelerating, the cleanup of the nation's dirtiest air.

V. Conclusion

The magnitude of the air pollution problem in the nation's municipalities cannot be overstated. While municipalities have made tremendous progress with the addition of factors such as unleaded gasoline and carpooling, additional steps are required to ensure that the air becomes clean. To resolve air pollution problems, Congress must address the problems in a very strategic and methodical manner. Congress needs to recognize that these problems existed for many years prior to the initial passage of the Clean Air Act. Moreover, Congress needs to recognize that this country began to understand the causes and extent of air pollution only recently. To strategically develop workable plans that will ultimately clean the nation's dirtiest air, municipalities need time and a concerted effort by federal, state and local governments, as well as environmental groups and businesses. So long as this cooperation is allowed to occur in a methodical and progressive manner, without hastily made and unrealistic deadlines, communities will most likely achieve progress. On the other hand, so long as unrealistic deadlines and deadlines established without correlation or justification for such dates are used, fighting between municipalities, the EPA, and environmental groups will continue, thereby delaying the ultimate cleanup of the air. In short, such an action seems to go against the intent of the Clean Air Act.