

1-1-1996

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Recommended Citation

Anya C. Musto, *California as a Model for Federal Regulation of Automobile Emissions Pollution: Replacing Title II of the Clean Air Act of 1990*, 5 *Penn St. Envtl. L. Rev.* 151 (1996).

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California as a Model for Federal Regulation of Automobile Emissions Pollution: Replacing Title II of the Clean Air Act of 1990

Those who cannot remember the past are condemned to repeat it.

George Santayana, American Philosopher

I. Introduction

Leading authorities recognize California as a trailblazer in the regulation of automobile emissions.¹ California's vigilance in air pollution control is a response to the serious threat that automobile emissions pose to both human health and the environment. Six of the seven American cities with the highest levels of ozone pollution² are in California.³ In fact, air pollution has become a serious health problem across the entire

¹ National Commission on Air Quality, *To Breathe Clean Air* 197 (1981). California standards have "led the rest of the country by two to five years and now have diverged from the federal standards in a manner appropriate to meet California's air pollution situation." *Id.*

² Ozone is formed by a reaction of volatile organic compounds and nitrogen oxides in sunlight. The Honorable Henry A. Waxman et al., *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1947, 1949 (1991). The Honorable Henry A. Waxman, a Democrat from California, was chair of the House Health and Environment Subcommittee, which has jurisdiction over the Federal Clean Air Act. The article is co-authored by Gregory S. Wetstone and Phillips S. Barnett, who were also members of the House Health and Environment Subcommittee. The authors analyze the new mobile source controls proposed in the 1990 Clean Air Act Amendments.

California has led research efforts to isolate the process and components that contribute to ozone pollution. As early as 1950, California biochemist Arlie Haagen-Smit "discovered the photochemical effect where unburned hydrocarbons from automobiles, under appropriate meteorological conditions, can combine with nitrous oxides from motor vehicles under the influence of sunlight to form photochemical smog, a serious air pollutant." Haagen-Smit later served on the California Air Resources Board. WILLIAM H. RODGERS, JR., ENVTL. L. § 3.24 (West 1986).

³ 140 CONG. REC. S6207 (daily ed. May 23, 1994) (statement of Sen. Boxer). In a report to the Senate, Senator Boxer declared that the quality of life is at stake in California because "more than 90% of Californians live in areas which do not meet federal healthy air standards, and over two-thirds of this pollution comes from mobile sources." The severity of the air pollution problem in California is evidenced by the fact that children who reside in the Los Angeles Basin suffer a 15% reduction in lung function by age 12 due to exposure to smog. *Id.* at S6208.

United States. One hundred fifty million Americans continue to breathe air that fails to meet national health-based standards for ozone pollution.⁴

The single most significant source of air pollution in the United States is the motor vehicle.⁵ Carbon monoxide, oxides of nitrogen, photochemical oxidants, and lead — all acknowledged hazards to health and property — are blamed on the passenger auto.⁶ Moreover, motor vehicles produce more than one third of smog and two thirds of carbon monoxide measured in American urban areas.⁷

The prominence of the automobile in American society defines the problem of air pollution in both personal and political terms. The American automobile sustains the economy, dictates land use patterns, and provides freedom for the population.⁸ As a result, Americans have a perceived “right to drive.”⁹ More than eighty percent of the population exercises that right by commuting to work in automobiles.¹⁰ At the same time, automobile emissions exact environmental costs on public health.¹¹ Thus, a dilemma exists concerning automobile use and mobile source

⁴ 136 CONG. REC. S16895, S16986 (daily ed. Oct. 27, 1990) (statement of Sen. Lieberman). Senator Lieberman went on to state that “[r]esearch conducted at Harvard University indicates that air pollution may be a contributing factor in one out of every 20 deaths in the United States” *Id.* at S16986.

⁵ Waxman, *supra* note 2, at 1949.

⁶ Rodgers, *supra* note 2. Carbon monoxide, oxides of nitrogen, photochemical oxidants, and lead are the four major criteria pollutants. *Id.*

⁷ S. William Becker & Nancy R. Kruger, *Wish They All Could Be California Cars*, THE ENVTL. FORUM, May-June 1992, at 30. S. William Becker is the Executive Director of both the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials in Washington, D.C.

⁸ *Id.*

⁹ Michael R. Campbell, *The Employer Trip Reduction Program: Driving Restrictions Arrive in Pennsylvania Via the Clean Air Act*, 3 DICK. J. ENVTL. L. & POL’Y 71, 73 (Spring 1994). Campbell examines the Employer Trip Reduction Program (hereinafter ETRP) mandated by the 1990 Clean Air Act. The ETRP requires employers of 100 employees or more to reduce the number of vehicles commuting to their workplaces. *Id.* at 71. The author notes that American citizens are unwilling to alter their driving habits without governmental intervention despite the severity of the automotive emission pollution problem. *Id.* at 73.

Accordingly, Americans have shown stiff opposition to Clean Air Act inspection and maintenance (hereinafter I/M) programs mandated under the Clean Air Act. In fact, Americans seem to be “unalterably opposed to such programs as unwarranted intrusions on their lifestyles.” Ora Fred Harris, Jr., *The Automobile Emissions Control Inspection and Maintenance Program: Making it More Palatable to “Coerced” Participants*, 49 LA. L. REV. 1315, 1319 (1989). The political resistance by states and their residents to federal regulation has resulted because “[t]he average citizen tends to characterize such programs as unwarranted intrusions into traditionally state or local matters, namely the safety, inspection, and maintenance of automobiles.” *Id.*

¹⁰ 136 CONG. REC. S16895, S16987 (daily ed. Oct. 27, 1990) (statement of Sen. Moynihan).

¹¹ Becker *supra* note 7, at 30.

controls: Americans rely on the automobile, yet they want to curb and prevent air pollution.

The Clean Air Act of 1990¹² is the federal legislative response to automobile emission pollution. It proposes to “protect and enhance the quality of the nation’s air resources.”¹³ The Act attempts to achieve health-based goals through cooperation among federal, state, regional, and local programs designed to prevent and control air pollution.¹⁴ Over the next ten years, Title II of the 1990 Amendments will affect every car that is manufactured and every gallon of gasoline that is sold in this country.¹⁵ Ultimately, Title II will dictate either the success or the failure of the nation’s efforts to control urban smog.¹⁶

The 1990 Amendments, nevertheless, will not successfully prevent and control air pollution. One author contends that the 1990 Act represents standards that are not stringent enough.¹⁷ Because of the substantial contribution of air pollution by motor vehicles, the problem requires more federal regulation than standards that preserve the status quo.¹⁸ Current federal emission standards will not adequately control the next decade’s projected increases in traffic congestion and vehicle miles traveled.¹⁹

The California Program contrasts federal attempts to regulate automobile emissions. The gravity of the air pollution problem in California has made it necessary for the California state legislature to set bright-line performance standards for emissions, and to have manufacturers

¹² 42 U.S.C. §§ 7401-7671 (1995).

¹³ 42 U.S.C. § 7401(b)(1) (1995).

¹⁴ 42 U.S.C. § 7401(a)(4) (1995).

¹⁵ Waxman, *supra* note 2, at 1949.

¹⁶ *Id.*

¹⁷ Becker, *supra* note 7.

¹⁸ Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647 (1991). Howard Latin is a Professor of Law and a Justice John A. Francis Scholar at Rutgers University School of Law. Latin contends that the 1990 Clean Air Act Amendments do not address “real-life difficulties” and, therefore, like the clean air legislation of the 1970s, are unlikely to be successful. *Id.* at 1648.

Latin’s central theme is “the adage that those who fail to learn from history are compelled to repeat it.” *Id.* Regulatory implementation of environmental protection programs “has seldom conformed to legislative expectations and rarely if ever achieved the desired degree of protection.” *Id.* Latin’s “central lesson” is that the key to effective environmental protection is not good legislative intentions but, rather, good implementation. *Id.*

¹⁹ Becker, *supra* note 7. New federal standards to combat air pollution from automobiles are not sufficient because of the “profound contribution of mobile sources to air pollution and the fact that traffic congestion and vehicle miles traveled are expected to increase in the next ten years” *Id.*

meet those standards.²⁰ The California Program has been developed to ensure that state citizens breathe air that is devoid of unhealthy automotive pollutants.

This Comment first will discuss the legislative history and substance of both the Federal Clean Air Act Amendments of 1990 and the California Clean Fuel/Low Emissions Vehicle Program. Second, it will address the inadequacy of the Clean Air Act Amendments of 1990, and the need for standards that more realistically deal with the insurmountable automobile emissions pollution problem in the United States. Third, this Comment will examine the benefits and problems inherent in the California Program. Finally, this Comment will conclude that the California standards should replace the federal standards on a national level for several reasons. The California Program is both economically and technologically feasible. In addition, enactment of the California Program will introduce a uniform standard across the United States. Most importantly, however, California's more stringent standards are necessary to protect public health and the environment as automobile use and the number of automobiles used increases into the twenty-first century.

II. The History and Substance of Automobile Emission Legislation

A. *The Clean Air Act Amendments of 1990*

The original Clean Air Act,²¹ enacted in 1955, was merely a research and assistance mandate for air pollution prevention. It made no provisions for federal motor vehicle emission standards. As a result, states began to adopt their own motor vehicle emission standards. In 1965, the Senate Committee on Public Works decided that national standards were preferable to individual state standards. The Committee reasoned that individual state standards could result in a chaotic economy for manufacturers, dealers, and consumers.²²

²⁰ 139 CONG. REC. S16845 (daily ed. Nov. 20, 1993) (statement of Sen. Baucus) (hereinafter 139 CONG. REC. S16845).

The California Low Emissions Vehicle standards are codified at CAL. CODE REGS. tit. 13, §§ 1900, 1904, 1956.8, 1960.1, 1960.1.5, 1960.5, 1965, 2061, 2111, 2112, 2125, and 2139 (1994). The Clean Fuels portion of the program is codified at CAL. CODE REGS. tit. 13, §§ 2300-2317 (1994).

²¹ Air Pollution Control — Research and Technical Assistance Act of 1955, Pub. L. No. 84-159, 69 Stat. 322.

²² S. REP. NO. 192, 89th Cong., 1st Sess. 5-6 (1965) (hereinafter S. REP. NO. 192).

Following Committee recommendation in 1965, Congress finally enacted standards for new motor vehicle engine emissions.²³ The law required the Secretary to prescribe emission standards for all new pollutants emitted from any class of new vehicles, provided the Secretary gave "appropriate consideration to technological feasibility and economic costs."²⁴ The 1965 Act prohibited the sale of nonconforming vehicles and imposed fines of up to \$1,000 for each offense.²⁵ It provided for voluntary certification provisions that allowed manufacturers to submit new motor vehicles or new motor vehicle engines for testing in order to determine compliance. The Act also imposed record-keeping obligations on manufacturers for the standard-setting process, but protected trade secrets from public disclosure.²⁶

The 1966 Clean Air Act Amendments made only minor technological changes,²⁷ it was not until 1967 that increasing attention was given to the auto emissions problem. Motor vehicles were finally recognized as the "greatest single contributor to total national air pollution."²⁸ As a result, Title II of the Air Quality Act of 1967 was named the National Emissions Standards Act.²⁹

The reforms in the Act of 1970 were intended to further strengthen mobile source controls.³⁰ Prototype testing by manufacturers was made mandatory instead of voluntary.³¹ The Act required manufacturers to warrant that each new motor vehicle or engine had emission control systems comparable to the prototype tested.³² The Secretary was given a year to research low cost techniques and to report the results to Congress.³³ Further, the Secretary was required to set standards for fuels or fuel additives that endangered the public health or welfare.³⁴

A National Air Pollution Control Administration (NAPCA) report, published in June 1970, revealed that emission-caused air pollution had

²³ Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, § 202(a), 79 Stat. 992.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954.

²⁸ Rodgers, *supra* note 2.

²⁹ Pub. L. No. 90-148, 81 Stat. 485.

³⁰ Committee on Interstate and Foreign Commerce, Clean Air Act Amendments of 1970, H.R. REP. NO. 1146, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

become a health risk of uncontrollable dimensions.³⁵ The report concluded that carbon monoxide, hydrocarbons, and nitrogen oxides each had to be reduced by at least ninety percent by 1980 in order to achieve ambient air quality levels to protect public health.³⁶ Congress ultimately adopted the standards when the Subcommittee determined that the “earliest possible date” for compliance would be 1975.³⁷ The 1970 Act increased by three pages in 1974,³⁸ and by an additional nineteen pages in 1977.³⁹ With the increased length of the Act came complexity.

The 1990 Amendments represent the “fifth significant federal air pollution control legislative effort.”⁴⁰ Congress took an “unapproachable piece of legislation,” tripled the Act’s length, and “geometrically increased its complexity.”⁴¹ The Clean Air Act Amendments of 1990 tighten tailpipe emission standards and establish new provisions to control cold-temperature emissions of carbon monoxide.⁴² New programs were added

³⁵ National Air Pollution Control Administration (NAPCA) Report, *Federal Motor Vehicle Emission Goals for Carbon Monoxide, Hydrocarbons, and Nitrogen Oxides, Based on Desired Air Quality Levels* (June 1970).

³⁶ *Id.* The NAPCA report indicated that by 1980, carbon monoxide had to be reduced by 92.7%, hydrocarbons by 99%, and nitrogen oxides by 93.6%.

³⁷ Committee on Public Works, National Air Quality Standards of 1970, S. REP. NO. 1196, 91st Cong., 2d Sess. 27 (1970). Senator Baker announced, “[t]his may be the biggest industrial judgment” made in the United States “in this century.” 116 CONG. REC. 33085 (1970).

The technology-forcing judgment by Congress was praised by some as a goal-raiser, and condemned by others as an empty threat too extravagant to be believed. Rodgers, *supra* note 2.

³⁸ National Emission Standards Act, tit. II of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, 261.

³⁹ Pub. L. 95-95, tit. II, 91 Stat. 685, 751-69.

⁴⁰ Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What’s Worked; What’s Failed; What Might Work*, 21 ENVTL. L. 1549, 1605 (1991). Reitze is Professor of Law and Director of the L.L.M. program in environmental law at George Washington University. The author provides a history and analysis of air pollution regulation in the United States, including the Clean Air Act Amendments of 1990. The author concludes that the Amendments do not address the reasons for prior failures and must be complemented by a national energy policy and other environmental initiatives. *Id.* at 1646.

⁴¹ *Motor Vehicle Mfrs. Ass’n of the United States v. New York State Dep’t of Envtl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994), *aff’d*, *Motor Vehicle Mfrs. Ass’n of the United States v. New York State Dep’t of Envtl. Conservation*, 1996 U.S. App. LEXIS 343, 341 ENV’T REP. (BNA) 1993 (2d Cir. N.Y. 1996). The amicus brief of the United States explains that the “enormity of the 1990 Amendments beggars description.” *Id.*

New provisions under the 1990 Amendments include “extensive nonattainment area requirements, a program for the regulation of 189 hazardous air pollutants, an acid deposition control program, mobile source controls, provisions addressing reformulated fuels, a federal operating permit program, and strengthened criminal and civil provisions.” Mel S. Schulze, *Air Quality: Industry Participation in Implementing the 1990 Clean Air Act Amendments*, 5 NAT. RESOURCES & ENV’T 38 (1991).

⁴² Waxman, *supra* note 2, at 1955.

for controlling refueling and controlling evaporative and “running loss” emissions, as well as for the installation of onboard diagnostics and for the requirement of extended durability.⁴³ In addition, the Act revamps emission warranties, requires reevaluation of vehicle test procedures, regulates emissions of some hazardous emission pollutants for the first time, and strengthens enforcement authority.⁴⁴

Despite these requirements, the 1990 Amendments represent a token effort to address the projected increase of automotive pollutants in the next few decades. Within ten years, the increased use of vehicles will outpace reductions achieved by pre-1990 controls.⁴⁵ In recognition of this fact, the 1990 Amendments establish tighter emission standards for new vehicles built in the 1990s in an effort to continue the reduction in motor vehicle emissions after the year 2000.⁴⁶

The federal standards under Title II consist of a two-tiered process for passenger, or light duty, vehicles.⁴⁷ Tier I standards, which are mandatory and were set to become effective in 1994, are based on standards set in

⁴³ *Id.*

⁴⁴ *Id.* at 1955-56.

⁴⁵ *Id.* at 1956.

⁴⁶ Waxman, *supra* note 2, at 1956.

⁴⁷ Committee on Energy and Commerce, Report of the Clean Air Act Amendments of 1990, H.R. REP. NO. 490, 101st Cong., 2d Sess., pt. 1, at 298 (1990) (hereinafter H.R. REP. NO. 490). “The Clean Air Act Tier 1 standards are 0.31 grams per mile (hereinafter gpm) hydrocarbons, 4.2 gpm carbon monoxide, and 0.6 gpm nitrogen oxides. The Tier II standards are 0.125 gpm hydrocarbons, 1.7 gpm carbon monoxide, and 0.2 gpm nitrogen oxides.” *Automakers Propose LEV Offer if States Abandon Plans to Join California Program*, 24 ENV'T REP. (BNA) 1500 (Dec. 10, 1993).

This Comment focuses on Title II of the 1990 Clean Air Act, which is being compared to the California Clean Fuel/Low Emissions Vehicle Program. Title I primarily regulates in-use vehicles, while Title II attempts to reduce automobile emissions through controls on new vehicles and fuels. Arnold W. Reitze, Jr., & Barry Needleman, *Control of Air Pollution from Mobile Sources Through Inspection and Maintenance Programs*, 30 HARV. J. ON LEGIS. 409, 411 (1993).

The states, through Title I, primarily regulate automobiles in the hands of consumers through the I/M program. 42 U.S.C. § 7511a(b)(4) (1995). The I/M program under the 1990 Clean Air Act requires:

- (1) computerized emission analyzers, including on-road testing devices;
- (2) no waivers for vehicles or parts covered by emission control performance warranties;
- (3) a minimum expenditure by the consumer of \$450.00 for repair, adjusted annually by reference to the Consumer Price Index;
- (4) enforcement through denial of vehicle registration unless the state can demonstrate a more effective enforcement program;
- (5) annual inspections unless biennial inspections are as effective;
- (6) a centralized program unless the state can demonstrate a decentralized program is just as effective; and
- (7) a program for inspection and repair of emission control diagnostic systems.

42 U.S.C. § 7511a(c)(3)(C) (1995).

California in 1989.⁴⁸ Tier I standards aim at a thirty percent reduction in tailpipe emissions of nonmethane hydrocarbons.⁴⁹ Nitrogen oxide emissions will be cut an additional sixty percent from pre-1990 requirements.⁵⁰ Particulate emissions from diesel-fuel vehicles will be reduced by eighty percent.⁵¹ Tier II standards, which will reduce emissions by another fifty percent, will go into effect in the year 2004 unless the Environmental Protection Agency (EPA) determines that the standards cannot be met, are unnecessary, or are not cost-effective.⁵²

B. The California Program

As early as 1955, California diverged from the rest of the states and began regulating automotive emission pollutants.⁵³ By this time, federal legislation was already lagging far behind.⁵⁴ Even after Congress enacted the 1965 emission standards for new motor vehicle engines, California continued to develop a separate and more stringent emissions program. Subsequently, Congress amended the 1967 Clean Air Act to impose federal preemption over motor vehicle emission standards.⁵⁵ Under the Clean Air Act, the federal government would determine the automobile emission standards, thereby preempting state regulation of emissions.⁵⁶ National

⁴⁸ H.R. REP. NO. 490, *supra* note 47.

⁴⁹ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 203, 202(g), 104 Stat. 2399, 2474-76 (codified at 42 U.S.C. § 7521(g) (1995)). The 30% reduction in nonmethane hydrocarbons (NMHC) constitutes a standard of 0.25 grams. Nonmethane hydrocarbons are total hydrocarbons minus methane, a relatively unreactive hydrocarbon that does not significantly contribute to ozone formation. Waxman, *supra* note 2, at 1957.

⁵⁰ *Id.* Nitrogen oxide emissions under the 1990 Act were reduced to 0.4 gpm. The pre-1990 Clean Air Act required a 75% reduction in nitrogen oxide emissions, equivalent to 1.0 gpm. 42 U.S.C. § 7521(b)(1)(B) (1988).

⁵¹ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 203, 202(g), 104 Stat. 2399, 2474-76 (codified at 42 U.S.C. § 7521(g)(1) (1995)).

⁵² Waxman, *supra* note 2, at 1956.

⁵³ S. REP. NO. 192, *supra* note 22.

⁵⁴ Air Pollution Control — Research and Technical Assistance Act of 1955, Pub. L. No. 84-159, 69 Stat. 322.

⁵⁵ Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485.

⁵⁶ 42 U.S.C. § 7543(a). Section 7543(a) provides:

(a) Prohibition

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

(b) Waiver

standards were preferred to having each state develop its own standards. Individual states having different standards would result in chaos for manufacturers, dealers, and users.⁵⁷

In 1967, California became the only state to receive a waiver of federal preemption, which allowed it to continue to promulgate its own emissions standards. California was exempt from the federal standards because it began regulating automobile emissions before March 30, 1966, in an effort to combat the smog problem in the Los Angeles basin.⁵⁸ In order for California to receive the waiver, the state's Senator on the Senate Committee on Public Works had to convince the Committee's members that his state's "unique problems and pioneering efforts" warranted a waiver from preemption.⁵⁹ The 1977 Clean Air Act Amendments provided that California could receive a waiver if the state's standards "in the aggregate" protected public health at least as well as the federal standards.⁶⁰ A waiver must be acquired by California for each model year that the state wishes to regulate automobile emissions.⁶¹ Waiver is granted if: 1) California needs to establish state standards to meet compelling and extraordinary conditions; 2) California shows that its standards are not less protective of public health than the applicable

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare, as applicable Federal standards. No such waiver will be granted if the administrator finds that —

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or,

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for the purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

42 U.S.C. § 7543 (1995).

⁵⁷ S. REP. NO. 192, *supra* note 22, at 5-6.

⁵⁸ 42 U.S.C. § 7543(b)(1).

⁵⁹ S. REP. NO. 404, 90th Cong., 1st Sess. 33 (1967).

⁶⁰ Clean Air Act Amendments of 1977, Pub. L. 9595, § 207, 91 Stat. 685.

⁶¹ Notice, EPA, California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 59 Fed. Reg. 48625 (Sept. 22, 1994).

federal standards; and 3) California's amendments are consistent with § 202(a) of the Federal Clean Air Act.⁶²

As a testament to California's aggressive ingenuity in its fight against automotive air pollution, the EPA granted California a waiver for its Clean Fuel/Low Emissions Vehicle Program on September 22, 1994.⁶³ Since the grant of the waiver, motor vehicles manufactured for sale in the United States must be either "federal cars" (certified to meet federal vehicle emission standards as set by the EPA),⁶⁴ or "California cars" (certified to meet the California standards).⁶⁵ An automobile that meets neither the federal standards nor the California standards would constitute a prohibited "third vehicle."

In the 1977 Amendments to the Clean Air Act, Congress recognized federal deference to California's expertise in automotive pollutant regulation. The Amendments allow a state to opt-in to the more stringent California Program if the state's standards are identical to the California standards for a given model year.⁶⁶ The requirements are carefully drafted to avoid placing an undue burden on the automobile manufacturing industry. For another state to use California's standards in a given model year, California must adopt its standards two years in advance of that year, California must receive a waiver for its standards, and the adopting state must adopt California standards at least two years before the model year.⁶⁷ This "lead-time" requirement insures that manufacturers have

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 42 U.S.C. § 7521 (1995).

⁶⁵ CAL. CODE REGS. tit. 13, § 1960.1 (1994).

⁶⁶ 42 U.S.C. § 7507 (1995). The 1990 Clean Air Act Amendments reaffirm the ability of the states to "opt-in" to the California Low Emissions Vehicle Program. *Id.* Section 7507 provides in pertinent part:

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if — (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

42 U.S.C. § 7507 (1995).

⁶⁷ H.R. REP. NO. 294, 95th Cong., 1st Sess. 310 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077.

ample time to adjust to upcoming regulations. The 1990 Amendments added two restrictions to this option: no state may limit the sale of the California-certified vehicle, or require the manufacture of a "third vehicle."⁶⁸ These restrictions relieve the automobile industry from the undue burden of producing different vehicles that conform to each individual state standard.

The California Low Emissions Vehicle Program will achieve reduction in volatile organic compounds, nitrogen oxides, and carbon monoxide well beyond the reductions anticipated under the federal program.⁶⁹ Benefits from both the federal and California standards will become evident between the years 2000 and 2005 as newer, cleaner vehicles replace older, higher-polluting vehicles.⁷⁰ By the year 2005, however, emissions under the federal program will begin increasing as the standards become incapable of offsetting the continued rise in vehicle use.⁷¹ The current California standards will continue to reduce motor vehicle emissions for an additional ten years.⁷² By 2015, volatile organic compound emissions will be twenty percent to sixty percent lower under the California Program than under the federal standards.⁷³ Likewise, under California standards, nitrogen oxides will be: one-fourth to two-fifths lower; carbon monoxide will be one-tenth to one-third lower; and toxics, such as benzene, will be up to two-thirds lower.⁷⁴

III. The Shortcomings of the Clean Air Act Amendments of 1990

A. The 1990 Clean Air Act Amendments do not Properly Address Compelling Public Health and Environmental Concerns

The 1990 Clean Air Act Amendments do not adequately address the environmental conditions which have given rise to numerous health risks. Ozone pollution, commonly known as urban smog, causes chest pain, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections.⁷⁵ The most severe diseases linked

⁶⁸ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 232, 104 Stat. 2355, 2529 (codified at 42 U.S.C. §§ 7401-7671 (1995)).

⁶⁹ Becker, *supra* note 7.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Becker, *supra* note 7.

⁷⁵ H.R. REP. NO. 490, *supra* note 47, at 199-200.

to air pollution are respiratory tract diseases such as chronic bronchitis, emphysema, and lung cancer.⁷⁶ Lung tissue may be permanently scarred after prolonged exposure to ozone.⁷⁷ In addition, long-term ozone exposure significantly reduces human pulmonary function.⁷⁸ Ultimately, breathing becomes less efficient because “[l]ung capacity and the speed with which the lungs can absorb oxygen or expel carbon dioxide is reduced.”⁷⁹ Both lung and heart diseases are more likely to occur in persons who experience long-term exposure to air pollution.⁸⁰

Persons with increased vulnerability to ozone pollution are: thirty-one million children; nineteen million elderly persons; six million asthmatics; and seven-and-one-half million persons with chronic lung disease.⁸¹ Infants suffer immediate impairment following exposure to ozone pollution because their lung and nasal passages are sensitive and undeveloped.⁸² Premature babies who are subject to air pollution are more susceptible to Sudden Infant Death Syndrome, otherwise known as “SIDS.”⁸³

Mobile sources are the most significant contributors to ozone pollution, which is the most widespread air pollution problem in the United States.⁸⁴ Mobile sources produce fifty percent of the nation’s volatile organic compound emissions and more than forty-five percent of nitrogen oxide emissions.⁸⁵ In addition, automobiles emit from seventy to ninety percent of the nation’s carbon monoxide pollution.⁸⁶ Carbon monoxide, the second leading air pollutant in the United States, deprives the heart and brain of oxygen.⁸⁷ Mobile sources also emit carcinogenic emissions such as diesel particulates,⁸⁸ butadiene, benzene, and formaldehyde, all of

⁷⁶ W. David Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 667, 682 (1986). The author contends that persons have a constitutional right to be free from air pollution. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Slawson, *supra* note 76.

⁸¹ 136 CONG. REC. S2826, S2832 (daily ed. Mar. 21, 1990) (statement of Sen. Kerry).

⁸² Slawson, *supra* note 76, at 691.

⁸³ *Id.*

⁸⁴ Waxman, *supra* note 2, at 1950.

⁸⁵ *Id.* The author notes that percentages of volatile organic compounds and nitrogen oxides are naturally higher in urban areas. *Id.*

⁸⁶ *Id.* at 1951.

⁸⁷ H.R. REP. NO. 490, *supra* note 47, at 205.

⁸⁸ Slawson, *supra* note 76, at 691. Fine diesel particulates in the air deeply penetrate into lung passages and are absorbed into mucous membranes. According to a Yale University study, over 140,000 Americans die each year as a result of particulate air pollution. *Id.*

which contribute to half of all cancers caused by air pollution.⁸⁹ Beyond human health risks, motor vehicles contribute to ozone depletion and global warming⁹⁰ by emitting chlorofluorocarbons, the major culprits in stratospheric ozone depletion.⁹¹

The 1990 Clean Air Act Amendments will not prevent or stall the eminent increase in current air pollution levels. The Amendments have been referred to as both an extravagant failure in social experimentation and an incomplete success.⁹² In order to meet federal health standards, heavily polluted cities must reduce emissions of volatile organic compounds and nitrogen oxides by sixty to eighty percent, notwithstanding economic and population growth.⁹³ This is an impossible task under the current standards. Large cities have already adopted most of the federal emission control measures.⁹⁴ Federal health standards cannot be accomplished unless vehicle emissions are cut drastically.⁹⁵ In fact, Los Angeles will not meet federal health standards by the year 2010 without widespread use of zero emission electric vehicles.⁹⁶

⁸⁹ H.R. REP. NO. 490, *supra* note 47, at 277; Becker, *supra* note 7. Toxic automotive air pollutants "are responsible for almost 60% of total cancers that result from outdoor exposure to air toxics."

⁹⁰ World Resources Institute, *Driving Forces* 9 (1990). Motor vehicle emissions constitute 16% of the chlorofluorocarbons in the United States. Chlorofluorocarbons are used as refrigerants in motor vehicle air conditioners. *Id.*

⁹¹ Steven S. Shimberg, *Stratospheric Ozone and Climate Protection: Domestic Legislation and the International Process*, 21 ENVTL. L. 2175, 2181-83 (1991).

⁹² Heritage Foundation Background, *Autos and Clean Air: Time for Reassessment*, at 10 (September 15, 1982).

[C]hanges in the mobile source pollution control regulatory structure could save the American consumer between \$5.4 and \$15.2 billion and put some 152,000 idle automobile workers back to work. \$5.4 billion could be saved through the rapid phaseout of most pollution control devices and their requisite imported strategic metal requirements. Repealing the 'no lead in gasoline' regulation could save an additional \$9.8 billion in 1983. Eliminating pollution control devices could increase automobile sales by at least 7.6 percent.

Id.

Compare S. REP. NO. 127, 95th Cong., 1st Sess. 72 (1977). "The National Academy of Sciences says that the added cost to meet the statutory standards would be \$44-203, compared with a conventional engine . . . meeting the 1975 standard." *Id.*

⁹³ Waxman, *supra* note 2, at 1993, 1994.

⁹⁴ *Id.* at 1994.

⁹⁵ *Id.*

⁹⁶ *Id.* Los Angeles has the distinction of being the most polluted city in the United States. The current California Program implementation plan for Los Angeles calls for 17% electric vehicles of the total state fleet by the year 2010. *Id.*

Success in fighting air pollution is directly proportionate to success in reducing emissions from mobile sources.⁹⁷ Mobile source provisions of the 1990 Clean Air Act Amendments are severely limited in combating domestic air pollution.⁹⁸ Current Clean Air legislation serves as mere ground work for the production of a new generation of clean-fuel vehicles.⁹⁹ It is necessary to extend clean-fuel provisions to all polluted areas and to further tighten emission standards.¹⁰⁰ The 1990 Amendments are an “unfinished agenda.”¹⁰¹ Congress must effectuate the California Program on a national level in order to forge a national strategy to thwart automobile emission pollution.

B. Administrative Failures in the 1990 Clean Air Act Amendments

Agencies responsible for implementing the 1990 Clean Air Act Amendments have failed to do so effectively. The EPA has missed fifty-eight regulation deadlines required by the Act.¹⁰² In fact, of the many deadlines set, “the Agency met only one: establishing a timetable for an air quality modeling conference.”¹⁰³ On one occasion, a frustrated member of Congress referred to the EPA as the “Environmental Procrastination Agency.”¹⁰⁴

The EPA claims that implementation difficulties result from a lack of staff and funds.¹⁰⁵ However, a more likely cause of delayed implementation is inefficient management of available staff and funds.¹⁰⁶ The EPA’s “bloated bureaucratic process” inhibits the timely implementation of the

⁹⁷ Waxman, *supra* note 2, at 2019. “[R]eduction of mobile source emissions is essential in any scheme to improve urban air quality.” Reitze, *supra* note 47, at 409. *See also* 57 Fed. Reg. 52950 (1992).

⁹⁸ Waxman, *supra* note 2, at 2018. “It is . . . important that Congress recognize the limits of the mobile source provisions of the 1990 Amendments in combating domestic air pollution. The Amendments enact a tough program for reducing emissions from vehicles and fuels over the next decade. But over the long term, the most heavily polluted cities will need widespread introduction of clean-fuel, or even zero-emission vehicles.” *Id.*

⁹⁹ *Id.* at 2019.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2018.

¹⁰² 139 CONG. REC. S16845, *supra* note 20.

¹⁰³ *Id.*; Warren H. Husband, *New Approaches and New Polluters: The Practical Impact of the Clean Air Act Amendments of 1990*, 19 FLA. ST. U. L. REV. 861, 862 (1991). An enormous task lies ahead for the EPA’s implementation of the 1990 Clean Air Act Amendments. *Id.* at 861.

¹⁰⁴ 134 CONG. REC. S16685 (daily ed. Oct. 18, 1988) (statement of Sen. Lautenberg during Senate Debate and Conference on the Ocean Dumping Ban Act of 1988).

¹⁰⁵ 139 CONG. REC. S16845, *supra* note 20.

¹⁰⁶ *Id.*

Clean Air Act Amendments of 1990.¹⁰⁷ The EPA needs to reinvent its regulatory process in order to implement legislation in an efficient manner and to sufficiently address public health issues.¹⁰⁸

The Act itself is the glaring result of a failed administrative process. It is the product of "last-minute, closed-door bargaining in conjunction with rushed drafting sessions by physically and mentally exhausted congressional staff."¹⁰⁹ It comes as no surprise in general that the most lengthy and most complex federal environmental statute¹¹⁰ is a law in which "ambiguities abound, internal inconsistencies exist, and seemingly unrelated provisions lie end-to-end."¹¹¹ Further, the Act is not preceded by enough legislative history to explain its provisions.¹¹² Finally, no political motivation exists to adopt a technical corrections bill.¹¹³ Instead of a "sacred commitment," the Act is known simply as a complex law that contains literally hundreds of pages.¹¹⁴

¹⁰⁷ *Id.* "There are too many people at too many levels reviewing too many documents. All have the power to veto and delay. The EPA must take a serious look at its resources and determine what its real needs are." *Id.*

¹⁰⁸ 139 CONG. REC. S16845, *supra* note 20. Senator Baucus, in a "mid-term report card on implementation," advised the EPA how to achieve more efficient implementation of the 1990 Clean Air Act:

1. The EPA should prioritize better and react more quickly to changes in assumptions about health effects of pollutants.
2. The EPA should provide greater leadership to the states and be more aggressive in its support for state activities that go beyond the minimum requirements of the law. Most states must go beyond the minimum requirements of the law in order to meet federal health-based standards.
3. The EPA must improve its regulatory process. The process by which the EPA promulgates regulations is too bureaucratic.

Id.

¹⁰⁹ Schulze, *supra* note 41, at 38.

¹¹⁰ *Id.* The Act has become so lengthy and complex in part because little of the pre-existing Clean Air Act was deleted or rewritten.

¹¹¹ *Id.*

¹¹² *Id.* "Unlike most regulatory situations, the EPA will be unable to rely heavily on legislative history to clarify the various inconsistencies in the Amendments. In contrast to the usually voluminous bulk of legislative history accompanying most Congressional action, the legislative history of the Amendments is rather sparse." Husband, *supra* note 103, at 862.

¹¹³ Schulze, *supra* note 41.

¹¹⁴ 139 CONG. REC. S16845, *supra* note 20.

IV. The California Program as an Alternative to Current Federal Standards

A. Practical Considerations of Implementation

The California Air Resources Board (CARB) developed a Low Emissions Vehicle Program after receiving special exemption status from the federal standards to regulate automobile emissions.¹¹⁵ To supplement its Low Emissions Vehicle Program, California seeks to introduce five new categories of automobiles into its fleet in the next ten years.¹¹⁶ The five types of California Clean Fuel/Low Emission automobiles include: 1) California Tier I Vehicles; 2) Transitional Low Emission Vehicles (TLEVs);¹¹⁷ 3) Low Emission Vehicles (LEVs);¹¹⁸ 4) Ultra Low Emission Vehicles (ULEVs);¹¹⁹ and 5) Zero Emission Vehicles (ZEVs).¹²⁰ The California Program also includes a clean fuel requirement that introduces two stages of reformulated gasoline containing a lower sulfur content than gasoline sold in the rest of the United States.¹²¹

The California Program offers a sound alternative to Title II of the 1990 Clean Air Act Amendments because it is technologically and

¹¹⁵ The CARB was directed by the California legislature to adopt a plan with motor vehicle controls, vehicle fuel restrictions, and in-use vehicle controls so as to achieve a 55% reduction in emissions by Dec. 31, 2000. CAL. HEALTH & SAFETY CODE § 43018(b), (c) (Deering 1995).

¹¹⁶ CAL. CODE REGS. tit. 13, § 1960.1(g)(2). More stringent emission standards for carbon monoxide, nitrogen oxide, and formaldehyde are in place for each successive type of low emission vehicle. The average emissions from the mix of these categories of vehicles produced by given manufacturers in a given year must meet an overall "fleet" requirement. *Id.*

¹¹⁷ TLEVs represent 10% to 20% of all new vehicles produced beginning in model year 1994. TLEVs must meet a hydrocarbon standard of 0.125 gpm. Carbon monoxide and nitrogen oxides standards are the same as those for 1993 model year vehicles. CAL. CODE REGS. tit. 13, § 1960.1 (1994).

¹¹⁸ LEVs will represent 25% of new vehicle production beginning in model year 1997. LEVs must meet standards of 0.075 gpm hydrocarbons and 0.2 gpm nitrogen oxides. The carbon monoxide standard for LEVs is the same as that for model year 1993 vehicles and TLEVs. CAL. CODE REGS. tit. 13, § 1960.1 (1994).

¹¹⁹ ULEVs will represent 2% to 12% of new vehicle production between 1997 and 2003. The hydrocarbon standard for ULEVs is 0.04 gpm, and the carbon monoxide standard is 1.7 gpm. The nitrogen oxide standard is 1.7 gpm. The nitrogen oxide standard for ULEVs remains the same as the standard for LEVs. CAL. CODE REGS. tit. 13, § 1960.1 (1994).

¹²⁰ ZEVs will represent 2% to 10% of new vehicle production between 1998 and 2003. The ZEV is expected to be an electric car, which will not have any direct pollutant emissions. CAL. CODE REGS. tit. 13, § 1960.1 (1994).

¹²¹ CAL. CODE REGS. tit. 13, §§ 2300-2317. Phase I gasoline was introduced in California on Jan. 1, 1992. Phase II gasoline is set to become effective on Mar. 1, 1996. *Id.*

economically feasible. Americans exhibit genuine concern over whether national regulatory programs will have an economic impact on their lives. Accordingly, the California Program promises to be both cost-efficient and cost-effective. The first phase of the low emissions vehicle is estimated to cost \$70.00 per vehicle, one half the price of a steering wheel.¹²² The second and third phases of the program, introducing LEVs and ULEVs, will cost an additional \$170.00 per vehicle, less than one half the cost of power door locks.¹²³ ZEVs, the fourth phase, will cost \$300.00 per vehicle, or the price of power windows.¹²⁴ The modest cost of the California Program compared to the amount of pollution reduction it accomplishes makes it more affordable than most other reduction strategies.¹²⁵ California has implemented a practical and comprehensive motor vehicle emission control strategy.¹²⁶ The California Program of aggressive, cost-effective controls represents a "wise environmental choice and prudent public policy."¹²⁷

In addition to being cost-effective, the California Program is also technologically feasible. The California mandate has stimulated technological development and innovation.¹²⁸ It utilizes bright-line performance standards based on environmental goals, not preselected technologies.¹²⁹ Bright-line performance standards have produced tremendous results by setting the standard and then giving industry the flexibility to comply in the most efficient manner possible.¹³⁰ Instead of stifling new ideas and technologies, the California standards have led to the development of technological advancements.¹³¹ In fact, bright-line performance standards force rapid technology development,¹³² for example, the California LEV

¹²² Becker, *supra* note 7.

¹²³ *Id.*

¹²⁴ *Id.* The \$300.00 estimated per vehicle cost for production of ZEVs factors in associated fuel and maintenance savings. *Id.*

¹²⁵ *Id.* at 31.

¹²⁶ Becker, *supra* note 7.

¹²⁷ *Id.*

¹²⁸ 140 CONG. REC. S6707, *supra* note 3.

¹²⁹ 139 CONG. REC. S16845, *supra* note 20.

Compare Federal Clean Air Act Legislation, which has been sharply criticized as a "rules statute." The 1990 Amendments are an "unambiguous rules statute" to the extent that they identify what the automobile industry feasibly can do and sets minimum standards that the industry is expected to meet. David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. REV. 740, 786 (1983).

¹³⁰ 140 CONG. REC. S6707, *supra* note 3.

¹³¹ 139 CONG. REC. S16845, *supra* note 20.

¹³² *Id.* Senator Baucus comments that bright-line performance standards have proven to be extremely productive with respect to the California Program. He recommends that the Committee look for appropriate opportunities to use the bright-line policy option in its future

mandate has been the catalyst for technological advancement in electric vehicle and battery production.¹³³

The Program's workability is evident in its results. Carbon monoxide levels were reduced by nearly sixty percent even though vehicle travel increased ninety-six percent from 1971 to 1991.¹³⁴ Without vehicle emission controls, carbon monoxide levels would have increased three times during the same twenty-year period, given the increased vehicle use.¹³⁵

The California Program continues to introduce standards that represent the future of air pollution control. Future standards for ZEVs, presumably electric cars, require the production of vehicles that will represent technological innovation in domestic transportation. Two percent of all motor vehicles sold in 1998, or twenty-five thousands cars, are required to be ZEVs. Five percent of all motor vehicles sold by the year 2001 are required to be ZEVs, and ten percent by 2003.¹³⁶ The ZEV sales mandate was included in the LEV plan to encourage the development, production, sale, and use of ZEVs.¹³⁷ The California ZEV mandate has been compared to President Kennedy's promise to put a man on the moon in a decade.¹³⁸ The California Program is an example of "technology forcing" law.¹³⁹ Despite that fact, California has never been penalized for noncompliance under its Low Emissions Vehicle Program.¹⁴⁰

The courts have accepted technology-forcing regulations imposed by states in an effort to control automobile emission pollution. In New York litigation over the implementation of the California Program, the Second Circuit failed to find that the sales mandate was unfair to the automobile industry because viable technology was not yet available. The court stated:

Federal Clean Air Act legislation reauthorizations and in the development of other environmental legislation. *Id.*

¹³³ 140 CONG. REC. S6707, *supra* note 3.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Motor Vehicle Mfrs. Ass'n of the United States, *supra* note 41.

¹³⁸ *Id.*

With consumer familiarity and acceptance of electric vehicles, and continued technological advancements and economies of scale, the incremental costs of electric vehicles will decrease. But the linchpin in this effort is California's zero emission requirement. Setting the target date for the zero emission requirement has become the equivalent of President Kennedy's pledge to put a man on the moon in a decade. We can put a significant number of electric vehicles on the road sooner than that. For the sake of our future, for our children's sake, we must not stop now.

140 CONG. REC. S6207, *supra* note 3, at S6208-09.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

No doubt as a result of the technology-forcing nature of the Clean Air Act, today's automobile as we know it is passing away. But the manufacturers' argument with respect to the difficulty of building a viable ZEV is reminiscent of the view that 100 years ago some thought that the U.S. patent office should be closed because anything that could ever be invented had already been invented.¹⁴¹

This acceptance of technology-forcing legislation by the courts aids the implementation and will not hinder progress in controlling automobile emission pollution.

California is not the only state that must take action against the specter of air pollution. While all areas of the country do not share the air pollution disaster of Southern California, the projected economic and population growth promises to step up conventional vehicle use and thus to exacerbate current air pollution levels. The present situation calls for a program that is aggressive, enthusiastic, and offers to handle the air pollution crisis proactively. If the federal government ignores growing pollution levels on the North American continent, the result will be serious repercussions for public health and will lead to ever-increasing costs for medical treatment of air pollution-related health ailments.

The EPA has the statutory authority to implement the California Low Emissions Vehicle Program on a national level without Congressional action. This power is granted to the EPA through the 1990 Clean Air Act Amendments.¹⁴² Section 202(a)(1)¹⁴³ allows the EPA Administrator to set standards of emission control. Additionally, section 301(a)(1)¹⁴⁴ directs the Administrator to set standards that will reduce air pollution from motor vehicles. The EPA can draw the power from the Clean Air Act to implement standards necessary to control automobile emission pollution. The well-established California Low Emissions Vehicle Program established the standards necessary to prevent and reduce automobile tailpipe emissions.

¹⁴¹ *Id.*

¹⁴² Sections 202(1)(a) and 301(a)(1) of the 1990 Clean Air Act Amendments give the EPA the authority to implement standards without Congressional action. 42 U.S.C. §§ 7521(a)(1), 7601(a)(1) (1995).

¹⁴³ 42 U.S.C. § 7521(a)(1) (1995).

¹⁴⁴ 42 U.S.C. § 7601(a)(1) (1995).

B. The Need for Uniformity in the Automotive Emission Pollution Control Strategy

Automobile emission regulation is currently a disjointed effort among the fifty states. The statutory provisions granting California a waiver of federal standards,¹⁴⁵ and giving the other forty-nine states an option to adopt California's standards,¹⁴⁶ are partly to blame for the disarray. At this point, manufacturers are to produce two types of vehicles: one type complies with the federal standards, and the other type satisfies California's requirements. The production of a "third vehicle" is specifically proscribed.¹⁴⁷ The production of a third, or hybrid, vehicle would be chaotic for the automobile industry, for retailers, and for consumers. The production, sale, and purchase of two different types of vehicles, depending on the state in which one resides, is thus confusing.

The effectiveness of air pollution regulation is threatened by the lack of uniformity in automobile emission control strategies among the states. More and more states are moving away from the federal standards and voting to adopt the California standards in their place. Thirteen northeastern and mid-Atlantic states have agreed to adopt the California Low Emissions Vehicle Program.¹⁴⁸ Texas, Illinois, and Wisconsin are considering exercising that option.¹⁴⁹ Litigation has ensued in New York,¹⁵⁰ Massachusetts,¹⁵¹ and Illinois¹⁵² over whether the California standards should be implemented. In addition, the Automobile Manufacturers Association of America proposed an alternative to the California Low Emissions Vehicle Program.¹⁵³ Automakers hope to persuade northeastern and Great Lakes states to abandon plans that will require the sale of the California Low Emissions Vehicle within their jurisdictions.¹⁵⁴ Division among the states regarding the implementation of either federal or California standards threatens to nullify any positive gains made in the fight against automobile emissions air pollution.

¹⁴⁵ 42 U.S.C. § 7507, *supra* note 66.

¹⁴⁶ 42 U.S.C. § 7543, *supra* note 56.

¹⁴⁷ 42 U.S.C. § 7507, *supra* note 66.

¹⁴⁸ Becker, *supra* note 7.

¹⁴⁹ *Id.*

¹⁵⁰ Motor Vehicle Mfrs. Ass'n of the United States, *supra* note 41.

¹⁵¹ American Auto Mfrs. Ass'n v. Commissioner, 31 F.3d 18 (1st Cir. 1994).

¹⁵² *In Re Application of Cal. Motor Vehicle Control Program in Ill.*, Ill. Pollution Control Board, No. R89-17 (C), 1993 ILL. ENVTL. LEXIS 48, Jan. 7, 1993.

¹⁵³ *Mobile Sources*, 24 ENVTL. L. REP. (Envtl. L. Inst.) 10101 (Feb. 1994).

¹⁵⁴ *Id.*

New York and Massachusetts were able to implement the California Low Emissions Vehicle Program without the clean fuels requirement only after a bitter struggle with automobile manufacturers. New York adopted the California Program on May 28, 1992.¹⁵⁵ The Motor Vehicle Manufacturers Association of the United States and the Association of International Automobile Manufacturers, Inc. filed suit against the New York Department of Environmental Conservation and the Commissioner of Environmental Conservation in an attempt to thwart implementation of the California Program. The District Court temporarily delayed implementation until the 1995 model year.¹⁵⁶ The District Court judge, nonetheless, vacated his earlier holding, and lifted the delay on New York's implementation of the California Low Emissions Vehicle Program.¹⁵⁷ On appeal, the Second Circuit Court of Appeals affirmed the requirement that New York delay the starting date of its California Low Emissions Vehicle Program.¹⁵⁸ Finally, the Federal District Court granted New York the right to implement the California program without further delay.¹⁵⁹

Massachusetts promulgated regulations incorporating the California Program on January 31, 1992.¹⁶⁰ Automobile manufacturers then filed an action to stall efforts to implement the new regulations.¹⁶¹ The District Court denied the automobile manufacturers' request to preliminarily enjoin the California Program.¹⁶² On appeal, the First Circuit's decision failed to halt Massachusetts' implementation of the California Program.¹⁶³

¹⁵⁵ The regulations were amendments to N.Y. COMP. CODES R. & REGS. tit. 6, § 218 (1992).

¹⁵⁶ *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't of Env'tl. Conservation*, 810 F. Supp. 1331, 1348 (N.D.N.Y. 1993), *aff'd in part and rev'd in part*, *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't of Env'tl. Conservation*, 17 F.3d 521 (2d Cir. 1994).

¹⁵⁷ *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't of Env'tl. Conservation*, 831 F. Supp. 57 (N.D.N.Y. 1993).

¹⁵⁸ *Motor Vehicle Mfrs. Ass'n of the United States*, *supra* note 41.

¹⁵⁹ *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't of Env'tl. Conservation*, 869 F. Supp. 1012 (N.D.N.Y. 1994), *aff'd*, *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't of Env'tl. Conservation*, 1996 U.S. App. LEXIS 343, 41 Env'tl. Rep. (BNA) 1993 (2d Cir. 1996).

¹⁶⁰ MASS. REGS. CODE tit. 310 § 7.40 (1992).

¹⁶¹ *American Auto. Mfrs. Ass'n v. Greenbaum*, No. CIA.A.93-10799-MA, 1993 WL 443946 (D. Mass. Oct. 27, 1993).

¹⁶² *Id.* at *10.

¹⁶³ *American Auto. Mfrs. Ass'n v. Massachusetts Dep't of Env'tl. Protection*, 31 F.3d 18, 28 (1st Cir. 1994). See John Hiski Ridge, *Deconstructing the Clean Air Act: Examining the Controversy Surrounding the California's Low Emission Vehicle Program*, 22 B.C. ENVTL. AFF. L. REV. 163 (1994).

Even though New York and Massachusetts adopted the California Program, other recent developments have thwarted a unified approach of controlling automobile emissions pollution. The Northeast Ozone Transport Region (OTR) is required by the 1990 Clean Air Act Amendments to bring OTR nonattainment areas into compliance with the national ambient air quality standard for smog.¹⁶⁴ In February 1994, the Northeast Ozone Transport Commission (OTC) recommended an OTC LEV Plan to the EPA. The plan suggested that all northeastern states adopt a modified California Low Emissions Vehicle Program in order to satisfy 1990 Clean Air Act Amendment requirements. A majority of the OTR states would have to adopt the OTC LEV Plan in order for it to go into effect.¹⁶⁵ The EPA officially endorsed the OTC LEV plan on January 24, 1995.¹⁶⁶ The EPA maintains that OTR states are not required to implement the ZEV mandate; however, states are free to incorporate the ZEV mandate as part of their programs.¹⁶⁷

Alternatively, the American Automobile Manufacturers Association (AAMA) developed its own program labeled the 49-State Plan, or the Federal LEV.¹⁶⁸ It is an obvious attempt by the automobile manufacturers to evade the ZEV mandate, or any mandate at all. This program would apply to every state except California and would be implemented in two stages. In the first stage, beginning in 1999, manufacturers must sell vehicles certified to meet at least California LEV standards in the OTR to achieve at least the same reductions in emissions as under the OTC LEV.¹⁶⁹ The second stage would require that cars and light duty trucks which are sold outside California in the model year 2001 meet the California LEV standard.¹⁷⁰

¹⁶⁴ The OTR program is designed under the Clean Air Act to handle regional pollution problems in the northeast United States. 42 U.S.C. § 7506a(a). The OTR was established by operation of law under section 184 of the 1990 Clean Air Act Amendments and includes Connecticut, Delaware, Maine, Massachusetts, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, the District of Columbia, and the portion of Virginia which is within the Consolidated Metropolitan Statistical Area. 42 U.S.C. § 7511c(a).

¹⁶⁵ Four states — Virginia, Delaware, New Jersey and New Hampshire — voted against the OTC petition to adopt the California Low Emissions Vehicle Program in the northeast. *Air Pollution: Northeast States Vote to Recommend EPA Impose California Standards on Them*, CAL. ENV'T DAILY (BNA), at D-2 (Feb. 3, 1994).

¹⁶⁶ 60 Fed. Reg. 4712, 4716 (1995).

¹⁶⁷ *Id.* at 4729.

¹⁶⁸ 60 Fed. Reg. 4712, 4713 (1995).

¹⁶⁹ *Id.*

¹⁷⁰ 59 Fed. Reg. 53,369, 53,398 (1994).

V. Conclusion

Adoption of the California Low Emissions Vehicle Program is the only viable option to enable the majority of the states to meet minimum federal health-based standards. Theoretically, the states are afforded broad discretion in the allocation of pollution control burdens in order to meet federal health-based standards.¹⁷¹ However, “[t]his discretion is partly illusory . . . because ambient ozone levels are so high in some areas that states may need to adopt every feasible control measure to meet the attainment deadlines.”¹⁷² The majority of the states may be forced to adopt the California Low Emissions Vehicle Program in order to prevent health and environmental hazards caused by automotive emission air pollution. Under current federal standards, “areas that fail to make required reductions will be subject to the imposition of harsh sanctions that reduce highway funding or require emissions from new industrial projects to be offset at a rate of two to one.”¹⁷³ Enacting the California Program nationally would ensure uniformity for the automotive industry and for clean air legislators and, therefore, would prove to be a successful weapon in the battle against automobile emission air pollution.

The California Low Emissions Vehicle Program represents an innovative alternative to current federal clean air legislation. A sufficient nexus has been established between automobile emissions and air pollution. Further, air pollution has become a health risk to more than half of all persons living in the United States. The federal government has attempted to rectify the situation by enacting hundreds of pages of legislation and by entrusting the EPA with implementation of the legislation. The 1990 Clean Air Act Amendments have been the most enthusiastic clean air measures to date. While the 1990 Amendments cut automobile emissions more drastically than regulation of the previous four decades, they are not efficient or effective enough to deal with the threats posed by automotive emission pollution.

History provides a model for dealing with the problem of automobile emission pollution. California began stringent regulation of automobile emissions years before the federal government had formalized any policy regarding automotive emission pollution. California has had a fresh approach to environmental regulation from the outset. Instead of enacting

¹⁷¹ Latin, *supra* note 18, at 1685, 1686.

¹⁷² *Id.*

¹⁷³ Becker, *supra* note 7, at 31.

confusing legislation, California sets bright-line performance standards and then gives the automobile industry flexibility to meet the standards. The California standards do what clean air legislation is supposed to do: produce results by preventing air pollution from further harming people and the environment. The California Program has proven successful in controlling automobile emission pollution.

The current air pollution situation calls for legislative action that is new, innovative, and aggressive. Fortunately, all states do not share California's air pollution nightmare. Nevertheless, air pollution is becoming a more serious problem to all persons living in the United States. Federal clean air regulations have proven ineffective in the fight against automobile air pollution. Therefore, the federal government should implement the California Low Emissions Vehicle Program nationally and place the solution to the automobile emission pollution problem within reach.

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