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The Clean Air Act and Indirect Source Review: 1970-1991

*Philip E. Rothschild**

INTRODUCTION

The air pollution which hangs over many cities in the United States remains a serious environmental problem, caused in large part by our reliance on the automobile. Separating individual Americans from their automobiles continues to be a personally and politically unpopular, but necessary, element of efforts to reduce air pollution. These efforts, embodied in the federal Clean Air Act,¹ must succeed so that over one hundred million Americans can once again breathe clean air.

"Indirect source review" (ISR) is an environmental review process encompassing air pollution, land use decisions and individual usage of the automobile. ISR involves permitting facilities that attract or produce additional vehicle trips, but do not themselves emit pollutants. ISR can serve as a tool for evaluating a land development project's effects on automobile usage and the resulting air quality effects of such increased vehicle usage. The United States Environmental Protection Agency (EPA) has recognized the necessity of regulating development through ISR since the early 1970s.² Presently, the Clean Air Act Amendments of 1990³ may revive measures similar to ISR in linking reductions in vehicle usage to control of siting of development projects.

Part I of this comment discusses the Clean Air Act Amendments of 1970⁴ which first introduced the notion of land use and transportation controls to combat air pollution. Part II tracks the EPA's

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1. 42 U.S.C.A. §§ 7400-7671 (West Supp. 1991).
2. 38 Fed. Reg. 6279 (1973). See *infra* text accompanying notes 19-39.
3. Pub. L. No. 101-549, 104 Stat. 2399; 42 U.S.C.A. §§ 7400-7671 (West Supp. 1991).
4. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

promulgation of ISR regulations from 1971 to 1974, which were the most extensive and explicit federal ISR rules. Next, Part III discusses the federal curtailment of ISR programs in the mid-1970s and the effect of the Clean Air Act Amendments of 1977⁵ on ISR programs. Part IV describes the Clean Air Act Amendments of 1990 and the return of provisions having effects similar to ISR. These provisions include a transportation control measure and highway conformity provisions which resemble ISR. Finally, Part V concludes by forecasting the future of ISR. ISR remains a controversial process which air pollution control authorities do not wish to force on unwilling citizens or politicians, especially during lean economic times.

I.

CLEAN AIR ACT AMENDMENTS OF 1970

In its 1970 amendments to the Clean Air Act (1970 Act),⁶ Congress for the first time enacted stringent deadlines for compliance with environmental standards, underscoring the perceived severity of the air quality problem and congressional resolve for finding a solution.⁷ The 1970 Act required states to prepare state implementation plans (SIPs) demonstrating attainment of National Ambient Air Quality Standards (NAAQS) within three years.⁸ The specified NAAQS constituted a multi-pronged attack on the air quality problems facing many urban areas of the United States. To reduce air pollution and achieve compliance with the NAAQS, the 1970 Act relied primarily upon both new performance standards for new stationary sources (such as factories and power plants) and motor vehicle emission standards.⁹ In addition, though less prominently, the 1970 Act provided for "transportation control."

A. *Transportation Control Measures in the 1970 Act*

The inclusion of "transportation control" is central to understanding the ensuing history of ISR programs, since ISR can be a powerful transportation control measure for regulating development projects that result in increased vehicular mileage travelled.

5. Pub. L. No. 95-95, 91 Stat. 685 (1977).

6. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

7. Before 1970, the Clean Air Act provided only for "research and technical assistance relating to air pollution control." Pub. L. 84-159, 69 Stat. 322 (1955).

8. Pub. L. No. 91-604, § 110(a)(2)(A), 84 Stat. 1676, 1680 (1970) (current version at 42 U.S.C.A. § 7410 (West Supp. 1991)).

9. Pub. L. No. 91-604, §§ 111-112, 84 Stat. 1676, 1683-86 (1970) (amended 1990).

ISR involves permitting of facilities that attract or produce additional vehicle trips, but do not themselves emit pollutants. Examples of such indirect sources include shopping centers, sports complexes, residential, commercial or industrial development and highways.¹⁰ By monitoring location of these facilities, a fully-implemented ISR permit program approximates land use regulation.¹¹

Specifically, the 1970 Act required each state to prepare an implementation plan and submit it to the EPA for approval or follow an EPA-prepared plan, in the absence of EPA approval.¹² Section 110(a)(2)(B) of the 1970 Act required each SIP to include:

emissions limitations, schedules, and timetables for compliance with such limitations, and such *other measures as may be necessary* to insure attainment and maintenance of such primary or secondary standard, including, but limited to, *land-use and transportation controls*.¹³

The important, yet vague, phrases in this statutory provision are "other measures" and "transportation controls." The legislative history surrounding section 110(a)(2)(B) does not provide much guidance on the kinds of "measures" or "transportation control" strategies Congress envisioned in 1970.¹⁴ Senator Edward Muskie (D-Maine), one of the 1970 Act's prime authors, stated the most

10. Indirect sources have only indirect effects on air quality (such as through production of vehicle trips and subsequent vehicle emissions) and should be contrasted with stationary sources like factories or smelters which may or may not produce indirect effects, e.g. employee vehicle trips.

11. Congress did not include the terms "indirect source" or "indirect source review" in the 1970 Clean Air Act. The terms did not appear in official parlance until EPA regulations dated June 18, 1973 (*see infra* notes 19-21 and accompanying text). In its regulations of 1971 through early 1973, the EPA apparently used the terms "control strategy," "area source" and then "complex sources." *See* 36 Fed. Reg. 15,487 (1971); 38 Fed. Reg. 6279 (1973).

Congress first used the term "indirect source" in the 1977 Clean Air Act amendments. Congress defined an indirect source in § 110(5)(C) as:

. . . a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply. . . , including regulation of existing off-street parking. Direct emissions sources or facilities at, within, or associated with any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

42 U.S.C. § 7410(a)(5)(C) (1988).

12. Pub. L. No. 91-604, § 110(a) and (c), 84 Stat. 1676, 1680-82 (1970) (current version at 42 U.S.C.A. § 7410 (West Supp. 1991)).

13. Pub. L. No. 91-604, § 110(a)(2)(B), 84 Stat. 1676, 1680 (1970) (amended 1977 and 1990) (emphasis added).

14. *See* DAVID P. CURRIE, AIR POLLUTION, FEDERAL LAW & ANALYSIS 4-60 (1981) [hereinafter CURRIE]; Daniel R. Mandelker & Susan B. Rothschild (no relation), *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970*, 3 *ECOLOGY L. Q.* 235, 239-40 (1973).

notable elucidation of these words in congressional debate. Muskie explained that "implicit in the concept of implementation plans" is that "urban areas do something about their transportation systems, the movement of used cars . . . the modification and change of housing patterns, employment patterns and transportation patterns generally."¹⁵ At the time, his interpretation of "land-use and transportation controls" represented the clearest linkage of air quality control policy to everyday local land use decisions. As described below, the EPA attempted to implement this linkage concept through ISR.

II.

ADMINISTRATIVE AND JUDICIAL INTERPRETATION OF THE 1970 ACT

A. 1971 EPA Regulations

Initially, the EPA promulgated modest regulations for the 1970 Act that allowed states to consider the cost-effectiveness of indirect source review.¹⁶ Thus several states managed to delay implementation of an ISR program pending study of the costs and benefits of ISR relative to other methods of meeting the NAAQS. In opposition to the delay permitted by the August 1971 regulations, the Natural Resources Defense Council (NRDC) filed suit against the EPA claiming that the regulations contradicted congressional intent. NRDC maintained that Congress intended to force states to disregard economic considerations when developing transportation control measures to combat air pollution. In 1973, the District of Columbia Circuit Court of Appeals agreed that the EPA regulations ignored the congressional intent which underlay the 1970 Act.¹⁷ Although the court recognized the "difficult responsibilities" imposed on the EPA Administrator by Congress, the court found that the EPA cost considerations "did not conform to the strict requirements of the Clean Air Act in permitting several states to delay submission of transportation control portions of their

15. 116 CONG. REC. 42,387 (1972).

16. 36 Fed. Reg. 15,186, 15,187 (1971) (current version at 40 C.F.R. § 51.101(b) (1991)) stated that:

Nothing in this part shall be construed in any manner:

...

(b) To encourage a State to adopt any particular control strategy without taking into consideration the cost-effectiveness of such control strategy in relation to that of alternative control strategies.

17. *Natural Resources Defense Council v. Environmental Protection Agency*, 475 F.2d 968 (D.C. Cir. 1973).

implementation plans. . . ."¹⁸ Thus, the court ordered the EPA to re-evaluate the state plans for compliance with the transportation control requirements of the 1970 Act.

B. EPA ISR Rules Promulgated

1. For State Implementation Plans

In response to the *NRDC* decision, in a notice of proposed rulemaking on SIP ISR rules, the EPA disapproved all state submitted SIPs because none of the SIPs included an ISR component.¹⁹ EPA Administrator Ruckelshaus wrote that states should be required:

to review, and where necessary prevent, the construction of facilities which may result in increased emissions from motor vehicle activity . . . that could cause or contribute to violations of national ambient air quality standards. Such facilities generally are designated "complex sources."²⁰

In hindsight, these EPA statements are remarkable for their prescience in describing the necessity of an ISR program. The statements demonstrate that, as early as 1973, the EPA recognized that stationary source controls and vehicle emission limits alone could not attain or maintain the NAAQS due to the future increase in mobile emission sources caused by increasing population growth, suburban development and vehicle use.

Accordingly, the final ISR SIP regulations of June 18, 1973 required states develop legally enforceable procedures to determine whether a direct or indirect source would interfere with attainment of the NAAQS.²¹ In effect, each state would have to create a permit system for indirect sources. Also, each state gained a veto power over certain large projects which traditionally would only need approval by the local land use authority.

Recognizing that local governmental agencies normally are responsible for final approval of applications to construct such facilities,²² the EPA regulations allowed local government to implement the ISR program.²³ However, the state or local agency needed to have legal authority to "prevent such construction or modification if it [would] result in a violation of applicable portions of the control

18. *Id.* at 970.

19. 38 Fed. Reg. 6279 (1973).

20. *Id.*; see *supra* note 11.

21. 38 Fed. Reg. 15,836 (1973) (current version at 40 C.F.R. § 51.160(a) (1991)).

22. 38 Fed. Reg. 9599 (1973) (preamble to the proposed rules).

23. 38 Fed. Reg. 15,386 (1973) (current version at 40 C.F.R. § 51.18(a)(1991)).

strategy or would interfere with attainment or maintenance of a national standard"²⁴ either directly or "indirectly, because of emissions resulting from mobile source activities associated with it."²⁵ Thus, whether or not a state held a veto power over local land use, the power to stop development based upon the effects of increased vehicle emissions on air quality had to be vested in some governmental entity.

The regulations for ISR in SIP's did not define "indirect source." At the time, the EPA believed that uniform national size standards for each facility type were not appropriate, because local conditions, such as topography, meteorology and growth rates, affected a source's effect on air quality.²⁶ Nonetheless, the EPA listed specific types of facilities which "generally should be considered for review,"²⁷ though the EPA did not intend for the list to be exhaustive. These sources included "major highways and airports, large regional shopping centers, major municipal sports complexes or stadiums, major parking facilities, and large amusement and recreational facilities."²⁸

In the preamble to the proposed ISR rules, the EPA encouraged state and local agencies to analyze the projected growth of population, industrial activity and motor vehicle use for their regional air quality impacts.²⁹ The final SIP ISR rules required an analysis of the impact of growth on air quality in potential areas of non-attainment.³⁰ The EPA would approve a SIP only after adoption of measures, such as ISR, to assure that growth and development would be compatible with maintenance of the NAAQS.³¹ Thus, the EPA specifically linked air quality concerns to land use decisions, which local government previously made in an environmental vacuum, approving large scale development that promised economic advantages.

24. 38 Fed. Reg. 15,836 (1973) (current version at 40 C.F.R. § 51.18(b)(1991)).

25. 38 Fed. Reg. 15,836 (1973) (current version at 40 C.F.R. § 51.18(a)(1991)).

26. 38 Fed. Reg. 15,836-37, app. O (1973).

27. *Id.* at 15,387. In the proposed rules of April 18, 1973, the EPA stated that these types of facilities "generally should not be exempt from review procedures." 38 Fed. Reg. 9600 (1973). This proposed language was stronger than the June 18 final language.

28. 38 Fed. Reg. 15,837, app. O (1973).

29. 38 Fed. Reg. 9599 (1973).

30. 38 Fed. Reg. 15,834 (1973). *See* 39 Fed. Reg. 7270 (1974).

31. *See* 39 Fed. Reg. 7270 (1974).

2. EPA Regulations for Federally Imposed Plans

To cover the case of a state's failure to submit an approvable SIP, the EPA regulations provided for the EPA to draft ISR programs within a state's federal implementation plan (FIP).³² The final regulations promulgated on February 25, 1974 included specific criteria for determining which indirect sources would be subject to review.³³ For those areas within urban regions that might exceed the NAAQS,³⁴ any new parking facility (or other indirect source) with parking capacity of 1,000 or more cars, or any new highway section with "an anticipated average annual daily traffic volume of 20,000 or more vehicles per day," would be subject to air quality impact review.³⁵ Outside such an area, parking facilities for 2,000 or more cars and airports with 50,000 or more operations per year by regularly scheduled air carriers would be subject to ISR.³⁶ The EPA stated that it considered it necessary to devote more attention to problem areas by reviewing smaller sources in those areas.³⁷

Taken together, the EPA ISR rules directly linked large development projects to their negative impacts on air quality due to increased vehicle use and emissions. For example, projects could be disapproved because they would either cause a violation of a control strategy in a SIP, or delay attainment or cause a violation of a NAAQS.³⁸ In addition, the rules described permit application requirements, notice procedures and time limits on project approval or disapproval, the ability of the EPA to impose conditions and

32. *Id.*; see Pub. L. No. 91-604, § 110(c), 84 Stat. 1676, 1681-82 (1970) (formerly codified at 42 U.S.C. § 1857c-5(c) (1970), current version at 42 U.S.C. § 7410(c) (1988)).

33. Here, the EPA defined indirect source for the first time. An indirect source is: [A] facility, building, structure, or installation which attracts or may attract mobile source activity that results in emissions of a pollutant for which there is a national standard. Such indirect sources include, but are not limited to: (a) highways and roads, (b) parking facilities, (c) retail, commercial and industrial facilities, (d) recreation, amusement, sports and entertainment facilities, (e) airports, (f) office and Government buildings, (g) apartment and condominium buildings, and (h) education facilities.

EPA Maintenance of National Standards, 39 Fed. Reg. 7276 (1974) (current version at 40 C.F.R. § 52.22(b)(1)(i) (1991)).

34. The EPA would publish a list of problem areas with non-attainment potential in June 1974. Until then, EPA decided that all Standard Metropolitan Statistical Areas would be considered areas with potential to exceed the NAAQS. 38 Fed. Reg. 29,894 (1973).

35. 39 Fed. Reg. 7277 (1974) (current version at 40 C.F.R. § 52.22(b)(2)(i) (1991)).

36. *Id.*, (current version at 40 C.F.R. § 52.22(b)(2)(ii)-(iii) (1991)).

37. 38 Fed. Reg. 29,894 (1973) (preamble to proposed rules).

38. 39 Fed. Reg. 7277-78 (1974) (current version at 40 C.F.R. § 52.22(b)(4) - (6) (1991)).

penalties for violators of the Act, those who, for example, construct development projects without approval.³⁹ As will be shown, this concept of linking development projects, vehicle use and air pollution would unfortunately prove to be ahead of the times; industry, local government and, in turn, Congress, were not prepared for ISR in 1973.

C. *Industry Attack and Judicial Defense of the EPA's
Transportation Control and ISR Regulatory Authority*

In late 1973, the EPA promulgated a final transportation control measure (TCM) plan for the metropolitan Boston area.⁴⁰ The TCM plan focused on reducing or freezing parking supply and included an ISR program for construction of parking facilities.⁴¹ Several corporations and industries, including the parking facilities construction industry, challenged the EPA's authority to create this plan and the validity of the plan itself. In the most important of its holdings, the First Circuit Court of Appeals upheld the authority of the EPA to impose indirect source review on parking facilities.⁴² In rejecting the plaintiffs' challenge to the EPA's authority, the court relied on the "land-use and transportation controls" language in section 110(a)(2)(B) of the 1970 Act.⁴³ The court stated:

Regulation of the dimensions and quantity of certain types of facilities in a specific urban area is a common use of the zoning tool; and the challenged parking controls are similar, in that they are directives to land owners not to use their land for parking except under specified circumstances.⁴⁴

Thus, the court held that the EPA had authority to impose an ISR permit program for parking facilities.⁴⁵ Unfortunately, as discussed in the next section, a political backlash to the EPA's ambitious ISR program had already begun by the time of the *South Terminal* decision.

39. *Id.* at 7277-79 (current version at 40 C.F.R. §§ 52.22(b)(3), 52.22(b)(8)-(11) (1991)).

40. 38 Fed. Reg. 30,960 (1973). See *South Terminal Corp. v. EPA*, 504 F.2d 646, 654-56 (1st Cir. 1974).

41. *South Terminal*, 504 F.2d at 655.

42. *Id.* at 667-68. The Court also stayed the parking facilities control provisions pending remand to the EPA on the threshold technical issue of the need for and amount of emission reductions, holding that technical questions remained on the amount of air pollutants affecting Boston's air quality. See *id.* at 662-67.

43. *Id.* at 668-69. See *supra* note 13.

44. *South Terminal*, 504 F.2d at 668.

45. *Id.* at 669.

III.

SUSPENSION OF ISR AND THE CLEAN AIR ACT
AMENDMENTS OF 1977A. *1974 Parking Supply Amendment and EPA Reaction*

Even before the *South Terminal* decision, Congress had restricted the EPA's authority to manage parking supply through preconstruction review. The "Energy Supply and Environmental Coordination Act of 1974" amended section 110(c)(2) of the Clean Air Act by suspending until January 1, 1975 the EPA's authority to regulate parking supply in a federally written implementation plan.⁴⁶

The EPA responded to lawsuits and Congressional pressure on two occasions. First, the EPA temporarily suspended its ISR procedures.⁴⁷ Later, the EPA indefinitely suspended its ISR procedures.⁴⁸ However, in the preamble to the suspension regulation, the EPA stated that it continued to believe that ISR is a necessary mechanism for attainment of the NAAQS.⁴⁹ The EPA sounded a warning which was again prescient:

New indirect sources . . . which have the effect of significantly increasing local or area-wide auto traffic, may either cause new health standard violations or exacerbate existing violations.⁵⁰

B. *Clean Air Act Amendments of 1977*⁵¹

By 1977, Congress decided to chop off the neck which EPA had

46. Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, § 4(b)(2)(C), 88 Stat. 246, 257 (1974) (formerly codified at 42 U.S.C. § 1857c-5 and 42 U.S.C. § 7410(c)(2)(C), *repealed by* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2409 (1990)). States could still regulate parking under an ISR program in their own SIP.

47. 39 Fed. Reg. 45,014-15 (1974). Congress had also amended EPA's Appropriation Act late in 1974 to deny the EPA funds (until June 30, 1975) to administer any program to limit or regulate parking facilities. 40 Fed. Reg. 28,064 (1975). *See* the Agriculture-Environmental and Consumer Protection Appropriations Act of 1975, Pub.L. No. 93-563, § 510, 88 Stat. 1822, 1843 (1974).

48. 40 Fed. Reg. 28,065 (1975).

49. 40 Fed. Reg. 28,064-65 (1975). The EPA hoped that State or local agencies responsible for air quality would incorporate ISR into their own SIPs.

50. *Id.* at 28,064. In 1989, the California Air Resources Board (CARB) noted that despite 80% reductions in vehicle emissions *per car*, the fast and steady growth in vehicle usage has increased air pollution. CARB, OFFICE OF STRATEGIC PLANNING, THE AIR POLLUTION-TRANSPORTATION LINKAGE (1989).

51. Pub. L. No. 95-95, 91 Stat. 685 (1977). The most prominent components of the 1977 Amendments were: 1) delay of the NAAQS attainment deadlines to no later than 1987 and mandated revision of SIPs, 2) specific auto emission requirements recognizing auto manufacturers' failure to reach the 1970 technology goals, and 3) specific statutory classifications for the prevention of significant deterioration of ambient air quality from

extended in the pursuit of clean air through ISR. Congress removed from the EPA's authority the "plausible but politically unpopular control strategies in the areas of land use regulation," namely ISR.⁵²

1. Statutory Provisions

Specifically, Congress made several amendments which constrained ISR. First, Congress flatly prohibited the EPA from promulgating any ISR program for any air quality control region.⁵³ However, states retained authority to include ISR in their SIPs if they chose to do so.⁵⁴ Second, Congress eliminated the phrase "land-use" controls from the "other measures" required to be included in a SIP in order to reach attainment of the NAAQS.⁵⁵ Third, Congress defined "indirect source" and "indirect source review" for purposes of the limitation on the EPA's rule-making authority.⁵⁶

2. Legislative History

The House Report on the 1977 Amendments⁵⁷ confirms that Congress reacted to political pressure by eliminating ISR generally, and parking supply management specifically, from the EPA's arsenal of air pollution control measures. The Report stated "poten-

stationary sources; see generally *The Clean Air Act Amendments of 1977: Expedient Revisions, Noteworthy New Provisions*, 7 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,182-87 (October 1977).

52. *The Clean Air Act Amendments of 1977: Expedient Revisions, Noteworthy New Provisions*, 7 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,182, 10,186 (October 1977); see CURRIE, *supra* note 14, at 4-70.

53. Pub. L. No. 95-95, sec. 108(e), § 110(a)(5), 91 Stat. 685, 695-96 (1977) (codified at 42 U.S.C. § 7410(a)(5)(A)(ii) (1988)).

54. *Id.*, 91 Stat. 685, 695-96 (codified at 42 U.S.C. § 7410(a)(5)(A)(i) (1988)).

55. *Id.* at sec. 108(a)(2), § 110(a)(2), 91 Stat. 685, 693 (formerly codified at 42 U.S.C. § 7410(a)(2)(B) (1988) (amended 1990)). Professor Currie suggests that this language change would have little practical effect. See CURRIE, *supra* note 14, at 4-72. But see text accompanying notes 32-36 *supra* (reliance of the First Circuit in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974) on this language).

56. Pub. L. No. 95-95, sec. 108(e), 91 Stat. 696 (codified at 42 U.S.C. §§ 7410(a)(5)(C) and (D) (1988)); see *supra* note 11 for "indirect source" definition. "Indirect source review program" is defined in subsection (D) as "the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution. . . ."

57. The Senate version of the 1977 Amendments did not contain the restrictions on EPA's ISR authority. The Conference Committee adopted a modified version of the House limitations. H.R. CONF. REP. NO. 564, 95th Cong., 1st Sess. 126 (1977), reprinted in 1977 U.S.C.C.A.N. 1502, 1506.

tially sweeping consequences and potentially socially and economically disruptive impacts which may result from efforts to reduce automobile pollution through mandated reductions in parking supplies and restrictions on new parking facilities."⁵⁸ The House also cited the inequity of making owners and operators of indirect sources and the public at large responsible for reducing air pollution before requiring an emphasis on auto tailpipe emissions.⁵⁹

3. Transportation Control Measures Delineated

Despite these restraints on the EPA, the 1977 Amendments added two sections which would become significant for the possible resurgence of ISR-type measures. The first of these sections required the EPA to publish information on a specified list of transportation control measures.⁶⁰ The second section required each SIP to contain "all reasonably available control measures."⁶¹ The combined effect of these two sections, after the 1990 Amendments substantially changed the TCM list, is discussed *infra*.⁶²

IV.

CLEAN AIR ACT AMENDMENTS OF 1990 AND THE IMPLICIT RETURN OF INDIRECT SOURCE REVIEW

A. Background

By the mid-to-late 1980s, it became clear that the 1977 Amendments would not achieve the NAAQS levels by the "final" deadline of 1987.⁶³ By 1990, ninety-six cities were in ozone nonattainment,

58. H.R. REP. NO. 294, 95th Cong., 1st Sess. 222 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1301.

59. *Id.* at 221, *reprinted in* 1977 U.S.C.C.A.N. at 1300.

60. Clean Air Amendments of 1977, Pub. L. No. 95-95, § 108(f)(1)(A), 91 Stat. 685, 689-90 (1977) (formerly codified at 42 U.S.C. § 7408(f)(1)(A) (1988) (amended 1990)). See H.R. REP. NO. 564, 95th Cong., 1st Sess. 124 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1502, 1504.

61. Clean Air Amendments of 1977, Pub. L. No. 95-95, § 172(b)(2), 91 Stat. 685, 747 (1977) (formerly codified at 42 U.S.C. § 7502(b)(2) (1988) (amended 1990)). Subsections 172(b)(8) and (b)(11) of the 1977 Act also required each SIP to contain "other measures" to reach NAAQS attainment (formerly codified at 42 U.S.C. § 7502(b)(8) & (b)(11)).

62. In 1977, only the Senate version of the Amendments contained the TCM list. The section was not considered controversial and thus was included in the final version. See H.R. REP. NO. 564, 95th Cong., 1st Sess. 124 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1502, 1504.

63. The 1987 attainment deadline can be found in the 1977 Amendments, *supra* note 52.

and forty-one cities were in carbon monoxide nonattainment.⁶⁴ "In 1989, over half of the population of the United States [was] still exposed to levels of air pollution considered unhealthy by the EPA and medical researchers."⁶⁵ As a result of the failure of the 1977 Amendments to achieve clean air, and after a decade of debate, Congress and the President finally agreed on a new set of Clean Air Act amendments.

The major features of the Clean Air Act Amendments of 1990⁶⁶ (1990 Amendments) include (1) new deadline requirements for revised SIPs, and EPA promulgation of FIPs, with sanctions for state noncompliance; (2) mandated reductions in volatile organic compounds, air toxics, acid rain precursors and CFCs; (3) requirements for cleaner gasoline in the nine worst nonattainment areas; (4) a permit system for stationary sources; and (5) stricter enforcement of the Act.⁶⁷

B. Provisions Concerning TCMs and ISR

The 1990 Amendments contain provisions which could lead to the requirement of ISR-type measures in SIPs in the areas of the United States with the worst air quality. This prediction for a revival of ISR is based upon the following evidence. First, the TCM list in section 108(f)(1)(A) was substantially changed and now includes the following TCM:

*Programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity.*⁶⁸

Thus, the list specifically contemplates ISR-type regulation. Second, states with the worst nonattainment areas must now submit a

64. *In the Congress: Overview*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,569 (Dec. 1990). "Nonattainment" means that the levels of ozone or carbon monoxide are higher than the NAAQS set by Congress.

65. S. REP. NO. 228, 101st Cong., 2nd Sess. 3 (1990), reprinted in 1990 U.S.C.A.N. 3385, 3389.

66. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

67. *In the Congress: Overview*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,569 (Dec. 1990); see 1) Pub. L. No. 101-549, §§ 179, 181, 104 Stat. 2399, 2420-26; 2) *id.*, §§ 183, 112, 401-416, 601-618, 104 Stat. 2399, 2443, 2531, 2584, 2649; 3) *id.*, § 211(k), 104 Stat. 2399, 2492; 4) *id.*, § 501-507, 104 Stat. 2399, 2635; 5) *id.*, § 113, 104 Stat. 2399, 2672.

68. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 108(b), § 108(f)(1)(A)(xiv), 104 Stat. 2399, 2465-66 (codified at 42 U.S.C.A. § 7408(f)(1)(A)(xiv) (West Supp. 1991)) (emphasis added).

revised SIP that which adopts specific, enforceable TCMs to achieve periodic emission reduction requirements.⁶⁹ These states must consider the TCMs listed in section 108(f) and choose from among them such measures as necessary to meet the NAAQS.⁷⁰ Third, there appears to be a rebuttable presumption that a state must include the section 108(f)(1)(A) TCMs in SIPs. The legislative history for section 108(f) indicates that a state should adopt "all reasonable available control measures unless they are demonstrably not needed to bring an area into attainment or maintain a health [sic] air quality level."⁷¹ The stated congressional intent is for the EPA to incorporate all the section 108(f)(1)(A) TCMs into those measures designated "reasonably available," as the EPA did with the prior list in the 1977 Amendments.⁷²

Furthermore, judicial and administrative sources buttress the existence of this rebuttable presumption. In *Delaney v. EPA*, the Ninth Circuit Court of Appeals held that the EPA arbitrarily and capriciously approved Arizona's SIP without requiring the state to demonstrate that other transportation control measures listed in section 108(f)(1)(A) would not advance attainment of the NAAQS.⁷³ The court relied on language in an EPA guidance document which specifically states that if a state does not adopt all reasonably available control measures, a state must demonstrate that such measures will not help it reach attainment faster.⁷⁴ Moreover, in a separate regulation, the EPA defined all the TCMs in section 108(f)(1)(A) as reasonably available transportation control measures.⁷⁵

While *Delaney* and these EPA documents pertained to the 1977

69. *Id.* at § 182(d)(1)(A), 104 Stat. 2399, 2437 (codified at 42 U.S.C.A. § 7511a(d)(1)(A) (West Supp. 1991)). See also 42 U.S.C.A. §§ 7511a(b)(1)(B) and (c)(2)(B).

70. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec 103, § 182(d)(1)(A), 104 Stat. 2399, 2437 (codified at 42 U.S.C.A. § 7511a(d)(1)(A) (West Supp. 1991)). In addition, all States in which an area is in nonattainment "shall provide for implementation of all reasonable available control measures as expeditiously as practicable." *Id.*, sec. 102, § 172(c)(1), 104 Stat. 2399, 2414 (codified at 42 U.S.C.A. § 7502(c)(1) (West Supp. 1991)).

71. 136 CONG. REC. S16,956 (daily ed. Oct. 27, 1990) (statement of Sen. Chaffee, a prime sponsor of the Amendments).

72. 136 CONG. REC. S16,972 (daily ed. Oct. 27, 1991) (statement of Sen. Baucus, a prime sponsor of the Amendments).

73. 898 F.2d 687, 692 (9th Cir. 1990), *cert. denied* 111 S. Ct. 556 (1990).

74. *Delaney*, 898 F.2d at 692 (quoting State Implementation Plans, General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas, 44 Fed. Reg. 20,372, 20,375 (1979)).

75. 46 Fed.Reg. 7187 (1981) (EPA final policy on 1982 SIP approvals).

Amendments, in 1990 Congress specifically approved the Ninth Circuit and EPA view that a rebuttable presumption exists regarding inclusion in SIPs of the section 108(f)(1)(A) TCMs.⁷⁶ Prior to Senate approval of the Conference Committee version, Senator Baucus noted that the "sponsors['] intention . . . was to retain current law with regard to consideration of transportation control measures."⁷⁷ Baucus next stated that the "sponsors intend that EPA expand its list of reasonably available transportation control measures to incorporate all the [new] measures in Section 108(f)(1)."⁷⁸ Therefore, it is possible that states with nonattainment areas will have to specifically address section 108(f)(1)(A)(xiv), the TCM subsection which resembles ISR.⁷⁹ Those states may find it difficult to avoid implementing some form of ISR.

C. "Conformity" Amendment and Implications for ISR

The 1990 Amendments clarified provisions that Congress had added in 1977. The 1977 provisions had prohibited the use of federal funds for highway projects approved by local planning agencies unless the projects "conformed" to a transportation plan that did not increase the severity of existing violations of a NAAQS or cause or contribute to any new violation.⁸⁰ The 1990 Amendments added that, regardless of the funding source, all metropolitan planning organizations (MPOs) must certify conformity with a SIP before giving approval to projects.⁸¹ Accordingly, MPOs now must confront the problem of increased vehicle emissions resulting from the building of capacity expanding highways by preconstruction review of each highway project for its potential effect on increasing mobile source use.

Thus, the 1990 Amendments link "the design and approval of regional transportation plans developed by MPOs to the emission reductions required for mobile sources."⁸² Recall that highways

76. 136 CONG. REC. S16,971 (daily ed. Oct. 27, 1990) (statement of Sen. Baucus).

77. *Id.*

78. *Id.* at S16,972.

79. See *supra* text accompanying note 68.

80. Pub. L. No. 101-549, § 176(c), 104 Stat. 2399, 2409-12 (codified at 42 U.S.C.A. § 7506(c)(1) & (2) (West Supp. 1991)). See S. REP. NO. 228, 101st Cong., 2nd Sess. 28-30 (1990), reprinted in 1990 U.S.C.C.A.N. 3387, 3414-16.

81. Pub. L. No. 101-549, § 176(c), 104 Stat. 2399, 2410.

82. Robert Yuhnke, Environmental Defense Fund, Clean Air in Our Times?, Address at the University of Colorado Natural Resource Law Center 5 (January 10, 1991)(available at the offices of the UCLA Journal of Environmental Law and Policy)[hereinafter Yuhnke].

and roads are considered indirect sources.⁸³ Also, note that a district court recently characterized even the far less specific conformity provisions of the 1977 Amendments as an ISR program. The court stated that "conformity provisions requiring review of highway projects to determine their compliance with . . . [a SIP] clearly constitute an 'indirect source review program.'"⁸⁴ Thus, without the controversy that surrounded the EPA's ISR programs of 1973 and 1974, Congress has revived a form of ISR in 1990.

D. Other Provisions Affecting Mobile Sources

Two other provisions of the 1990 Amendments may affect the resurgence of ISR programs. The first requires each state with "serious" (or worse) air pollution to demonstrate that the aggregate vehicle mileage, emissions and other relevant parameters are consistent with those projections used in the state's required demonstration of attainment of the NAAQS for ozone.⁸⁵ If the actual levels exceed the projected levels, the state must revise its SIP and implement section 108(f)(1)(A) TCMs, which as noted above, contain an

83. See *supra* text accompanying notes 33-35. The 1977 Amendments prohibiting the EPA from promulgating ISR programs contained an exception for "federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 108(e), § 110(a)(5)(B), 91 Stat. 685, 696 (1977) (codified at 42 U.S.C. § 7410(a)(5)(B) (1988)). See *supra* note 11 for the Congressional definition of indirect source.

84. *Citizens for a Better Environment v. Deukmejian*, No. C89-2044 TEH, slip op. at 4-5 (N.D. Cal. May 7, 1990), *aff'd* in part, No. 91-15151, unpublished slip op. (9th Cir. Oct. 21, 1991). The district court's order was in a jurisdictional context for an environmental group's ability to enforce conformity assessment provisions. The district court relied on a Ninth Circuit opinion which stated that the intended scope of enforceable emission limitations included TCMs, which in turn included ISR programs (under the 1977 Amendments). See *League to Save Lake Tahoe, Inc. v. Trounaday*, 598 F.2d 1164, 1172 (9th Cir. 1979).

85. Pub. L. No. 101-549, § 182(c)(5), 104 Stat. 2399, 2435 (1990) (codified at 42 U.S.C.A. § 7511a(c)(5) (West Supp. 1991)). For a breakdown of which cities fall into which ozone nonattainment categories, see S. REP. NO. 228, 101st Cong., 2d Sess. 35-37 (1990) reprinted in 1990 U.S.C.C.A.N. 3385, 3421-23. See also H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. 27 (Oct. 26, 1990).

The categories depend on the degree to which the city exceeds the NAAQS for ozone. S. REP. NO. 228, 101st Cong., 2d Sess. 35-37 (1990), reprinted in 1990 U.S.C.C.A.N. at 3416-17. Sixty-two cities are "moderate" areas; they exceed the ozone standard by up to 20% and must attain the standard within five years. Thirty-one cities are "serious" areas; they exceed the standard by between 20-50% and must attain the standard within ten years. Eight cities (Baltimore, Chicago, Houston, Milwaukee, Muskegon, MI, New York City, Philadelphia and San Diego) are "severe" regions; they exceed the standard by 50-120% and must attain within fifteen years. Only the Los Angeles basin is an "extreme" area; it exceeds the standard by over 120% and has twenty years to attain. *Id.* at 3421-23.

ISR-like provision.⁸⁶ The second notable provision added a land use authority "disclaimer" which states that nothing in the new Clean Air Act "constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use."⁸⁷ This provision could limit renewal of indirect source type review. However, because a state or local air district may be required to adopt ISR through the new TCM section 108(f)(1)(A)(xiv),⁸⁸ and lose federal funding for failing to comply with the highway conformity provisions, the above "disclaimer" could prove meaningless for preventing some intrusion upon local land use authority.

V.

THE FUTURE OF INDIRECT SOURCE REVIEW

In the quest for clean air, we clearly should have heeded the EPA's warnings in 1973 concerning the necessity of ISR. Even Congress now recognizes that the only way for many cities in the United States to have healthy air is through reducing vehicle miles traveled (VMT) and vehicle trips (VT).⁸⁹ The increase in emissions due to a two to six percent rise in VMT and VT will overtake the air pollution reductions achieved through cleaner tailpipe emissions.⁹⁰ Individual cars may be getting cleaner, but the continuing increase in the overall use of cars leads to greater emissions and increasing air pollution.

The need to decrease (or reduce the increase in) VMT within the specific deadlines in the 1990 Amendments may push state and local air pollution agencies, as well as the EPA, to seriously consider ISR programs. For example, the California Clean Air Act gives specific authority for air pollution control districts to implement ISR programs.⁹¹ Several air districts in California are currently

86. Pub. L. No. 101-549, § 182(c)(5), 104 Stat. 2399, 2435 (1990) (codified at 42 U.S.C.A. § 7511a(c)(5) (West Supp. 1991)). See *supra* text accompanying note 68.

87. Pub. L. No. 101-549, sec. 805, § 131, 104 Stat. 2399, 2689 (1990) (codified at 42 U.S.C.A. § 7431 (West Supp. 1991)).

88. See *supra* text accompanying note 68.

89. Yuhnke, *supra* note 82, at 1. See also 136 CONG. REC. S16,956 (daily ed. Oct. 27, 1990) (statement of Sen. Chaffee).

90. Congress estimates a 2-3 % increase. S. REP. NO. 228, 101st Cong., 2nd Sess. 18-19 (1990), reprinted in 1990 U.S.C.C.A.N. 3404-05. Robert Yuhnke of the Environmental Defense Fund reports a 3.5-6 % increase per year in VMT. See Yuhnke, *supra* note 82, at 1.

91. CAL. HEALTH & SAFETY CODE § 40,716(a)(1) (Deering Supp. 1991). Section 40,716(b) contains a land use disclaimer similar to the federal disclaimer in the 1990 Clean Air Act Amendments, § 131, Pub. L. No. 101-549, 104 Stat. 2399, 2689 (1990)

drafting required Clean Air Plans with ISR components.⁹²

As for the EPA, the 1977 Amendments' prohibition on federal imposition of ISR programs on states remains the law even after the 1990 Amendments. However, the inclusion of an ISR-like provision in the new federal list of transportation control measures blurs the distinction between permissible transportation controls and impermissible ISR programs.

In addition, long before the 1990 Amendments, Professor Currie of the University of Chicago made statutory arguments which suggested that Congress did not intend to outlaw *all* federal regulation of indirect sources. First, noting that an indirect source is defined as a structure or road (facility, building, highway),⁹³ Currie reasoned that restrictions on the vehicle *operator*, such as peak hour driving fees or simple bans on driving at certain hours, days or in downtown areas, do not regulate indirect sources.⁹⁴ Yet, such measures may force indirect sources to choose their locations based on air quality considerations, in effect dictating land use decisions. Second, Currie argued that since an ISR program is defined as a "facility-by-facility review"⁹⁵ (such as of new parking facilities in *South Terminal*), the EPA could "simply forbid the construction of new traffic generators in an area exceeding ambient standards"⁹⁶ without violating current law. Thus, the EPA effectively may regulate indirect sources.

(codified at 42 U.S.C.A. § 7431 (West Supp. 1991)). However, air districts in California should be able to draft ISR programs which get around the land-use disclaimer. CALIFORNIA AIR RESOURCES BOARD, GUIDANCE FOR THE DEVELOPMENT OF INDIRECT SOURCE CONTROL PROGRAMS (July 12, 1990).

92. As of January 1992, it was unclear whether California air districts would be successful in approving or implementing ISR programs. As of yet, no district has adopted a comprehensive ISR program involving new development projects.

93. See *supra* note 11.

94. CURRIE, *supra* note 14, at 4-71. Thus, the EPA could regulate people and cars directly, and not necessarily regulate the indirect source itself. As further support for this argument, Congress included such economic incentives as an "other control measure" to be included in an implementation plan. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 110(a)(2)(A), 104 Stat. 2399, 2404 (1990) (codified at 42 U.S.C.A. § 7410(a)(2)(A) (West Supp. 1991)).

95. See *supra* note 56.

96. CURRIE, *supra* note 14, at 4-71. However, such a regulation is unlikely in today's political environment. In addition, the recession of the early 1990s has increased the call for a reduction of environmental regulations so as to spur economic growth. Implementation of ISR could trigger greater opposition in slow economic times, unless presented as an indispensable component of an air pollution and thus health-enhancing program. A linkage between the health consequences of unchecked vehicle exhaust, in both its human and productivity costs, and a pollution prevention program such as ISR is critical to overcome the economic growth argument against ISR.

CONCLUSION

Indirect source review has returned as an integral part of the war on air pollution, either as properly named, or masquerading as transportation control measures or the conformity provisions of the 1990 Amendments. Even if a direct usurpation of local land use authority remains prohibited, the requirements of the 1990 Amendments, including the withholding of federal funds, provide an adequate incentive to force air pollution control districts to implement ISR programs, even if these programs are labeled something else.

While local resistance to any program which seeks to separate individuals from their personal vehicles, as well as slowing some land development, remains as strong as ever, the 1990 Amendments at least force consideration, and possibly the implementation, of necessary ISR programs. Perhaps in the twenty-first century, we all will be able to breathe a bit easier.