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COMMENT

**State Implementation Plans under the
1990 Clean Air Act: Can New York
Conform?**

CATHERINE V. GRECO*

The Clean Air Act Amendments of 1990 were enacted in response to an increased awareness of the negative health effects associated with air pollution coupled with the failure of the Clean Air Act Amendments of 1970 to improve the nation's air quality. Under the 1990 amendments each state is required to submit a State Implementation Plan ("SIP") explaining the state's method for attaining the national air quality standards. This article provides an in-depth explanation of the standards set by the 1990 amendments. Using the New York State SIP as an illustration, the author contends that states will have difficulty conforming with the 1990 amendments.

* The author wishes to thank the Pace Environmental Law Review staff for its dedication and excellent work. This article is dedicated to the memory of Eleanor Greco Darby (1933 - 1993).

I. Introduction

On November 15, 1990, President George Bush signed into law amendments to the Clean Air Act ("CAA"),¹ ending a thirteen year legislative battle.² These amendments made the Clean Air Act the most comprehensive of the environmental statutes.³ The purpose of the Clean Air Act of 1990 ("Act") is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."⁴ To facilitate this purpose, the Act requires states to submit revised State Implementation Plans ("SIPs") detailing how each state plans to attain the national standard of air quality.⁵

The SIP is the state's comprehensive plan for the control of existing or new air pollution.⁶ All state actions affecting air quality must conform with the policies and provisions provided within the SIP and within the Act. The Act requires states to commit to specific plans in their SIPs to reduce ambient air pollution. The cost of failing to achieve the SIP provisions or statutory deadlines for attainment is high, because the Act also strengthened the available federal sanctions and

1. Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7671q (1989 & Supp. 1992) [hereinafter CAA].

2. *President's Signature on Clean Air Act Starts New Era of Pollution Control*, Says EDF, U.S. NEWSPAPER, Nov. 15, 1990, at B5.

3. *Signing Ceremony for the Clean Air Act of 1990*, FED. NEWS SERV., Nov. 15, 1990, at A1. In his speech upon signing the 1990 Clean Air Act amendments, President Bush commented that the new Clean Air Act was "the most significant air pollution legislation in our nation's history." *Id.* The Act is a "sweeping collection of programs that dwarfs previous environmental laws. Any one of the 1990 Amendments' five major titles would ordinarily be an act in itself." Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1724 (1991) [hereinafter *Overview*].

4. 42 U.S.C. § 7401(b)(1).

5. 42 U.S.C. § 7410(a)(1).

6. DIV. OF AIR RESOURCES, NEW YORK STATE DEPT' OF ENVTL. CONSERV., NEW YORK STATE IMPLEMENTATION PLAN, PROPOSED OZONE REVISIONS 65 (Nov. 1992) [hereinafter PROPOSED OZONE SIP].

SIPs take into consideration transportation control plans (TIPs) which are plans developed by metropolitan planning organizations (MPOs) pursuant to 23 U.S.C. § 133. TIPS are designed to control air pollution contributed by motor vehicles by providing a strategy efficient mobilization of people and goods and minimize transportation-related fuel consumption. *Id.* These programs include high occupancy vehicle lanes and improvements to mass transit.

citizen suit provisions which could expose states to potential liability.

This article will discuss conformity and the role it plays in the 1990 Clean Air Act Amendments. Part II will explain the 1970 amendments to the Clean Air Act. Part III will discuss the background of the 1990 amendments and the need for air pollution control. Part IV will detail the requirements for the 1992 SIP submission and, as an illustration, will include excerpts from New York State's November 15, 1992 ozone SIP. Part V will discuss conformity under the CAA and part VI will examine the practicality of conformity in light of the strengthened citizen suit provision and increased penalty provisions.⁷

II. Clean Air Act Amendments of 1970

Congress amended the CAA in 1970 upon recognizing that the strategies within the CAA were inadequate and progress toward controlling air pollution was "regrettably slow."⁸ In 1970, air pollution was a significant national concern. Smog kept children home from school in southern California.⁹ There were daily pollution alerts on the east coast.¹⁰ In addition, Congress acknowledged, for the first time, that transportation was a significant cause of air pollution.¹¹ Thus, the 1970 amendments were designed to "speed up, expand, and intensify the war against air pollution . . ."¹² These amendments significantly altered the structure and provisions of the CAA to the form which prevails today.

7. This article will focus on the general conformity requirements, published in 58 Fed. Reg. 63,214 (1993). Transportation conformity requirements are published in 58 Fed. Reg. 62,188 (1993).

8. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 1970 U.S.C.A.N. (84 Stat.) 5356, 5360.

9. David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 744 (1983).

10. *Id.*

11. At that time, approximately sixty per cent of the nation's air pollution was caused by transportation. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 1970 U.S.C.A.N. (84 Stat.) 5361.

12. *Id.* at 5356.

The Clean Air Act Amendments of 1970 established a co-operative federal and state regulatory approach for controlling air quality by establishing the National Ambient Air Quality Criteria and Standards. Prior to 1970, state and federal officials had wide discretion to balance environmental goals with other concerns while implementing the CAA.¹³ The 1970 amendments were designed to achieve clean air by directing federal and state officials to take action. That is, the 1970 amendments were designed to regulate the conduct of government officials by imposing mandatory duties rather than to regulate the conduct of polluters.¹⁴ This approach was later strengthened by the 1990 amendments.

Pursuant to section 108 of the CAA, the Environmental Protection Agency ("EPA") was required, within thirty days after December 31, 1970, to establish a list of air pollutants:

- (A) . . . which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
- (B) . . . which in the ambient air results from numerous or diverse mobile or stationary sources; and
- (C) for which air quality criteria had not been issued before December 31, 1970 but for which [EPA] plans to issue air quality criteria under this section.¹⁵

After a pollutant was listed, EPA had twelve months to establish and publish air quality criteria which "reflect accurately the latest scientific knowledge" that would indicate the kind and extent of all possible effects the pollutant would have on the public health or welfare.¹⁶ At the time this legislation was enacted, EPA had already issued criteria for five pollu-

13. Schoenbrod, *supra* note 9, at 745.

14. *Id.* at 742.

15. 42 U.S.C. § 7408(a)(1). See 40 C.F.R. § 7412(b) for current EPA list of air pollutants. Congress provided for the regulation of hazardous air pollutants in the CAA. Hazardous air pollutants are any pollutants Congress listed in section 112(b) as hazardous. 42 U.S.C. § 7412.

16. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 1970 U.S.C.C.A.N. (84 Stat.) 5356, 5362 n.1; see also 42 U.S.C. § 7408(a)(2).

tants: sulfur oxide, particulate matter, carbon monoxide, hydrocarbons, and photochemical oxidants.¹⁷

Section 109 directed EPA to establish national primary and secondary ambient air quality standards (NAAQS) for those pollutants with established criteria.¹⁸ NAAQS are "numerical standards representing minimally acceptable air quality . . . [which] all areas of the country are required to attain and maintain."¹⁹ Primary ambient air quality standards define levels of air quality that are necessary, with an adequate margin of safety to protect the public health.²⁰ Secondary ambient air quality standards define levels of air quality that are necessary "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."²¹ Once EPA promulgates the criteria and air quality standards, states are required to implement a "plan which provides for implementation, maintenance, and enforcement" of the primary and secondary ambient air quality standards.²²

III. Clean Air Act of 1990

The 1990 amendments were enacted as a response to increased awareness of the extensive health effects associated with air pollution. Congress recognized that air is a valuable

17. See John E. Milner & Charles A. Waggoner, *Overview of Major Federal Environmental Acts and Regulations for the General Practitioner*, 60 Miss. L.J. 1, 125 (1990); Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 Iowa L. Rev. 1, 8 (1988).

18. 42 U.S.C. § 7409(a)(1)(A).

19. Jefferson V. Houpt, *The Clean Air Act's Revitalized Attainment Program*, 7 NAT. RESOURCES & ENV'T 10, 10 (1992) [hereinafter *Revitalized Attainment Program*]. To date, EPA has set NAAQS for six pollutants: carbon monoxide (CO), nitrogen oxide (NO_x), sulfur dioxide, ozone, small particulate matter and lead. 40 C.F.R. § 50 (1990). In addition, eight substances have been listed as hazardous air pollutants: asbestos, beryllium, mercury, vinyl chloride, radionuclides, inorganic arsenic, benzene, and coke oven emissions. National emission standards have been set for seven of these pollutants. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 1990 U.S.C.C.A.N. (104 Stat.) 3389 (codified as amended at 42 U.S.C. §§ 7401-7671q (1989 & Supp. 1992)).

20. 42 U.S.C. § 7409(b)(1).

21. *Id.* § 7409(b)(2), the NAAQS are published in 40 C.F.R. Pt. 50.

22. 42 U.S.C. § 7410(a)(1).

natural resource to be protected and, therefore, subject to uniform regulations.²³ In addition, the 1970 CAA had not achieved its goals. For example, every state was to have attained the national air quality standards for ozone and carbon monoxide by 1983.²⁴ By 1989, however, half of the U.S. population was still exposed to unhealthy levels of pollution.²⁵

In order to achieve adequate air quality, the 1990 Act focused primarily on transportation. Three of the four main areas addressed by the Act include urban smog, acid rain, and the depletion of the ozone layer.²⁶ Transportation significantly affects each of these areas. Transportation emissions are a major contributor of ozone precursors, which consist of volatile organic compounds (VOC), nitrogen oxides (NO_x), and carbon monoxide (CO).²⁷

The Act redesigned the nation's requirements for the achievement of NAAQS.²⁸ The Act mandates attainment of the NAAQS by categorizing non-attainment areas²⁹ and providing attainment dates for each specific category.³⁰ The Act also requires states to develop or revise existing SIPs and to describe how the state will attain and maintain the NAAQS by the newly prescribed deadlines.³¹

23. *Id.* § 7401.

24. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 1990 U.S.C.A.N. (104 Stat.) 3385, 3389.

25. *Id.*

26. *Overview*, *supra* note 3, at 1723. The fourth area addressed by the Act relates to stationary sources of ambient air pollution.

27. *Id.* at 1758. See also Arnold W. Raze, Jr., & Barrio Needleman, *Control of Air Pollution from Mobile Sources Through Inspection and Maintenance Programs*, 30 HARV. J. ON LEGIS. 409 (1993). "In 1985, motor vehicles were responsible for seventy percent of the nation's carbon monoxide (CO), forty-five percent of the nitrogen oxides (NO_x), and thirty-four percent of the volatile organic compounds (VOC's)." *Id.* at 411.

28. See *Revitalized Attainment Program*, *supra* note 19.

29. A non-attainment area is "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. § 7407(d)(1)(A)(i).

30. *Id.* §§ 7511(a)(1), 7512(a)(1).

31. DIV. OF AIR RESOURCES, NEW YORK STATE DEP'T OF ENVTL. CONSERV., NEW YORK STATE IMPLEMENTATION PLAN, CARBON MONOXIDE ATTAINMENT DEM-

A. NAAQS For Ozone

In 1992, ninety-eight cities across the United States were in violation of the Clean Air Act's standard for ozone.³² Ozone is not directly emitted into the air, but is the product of a photochemical reaction³³ between VOC's and NOx.³⁴ VOC's and NOx are released into the air by motor vehicles, factories and other smaller sources.³⁵ Mobile sources release approximately forty-five percent of all VOC emissions.³⁶ Presently, the level of tropospheric ozone³⁷ in the atmosphere is increasing by one percent per year, as compared to an increase of between twenty and fifty percent over the last 100 years.³⁸

Non-attainment areas for ozone are categorized as extreme, severe, serious, moderate and marginal.³⁹ The lower

ONSTRATION NEW YORK METROPOLITAN AREA 12 (Nov. 1992) [hereinafter PROPOSED CARBON MONOXIDE SIP].

32. Gary Hawthorn & Michael D. Meyer, *A User-Friendly Guide to the Transportation Provisions of the 1990 Clean Air Act*, App. A27 (Feb. 1992) (unpublished, on file with the *Pace Environmental Law Review*) [hereinafter *Guide*]. The New York Metropolitan area and parts of Long Island have been designated as severe non-attainment areas. The Albany-Schenectady-Troy, Buffalo-Niagara Falls areas and the Essex and Jefferson Counties are designated as marginal non-attainment areas. *Id.*

33. A photochemical reaction results from the exposure of a mixture of chemicals to the sun. Honorable Henry A. Waxman et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990: Bringing Blue Skies Back to America's Cities*, 21 ENVTL. L. 1843, 1852 (1991) [hereinafter *Review*].

34. *Id.* at 1853.

35. *Id.*

36. *Id.* at 1854.

37. Tropospheric ozone is ozone that is trapped below the stratosphere and is closest to the earth's surface. ALBERT K. BATES, *CLIMATE IN CRISIS* 80 (1990).

38. Peter Ciburowski, *Sources, Sinks, Trends, and Opportunities*, in *THE CHALLENGE OF GLOBAL WARMING* 217 (Dean E. Abrahamson ed., 1989) [hereinafter Ciburowski].

39. 42 U.S.C. § 7511(a)(1). The following table details the qualifications for designation and when the NAAQS for ozone must be attained. For example, a marginal non-attainment area has an ozone value of between 0.121 to 0.138 parts per million ("ppm") and must comply with the NAAQS for ozone of 0.12 ppm by November 1993.

Area Classification	Designated Value (ppm)	Attainment Date
Marginal	0.121 to 0.138	Nov. 1993
Moderate	0.138 to 0.160	Nov. 1996
Serious	0.160 to 0.180	Nov. 1999
Severe	0.180 to 0.280	Nov. 2005
Extreme	0.280 and above	Nov. 2010

region of New York is classified as a severe non-attainment area,⁴⁰ and has the third worst ozone pollution problem in the United States.⁴¹ New York is required to meet a NAAQS for ozone of 0.12 parts per million (ppm) by the year 2005.⁴² An ozone standard of 0.12 ppm is attained "when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm is equal to or less than 1."⁴³

In recognition of the damaging effects of ozone, the Act added additional SIP provisions for ozone non-attainment areas.⁴⁴ Additional requirements are imposed by classification of ozone non-attainment areas.⁴⁵ Each classification must meet the requirements designated for that particular classification, as well as the requirements for all of the classifications below it.⁴⁶ For example, states containing extreme non-attainment areas must submit an implementation plan that not only meets the requirements set forth for extreme non-attainment areas, but also those set forth for severe, serious, moderate and marginal non-attainment areas.⁴⁷ In addition, the Act created an Ozone Transport Region (OTR) in the northeastern United States, encompassing states from Virginia to Maine.⁴⁸ Each state included within a transport region established for ozone reduction is required to submit a SIP or revision not later than two years after the enactment of the 1990 amendments.⁴⁹ Areas within the OTR must also

Id.

40. *Guide*, *supra* note 32, at App. A27.

41. PROPOSED OZONE SIP, *supra* note 6, at 30.

42. 40 C.F.R. § 50.9 (1990).

43. *Id.*

44. 42 U.S.C. §§ 7511, 7511a-7511d.

45. *Id.* § 7511a.

46. *Id.* § 7511a(c), (d).

47. *Id.* § 7511a(e).

48. A single transport region for ozone was created comprising Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont and Washington D.C. *Id.* § 7511c(a).

49. *Id.* § 7511c(b)(1).

implement minimum control measures regardless of their ozone designation.⁵⁰

B. NAAQS For Carbon Monoxide

In 1992, forty-two cities were in violation of the CAA's carbon monoxide (CO) standard.⁵¹ Carbon monoxide is a colorless and odorless gas which is a by-product of incomplete fuel combustion in cars, buses and trucks.⁵² CO has a life span of five months in the atmosphere.⁵³ Mobile sources accounted for seventy to ninety percent of CO emissions in 1987.⁵⁴ Highway vehicles alone accounted for eighty percent of CO emissions in the seven non-attainment counties in New York in 1990.⁵⁵ Severe health effects such as fetal damage, heart attacks and lung damage may be caused by exposure to CO,⁵⁶ while high levels of CO can cause death by asphyxiation.⁵⁷

Carbon monoxide non-attainment areas are broken down into two categories: moderate and serious.⁵⁸ The five bor-

50. *Id.* § 7511c. In the November 15, 1992 SIP, states within the OTR must include implementation plans for reasonably available control technology for the control of volatile organic compounds. *Id.* § 7511c(b)(1)(B). In addition, metropolitan areas with a population of 100,000 or more must submit a compliance statement regarding enhanced vehicle inspection and maintenance programs. *Id.* § 7511c(b)(1)(A). New York has included these requirements in its November 15, 1992 SIP. PROPOSED OZONE SIP, *Supra* note 6, at 39, 42, 69, 94.

51. *Guide, supra* note 32, at App. A28. The New York Metropolitan area, including parts of Long Island, is classified as a moderate non-attainment area with a CO value between 12.7 and 16.4 ppm. Syracuse is designated as a moderate non-attainment area with a CO value between 9.1 and 12.7 ppm. *Id.*; see also 42 U.S.C. § 7511a.

52. *Review, supra* note 33, at 1900.

53. Ciborowski, *supra* note 38, at 216.

54. *Id.* Although mobile sources are the largest single source of CO discharges, space heaters, refuse, agricultural burning and industrial processes also contribute to CO levels. PROPOSED CARBON MONOXIDE SIP, *supra* note 31, at 9.

55. PROPOSED CARBON MONOXIDE SIP, *supra* note 31, at 11.

56. *Review, supra* note 33, at 1901.

57. *Id.*

58. 42 U.S.C. § 7512(a)(1). The following table defines the CO categories and attainment deadlines.

Area Classification	Designated Value (ppm)	Attainment Date
Moderate	9.1 - 16.4	Dec. 31, 1995

oughs of New York City, as well as the counties of Nassau and Westchester, are designated as moderate high non-attainment areas with a CO value of 13.5 ppm.⁵⁹ Thus, pursuant to section 7512(a)(1) of the 1990 Act, New York must meet the CO standard of 9 ppm by 1995.⁶⁰ To achieve this standard, New York must attain a CO level of 9 ppm for an eight-hour average concentration, and a CO level of 35 ppm for a one-hour average concentration.⁶¹ Both are not to be exceeded more than once per year.

C. SIP Implementation

In New York, the CAA SIPs are designed and implemented by the Department of Environmental Conservation ("DEC").⁶² The DEC is aided by the SIP Coordinating Council, a group of representatives from fifteen state agencies.⁶³ Council membership includes local elected officials and representatives from the Metropolitan Planning Organizations ("MPOs").⁶⁴ The SIP Coordinating Council assists the DEC in both the development and implementation of the SIPs.⁶⁵ In addition, two advi-

Serious	16.5 and above	Dec. 31, 2000
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Id.

59. PROPOSED CARBON MONOXIDE SIP, *supra* note 31, at 36. The CO design value of 13.5 ppm was based on air quality levels measured in 1988 and 1989. *Id.* Non-attainment areas are designated according to their design values. *Id.* at 15. "Design value methodology is derived from the statistical basis of the NAAQS." *Id.* Because the NAAQS for CO is 9 ppm and cannot be exceeded more than once per year for a two year period, the design value for CO is the "highest of the second annual high, monitored at a site during a two-year period." *Id.*

60. *Guide*, *supra* note 32, at App. A28.

61. 40 C.F.R. § 50.8.

62. PROPOSED CARBON MONOXIDE SIP, *supra* note 31, at 17.

63. *Id.*

64. *Id.* at 17. Membership includes representatives from the following agencies: DEC; the Department of Transportation ("DOT"); the Departments of Agriculture and Markets, Economic Development, Health, Motor Vehicles; the Public Service Commission; the Division of the Budget; the Energy Office; the Energy Research and Development Authority; the Long Island Power Authority; the Metropolitan Transportation Authority; the New York Power Authority; the Office of General Services; and the Governor's Office of Employee Relations. *Id.* at 3.

65. *Id.* at 17.

sory committees have also been created to assist the Coordinating Council: the Metropolitan Advisory Group⁶⁶ and the New York Ozone Transport Region Advisory Group.⁶⁷

IV. State Implementation Plans

Each state with designated non-attainment areas under the air quality standards must take steps to achieve NAAQS attainment as expeditiously as practicable, but no later than the statutory deadlines.⁶⁸ To achieve attainment, each state must submit to EPA a SIP for each pollutant with a designated NAAQS.⁶⁹ SIPs contain measures the state will take to reduce air pollution in order to attain the prescribed air quality standards.⁷⁰ All measures must be fully adopted by the state through regulations and must conform to the objectives of the SIP and the Act.⁷¹ For a SIP to be enforceable, "it must clearly spell out which sources or source types are subject to its requirements and what its requirements are."⁷²

66. *Id.* at 3. The Metropolitan Advisory Group consists of representatives from Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester Counties; the New York City Mayor's Office of Transportation, Department of Environmental Protection, Department of Transportation, and Planning Commission; the Port Authority of New York and New Jersey; and the New York Metropolitan Transportation Council. *Id.*

67. *Id.* at 4. The New York Ozone Transport Region Advisory Group consists of representatives from the following groups: New York State Association of Counties, Conference of Mayors, the Association of Towns, Niagara Frontier Transportation Councils, Genesee Transportation Councils, Metropolitan Syracuse Transportation Councils, the Capital District Transportation Committee, Herkimer/Onondaga Comprehensive Transportation Council, Binghamton Metropolitan Transportation Council, Glens Falls Transportation Council, Poughkeepsie/Dutchess County Transportation Committee, Montgomery County Board of Supervisors, Greene County Executive, and Jefferson County. *Id.*

68. 42 U.S.C. § 7511(a).

69. *Id.* § 7410(1).

70. The New York State SIP was designed through a cooperative effort between the Departments of Environmental Conservation, Transportation, Health, Motor Vehicles, and Agriculture & Markets; the Division of the Budget; Energy Office; and Metropolitan Transportation and Power Authorities, as well as the New York Metropolitan Transportation Council and representatives from Nassau, Orange, Putnam, Rockland, Suffolk and Westchester Counties. See PROPOSED OZONE SIP, *supra* note 6, at 3.

71. *Id.* at 31.

72. 57 Fed. Reg. 13,498, 13,502 (1992) (to be codified at 40 C.F.R. § 52).

EPA is required to review a state's SIP to ensure that its measures are adequate to achieve the NAAQS.⁷³ If EPA does not approve a state's SIP for any area, the state must revise the plan to correct the inadequacies.⁷⁴ If the revision is not approved by the EPA Administrator, or if the Administrator finds that the state is not implementing the approved SIP provisions, sanctions are imposed.⁷⁵

On November 15, 1992, New York State submitted to the EPA a SIP for the attainment of the air quality standards for ozone and carbon monoxide.⁷⁶ On November 15, 1993, New York State submitted a revised SIP for ozone, demonstrating the achievement of the fifteen percent rate of progress requirement.⁷⁷ New York is required to submit its last revised SIP on November 15, 1994.⁷⁸

EPA identified eleven deficiencies in New York State's November 1992 SIPs⁷⁹ and considered New York's enhanced inspection and maintenance program, submitted in its November 1993 SIP, incomplete.⁸⁰ New York has eighteen months to cure any defects before sanctions are automatically imposed.⁸¹

73. 42 U.S.C. § 7410(k)(1)(B).

74. *Id.* § 7410(k)(5). See *infra* section IV.C. for a discussion of available sanctions.

75. *Id.* § 7410(m). Section 7509(a) lists the circumstances under which sanctions may be imposed. Section 7509(b) lists the sanctions available to the Administrator, including the highway sanction, which prohibits the approval of federal funding for any highway projects within a state. *Id.* § 7509(b)(1). See *infra* section IV.C for a discussion of available sanctions.

76. 42 U.S.C. §§ 7410, 7511, 7511a, 7512a.

77. *Id.* § 7511a(b)(1). Also submitted was a plan developing an Operating Permits Program pursuant to section 502. *id.* § 7661a(d).

78. *Id.* § 7511a(c)(2).

79. On January 15, 1993, EPA found deficiencies in the following submissions: emission statement, new source review, VOC RACT (reasonable available control technology), NOx RACT, stage II, enhanced I/M, vehicle miles traveled measures, employer trip reduction, contingency measures, vehicle miles traveled forecasted. United States Environmental Protection Agency, Congressional Briefing on Upstate New York 55 (Apr. 19, 1993).

80. Letter from William J. Miszynski, Acting Region II Administrator, United States Environmental Protection Agency, to Mario Cuomo, Governor, State of New York 2 (Feb. 2, 1994).

81. 42 U.S.C. § 7509(a). See section IV.C for a discussion on sanctions.

A. General SIP Provisions

All SIPs must include general requirements pursuant to section 7410(a)(2).⁸² This section includes provisions for state monitoring and reporting of data on the ambient air quality,⁸³ periodic revisions of the SIP,⁸⁴ and adequate contingency plans.⁸⁵

In addition, each state must submit: enforceable emissions limitations and other control measures, as well as schedules and timetables for compliance;⁸⁶ prohibitions against emissions activity that will contribute significantly to non-attainment, or will interfere with maintenance of NAAQS;⁸⁷ and provisions ensuring that the state will have adequate funding to carry out the implementation plan.⁸⁸

These provisions theoretically comprise the building blocks toward attainment of the NAAQS. With set emissions limitations, a state may project how much and what type of pollutants may be emitted into the ambient air. Schedules for compliance force the states to take adequate measures to meet the NAAQS. The combination of stringent compliance provisions with prohibitions against federally funded actions which contribute to non-attainment of the NAAQS may force states into a position of non-compliance or inaction.

B. Specific SIP Requirements

SIP requirements for ozone non-attainment areas vary with the severity of ozone pollution. Each non-attainment area must submit requirements for its designated level as well as the level preceding it. For example, an ozone non-attainment area designated as extreme must submit SIP provisions for the marginal through extreme levels, while the SIP for areas designated as moderate must only include provisions for the marginal and moderate levels.

82. *Id.* § 7410(a)(2).

83. *Id.* § 7410(a)(2)(B)(i), (ii).

84. *Id.* § 7410(a)(2)(H).

85. *Id.* § 7410(a)(2)(G).

86. *Id.* § 7410(a)(2)(A).

87. *Id.* § 7410(a)(2)(D)(i)(I).

88. *Id.* § 7410(a)(2)(E).

Marginal ozone non-attainment areas⁸⁹ were to have included in their November 15, 1992 SIP a comprehensive and current inventory of actual emissions which accounted for both mobile and stationary sources.⁹⁰ Furthermore, owners and operators of NO_x or VOC stationary sources⁹¹ must provide the state with an actual emissions statement.⁹² New York requires all owners of air contamination sources to submit reports of measured emissions.⁹³ New York has complied by providing an inventory of actual emissions of carbon monoxide and ozone precursors of mobile sources.⁹⁴ SIPs must also include permit provisions for the construction and operation of every new or modified major stationary source within marginal non-attainment areas.⁹⁵

Moderate areas⁹⁶ must include in their SIP's the requirements for marginal areas, in addition to the requirements for moderate areas. Each moderate SIP submission must require the implementation of reasonably available control technology (RACT)⁹⁷ for sources of VOC.⁹⁸ EPA issues control technique guidance (CTG) documents to provide suggestions to states regarding the RACT's for selected industrial

89. Marginal ozone non-attainment areas have a designated ozone value of 0.121 to 0.138 ppm. *See supra* note 39 and accompanying text.

90. 42 U.S.C. § 7511a(a)(1).

91. These sources include petroleum refineries, dry cleaning facilities, graphic art facilities and incinerators. DIV. OF AIR RESOURCES, NEW YORK STATE DEP'T OF ENVTL. CONSERV., NEW YORK STATE IMPLEMENTATION PLAN FOR OZONE 56 (Nov. 1993) [hereinafter *PLAN FOR OZONE*].

92. 42 U.S.C. § 7511a(a)(3)(B)(i). Each stationary source must submit the first emissions statement by 1993. *Id.*

93. N.Y. COMP. CODES R. & REGS. tit. 6, § 202.1 (1992).

94. DEP'T OF ENVTL. CONSERV., DIV. OF AIR RESOURCES, NEW YORK STATE IMPLEMENTATION PLAN FOR OZONE: MEETING THE 15% RATE OF PROGRESS REQUIREMENT App. (Nov. 1993).

95. 42 U.S.C. § 7511a(a)(2)(C). *See also* N.Y. COMP. CODES R. & REG. tit. 6, §§ 201, 231 (1992).

96. Moderate areas have designated ozone values of between 0.138 and 0.16 ppm. *See supra* note 39 and accompanying text.

97. RACT is "the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." *PLAN FOR OZONE, supra* note 91, at xiii.

98. 42 U.S.C. § 7511a(b)(2).

sources.⁹⁹ New York has enacted regulations mandating RACT for non-mobile sources of VOC.¹⁰⁰ The EPA, however, noted deficiencies in two of New York's regulations relating to surface coating processes and graphic arts pollutants.¹⁰¹ In response, DEC included proposed revisions to those regulations in the 1990 SIP.¹⁰²

In addition to RACT for VOC sources, moderate areas must require all owners and operators of gasoline dispensing systems to install gasoline vapor recovery systems.¹⁰³ New York has complied by implementing Stage I and II vapor recovery systems.¹⁰⁴ Gas dispensing stations in the New York City metropolitan area with an annual throughput in excess of 120,000 gallons may not transfer gasoline into storage tanks unless the tanks are equipped with Stage I vapor collection systems,¹⁰⁵ on-site vapor control systems or an equivalent system.¹⁰⁶ Owners of gasoline dispensing sites whose annual throughput exceeds 250,000 gallons may not transfer fuel into a motor vehicle unless the site is equipped with a Stage II vapor collection system.¹⁰⁷

Presently, most of the New York City metropolitan area is in compliance with Stage I and II requirements as mandated in the 1984 SIP.¹⁰⁸ There are, however, areas in New

99. *Review, supra* note 33, at 1866.

100. New York presently regulates architectural surface coatings, surface coating processes, petroleum and volatile organic liquid storage facilities, pharmaceutical and cosmetic manufacturing processes and graphic arts. *See* N.Y. COMP. CODES R. & REGS. tit. 6, §§ 205, 228, 229, 233, 234 (1992).

101. PROPOSED OZONE SIP, *supra* note 6, at 39.

102. *Id.* at 74-75.

103. 42 U.S.C. § 7511a(b)(3).

104. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 230 (1992).

105. A Stage I vapor collection system forces gasoline vapors from a tank into a "vapor-tight holding system or vapor control system through direct displacement by the gasoline being loaded." *Id.* § 230.1(b)(7).

106. A vapor control system prevents "emissions to the outdoor atmosphere from exceeding 4.7 grains per gallon (80 grams per 1,000 liters) of petroleum liquid loaded." *Id.* § 230.1(b)(10).

107. *Id.* § 230.2(c). A Stage II vapor collection system is a system where at least ninety per cent of the "gasoline vapors that are displaced or drawn from a vehicle fuel tank during refueling are removed to a vapor-tight holding system or vapor control system." *Id.* § 230.1(b)(8).

108. PROPOSED OZONE SIP, *supra* note 6, at 78.

York State that have recently been designated severe non-attainment areas.¹⁰⁹ New York proposes to amend its regulations to require all gasoline dispensing facilities with an annual tank throughput in excess of 120,000 gallons to install both Stage I and II systems.¹¹⁰ Furthermore, gasoline delivery trucks servicing the newly designated areas will also be required to install vapor recovery piping and to pass annual vapor tightness tests.¹¹¹

In addition to the SIP requirements for marginal and moderate areas, the November 15, 1992 SIP focuses attention on the need for serious ozone non-attainment areas to increase their regulation of motor vehicles. An enhanced vehicle inspection and maintenance (I/M) program providing for a reduction in hydrocarbon and NO_x (ozone precursors) emissions must be implemented in urban areas with populations of 200,000 or more.¹¹² Metropolitan statistical areas with populations of 100,000 or more and areas within the OTR must also implement enhanced I/M programs.¹¹³ In New York State, this requirement affects the five boroughs of New York City, as well as Nassau, Suffolk, Westchester, Rockland, Orange, and Putnam Counties.¹¹⁴

The New York City metropolitan area is presently operating a basic I/M program that was amended in 1990.¹¹⁵ This program applies more stringent CO and HC (hydrocarbon) emissions standards to heavy duty gas vehicles made in 1979 and later.¹¹⁶ It also requires new exhaust analyzers for light duty vehicles.¹¹⁷ The enhanced program must be imple-

109. *Id.* Seven towns in Orange County have been designated as severe ozone non-attainment areas. *Id.*

110. PROPOSED OZONE SIP, *supra* note 6, at 78-79.

111. *Id.* at 79.

112. 42 U.S.C. § 7511a(c)(3).

113. PROPOSED OZONE SIP, *supra* note 6, at 43.

114. *Id.*

115. N.Y. COMP. CODES R. & REGS. tit. 6, § 217-2 (1992). See also PROPOSED OZONE SIP, *supra* note 6, at 36.

116. PROPOSED OZONE SIP, *supra* note 6, at 36.

117. *Id.*

mented by January 1996, with phase-in of the program to begin in January 1995.¹¹⁸

EPA promulgated final regulations regarding requirements for enhanced I/M programs on November 5, 1992.¹¹⁹ Pursuant to the EPA guidelines, the enhanced I/M program is applicable to all 1968 and later model light duty vehicles and trucks rated up to 8,000 pounds Gross Vehicle Weight Rating.¹²⁰ The EPA guidelines call for states to adopt the IM240 test, which is a centralized testing program of auto emissions.¹²¹ New York State will be adopting this program.¹²²

In addition to implementing enhanced I/M programs, states must also implement a Clean Fuel Vehicle program by mid-1994.¹²³ An alternative plan may be implemented, if the state can demonstrate long-term reductions in ozone-producing and toxic air emissions equal to those which would have been achieved under the Clean Fuel Vehicles program.¹²⁴ New York chose an alternative program by adopting the California New Low Emission Vehicle (LEV) standards as part of its new motor vehicle emissions control program.¹²⁵ The LEV

118. *Id.* at 43.

119. *Id.* at 43-46. The EPA requires an enhanced I/M program to include: centralized testing, exhaust emissions standards of 1.2% CO and 220 ppm HC on 1981-1985 model year vehicles, visual inspection of catalyst and fuel inlet restrictors on all models later than 1984, and road testing of at least .5% of the subject vehicle population. *Id.* at 44-45.

120. *Id.* at 44.

121. *Id.*

122. Revisions to 6 N.Y. Comp. Codes R. & Regs. tit. 6, § 217 are currently being promulgated to include regulations adopting the IM240 test.

123. *Id.* § 7511a(c)(4). A clean fuel vehicle is a vehicle that meets the applicable clean fuel vehicle emissions standards set forth for that particular model. *Id.* § 7581(7). Emissions standards were to be promulgated by EPA in 1992. *Id.* § 7582(a). Emission standards are expressed in grams per mile (gpm). For light-duty trucks, beginning with model year 1996, the 50,000 mile standard for CO is 3.4 gpm. To classify as a clean-fuel vehicle, a light-duty truck cannot emit more than 3.4 gpm per 50,000 miles. *Id.* § 7583(a)(1). States may "opt-out" of this program provided that the state expressed its intention to exercise this option by November 15, 1992. New York has chosen to reserve its right to opt-out of the program. PROPOSED OZONE SIP, *supra* note 6, at 47.

124. *Id.* § 7511a(c)(4)(B).

125. N.Y. COMP. CODES R. & REGS. tit. 6, § 218-1 (1992). *See also* PROPOSED OZONE SIP, *supra* note 6, at 41-42.

program applies to 1993 motor vehicle models and is expected to provide for reductions of non-methane organic compounds (NMOC's), NO_x and CO emissions.¹²⁶

Severe ozone non-attainment areas are also required to concentrate on altering transportation use. As previously mentioned, transportation emissions are currently the largest contributor to air pollution. In 1990, highway vehicles alone accounted for eighty percent of all CO emissions in the non-attainment counties.¹²⁷ New York's requirement to alter the way it uses its motor vehicles may prove to be the most invasive requirement of the Act.

Severe non-attainment areas must offset any growth in emissions from growth in vehicle miles traveled (VMT).¹²⁸ To do this, states must adopt transportation control measures (TCM) that will decrease the total number of VMT.¹²⁹ Guidance regarding the emission reduction potential of a given TCM is to be provided by EPA.¹³⁰ However, EPA has yet to publish the guidelines and, as a result, deferred the adoption of TCMs until the next SIP submission on November 15, 1993.¹³¹

To reduce VMTs, states in severe ozone non-attainment areas may be required, as part of their TCMs, to implement employer trip reduction programs (ETR).¹³² Employer ETR programs require employers of 100 or more persons to increase the average passenger occupancy per vehicle by not less than twenty-five percent.¹³³ This provision applies only to vehicles used to commute to and from the workplace, and

126. PROPOSED OZONE SIP, *supra* note 6, at 41-42.

127. PROPOSED CARBON MONOXIDE SIP, *supra* note 31, at 11.

128. 42 U.S.C. § 7511a(d)(1)(A). Plans developed to offset growth in VMT are typically found in the state/cities transportation implementation plan (TIP).

129. *Id.*

130. PROPOSED OZONE SIP, *supra* note 6, at 51. Pursuant to section 7408, EPA is to issue guidance regarding the emission reduction potential of TCM's. Potential TCM's that EPA is to consider include improvements to public transportation, trip reduction ordinances, and the use of high occupancy vehicle lanes and vehicle limitations in downtown areas. 42 U.S.C. § 7408(f)(1)(A).

131. PROPOSED OZONE SIP, *supra* note 6, at 52. As of this writing, TCM guidelines for 1993 have not been published.

132. 42 U.S.C. § 7511a(d)(1)(B).

133. *Id.*

must be in accordance with EPA guidance.¹³⁴ Employers must submit a compliance plan within two years after the SIP revision is submitted, and must demonstrate compliance no later than four years after submission.¹³⁵ The ETR is applicable to the five boroughs of New York City, as well as the counties of Nassau, Suffolk, Rockland, Westchester and parts of Orange.¹³⁶ Governor Cuomo submitted legislation regarding an employer trip reduction enabling program on January 8, 1992.¹³⁷ This legislation, however, was not enacted.¹³⁸ Public hearings were held, however, on adopting an ETR program in January 1994.¹³⁹

In order for affected employers to complete their reduction plans by 1994, New York is currently establishing average vehicle occupancy (AVO) zones and target values as part of its November 15, 1992 SIP.¹⁴⁰ New York is anticipating two AVO zones: one for New York City, and one for the surrounding suburbs.¹⁴¹ The target AVO value for New York City is 4.18, and the target value for the suburbs is 1.42.¹⁴² This means that every employer of over 100 people must guarantee that each car commuting to and from work will contain an average of 4.18 people in New York City, and 1.42 people in the suburbs.¹⁴³

134. *Id.*

135. *Id.*

136. PROPOSED OZONE SIP, *supra* note 6, at 54.

137. *Id.* at 55. The bill requires the Commissioner of Transportation to promulgate regulations in conformity with the 1990 Act. The regulations must include a requirement that employers submit compliance demonstration reports. *Id.*

138. *Id.* If this legislation is not adopted, each city will be asked to adopt necessary local ordinances. *Id.*

139. ASSEMBLY COMMITTEE ON ENVIRONMENTAL CONSERVATION (Jan. 20, 1994). STATEMENT OF LANGDON MARSH, EXECUTIVE DEPUTY COMMISSIONER OF THE DEP'T OF ENVTL. CONSERV..

140. PROPOSED OZONE SIP, *supra* note 6, at 56.

141. *Id.* This includes Nassau, Rockland, Suffolk, Westchester and part of Orange Counties. *Id.*

142. *Id.*

143. These target AVO values require an increase in passenger occupancy by twenty-five per cent in New York City and between fourteen and thirty-three per cent in the suburbs. *Id.*

C. Sanctions

Sanctions against a state may be assessed under the Clean Air Act if: 1) the state fails to timely submit an implementation plan; 2) the Administrator disapproves a plan for not complying with the general criteria for plan submissions; or 3) the Administrator finds that *any* requirement specified in the plan is not being implemented.¹⁴⁴ The state has eighteen months in which to cure any existing defects.¹⁴⁵ If the defect is not corrected, the Administrator may choose one of two available penalties.¹⁴⁶ The sanctions available to the Administrator are found in section 7509(b).¹⁴⁷ The Administrator may choose to withhold the approval of any grants for any projects other than those designed to improve highway safety or reduce vehicle miles travelled, or he may choose to require states to offset emissions by a ratio of two to one.¹⁴⁸ If the defects have not been corrected within six months after the first penalty has been levied, the second penalty is automatically imposed.¹⁴⁹

The Act also contains an exception to the general rule that there shall be no withholding of funds for safety projects. Funding can not be withheld for the implementation of programs designed to reduce mobile source emissions.¹⁵⁰ Transportation control measures such as improvements to public transportation, the construction of high occupancy lanes and employer trip reduction programs all are designed to reduce emissions from mobile sources. Therefore, the CAA does not prohibit the Administrator from approving such programs, even though the state may be deficient in other areas.¹⁵¹

144. 42 U.S.C. §§ 7509(a), 7410(k) (emphasis added).

145. *Id.* § 7509(a).

146. *Id.*

147. *Id.* § 7509.

148. *Id.* § 7509(b)(2).

149. *Id.*

150. *Id.* § 7509(b)(1)(B).

151. The following programs may be approved regardless of whether the state is subject to section 7509 sanctions:

- (i) programs that enhance public transit;
- (ii) construction of high occupancy vehicle or bus lanes;

The 1990 amendments reduce the Administrator's discretion to impose sanctions.¹⁵² Previously, the imposition of sanctions was an unreviewable "judgment call" left to the discretion of the Administrator.¹⁵³ The amendments, however, added mandatory language that restricts the Administrator's discretion: "[U]nless such deficiency has been corrected within 18 months after the finding, . . . one of the sanctions referred to in subsection (b) . . . shall apply"¹⁵⁴ Now, sanctions may be imposed not only for failures unrelated to transportation or mobile sources, but also for *both* planning and implementation failures.¹⁵⁵

In the EPA's February 2, 1994 letter to New York State informing the state of deficiencies in its November 1993 SIPs,¹⁵⁶ EPA advised the state of its potential liability under the Act's sanction provision.¹⁵⁷ EPA specifically informed New York that the sanctions clock began the date the letter was issued.¹⁵⁸

V. Conformity

Conformity under the CAA is a somewhat vague and amorphous concept. The Act states that:

[n]o department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan

(iii) employer plans designed to reduce employee "work-trip-related vehicle emissions;"

(iv) special parking for high occupancy vehicles; and

(v) programs that limit vehicle access to downtown areas.

Id.

152. *Guide, supra* note 32, at 16.

153. *Id.*

154. 42 U.S.C. § 7509(a) (emphasis added).

155. *Guide, supra* note 32, at 16.

156. See *supra* note 79 and accompanying text.

157. Letter from William J. Miszynski, Acting Region II Administrator, United States Environmental Protection Agency, to Mario Cuomo, Governor, State of New York 2 (Feb. 2, 1994).

158. *Id.*

after it has been approved or promulgated under section 7410¹⁵⁹ of this title.¹⁶⁰

Conformity in the Act is defined as:

- (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
- (B) that such activities will not —
 - (i) cause or contribute to any new violation of any standard in any area;
 - (ii) increase the frequency or severity of any existing violation of any standard in any area; or
 - (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.¹⁶¹

Thus, a state cannot receive federal financial assistance for, or approval of, projects that do not conform to its approved implementation plan.¹⁶² Any activity that causes or contributes to a new violation of any standard, increases the frequency or severity of any existing violation, or delays timely

159. Section 7410 of the Act requires states to formulate and submit state implementation plans. 42 U.S.C. § 7410.

160. 42 U.S.C. § 7506(c). Transportation Implementation Plans ("TIPs") must also meet conformity requirements. Federal agencies must not "approve, accept or fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this Act." *Id.* § 7506(c)(2). Transportation plans or programs cannot be adopted by an MPO or found to satisfy the conformity requirements unless the expected emissions from such plan "are consistent with estimates of emissions from motor vehicles contained in the applicable implementation plan." *Id.* MPOs may also not adopt or approve of transportation improvement plans unless it determine that such plan "provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan." *Id.* § 7506 (c)(2)(A).

161. 42 U.S.C. 7506 (c)(1)(A), (B).

162. 42 U.S.C. § 7506(c). Limitation on financial assistance has been interpreted to represent only a withholding of federal funding, thereby affecting only federally approved or assisted projects. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY & UNITED STATES DEPARTMENT OF TRANSPORTATION, GUIDANCE FOR DETERMINING CONFORMITY OF TRANSPORTATION PLANS, PROGRAMS AND PROJECTS WITH CLEAN AIR ACT IMPLEMENTATION PLANS DURING PHASE 1 OF THE INTERIM PERIOD 7 (1991).

attainment of any standard is not considered to be in conformity with a state's approved implementation plan.¹⁶³

Conformity is determined based upon review of a state's most recent emissions estimates.¹⁶⁴ Each state is to report actual and projected emissions from mobile and stationary sources every three years to ensure that attainment will not be delayed due to increased emissions.¹⁶⁵ If estimated emissions from federal actions increase emissions beyond projected emissions thereby delaying attainment, the federal action will not be said to conform to an approved implementation plan.

The EPA and the Federal DOT are required to promulgate regulations to guide states in the preparation of conformity revisions to their SIPs.¹⁶⁶ The final regulations for general conformity were published on November 30, 1993.¹⁶⁷ Final regulations pertaining to transportation plans were published on November 24, 1993.¹⁶⁸

Conformity is imposed solely on federal agencies. Federal agencies can not "support in any way" nonconforming ac-

163. 42 U.S.C. § 7506(c)(1)(B)(i)-(iii).

164. PROPOSED OZONE SIP, *supra* note 6, at 61.

165. 42 U.S.C. § 7511a(a)(1).

166. *Id.* § 7506(C)(4).

167. 58 Fed. Reg. 63,214 (1993).

168. 58 Fed. Reg. 62,188 (1993). Regulations for general and transportation conformity were late. The unavailability of final conformity guidelines delayed conformity determinations thereby delaying implementation of the SIP, this delay may effect a state's ability to conform with the Act.

The EPA has missed five deadlines that are crucial to states' compliance with the Act's transportation planning requirements. *Legal Action Threatened Against EPA, DOT*, BULLETIN (Surface Transp. Pol'y Project, Washington, D.C.), Apr. 23, 1992, at 2. The missed deadlines include: Transportation and Air Quality Planning Guidance, due August 1991; Enhanced Vehicle Inspection and Maintenance Regulations, Employer Trip Reduction Program, Transportation Control Measures Guidance and Final Conformity Guidelines, all due November 15, 1992. *Id.* The Honorable Henry Waxman, co-author of the 1990 Amendments, cited thirty-five statutory violations of the Act and declared to the administrator his intent to sue EPA as a citizen under the Act's citizen suit provision. *Id.*

The delay in promulgation of final conformity guidelines forced states to delay the implementation of transportation planning. Continued delays will result in the failure to attain air quality standards by the statutory deadline.

tivities.¹⁶⁹ EPA has liberally interpreted this language and thus requires indirect exclusive emissions to be included in the agencies' determination of conformity.¹⁷⁰ Indirect exclusive emissions, which are increased emissions incurred due to the actual construction and subsequent use of the project¹⁷¹ that are reasonably foreseeable,¹⁷² must be identified at the time the conformity determination is made.¹⁷³

The following federal actions are subject to conformity under the indirect exclusive emissions definition: (1) proscribed burning activities by federal agencies; (2) private actions on federal land pursuant to an approval, permit or leasing agreement; (3) direct emissions from Army Corps of Engineers permit actions;¹⁷⁴ (4) expansion to wastewater treatment plants; (5) construction of federal buildings; (6) leasing of mineral rights; (7) actions taken on federal lands or federal facilities.¹⁷⁵ Federal agencies do not have to consider activities associated with disposal or leasing of property due to military closures and NPDES permits issued pursuant to the Clean Water Act.¹⁷⁶

Conformity also only applies to federal activities. EPA defines a federal activity as any activity a federal agency engages in or supports in any way either by financial assistance, permits, licenses or approvals. All proposed actions which require federal permits or approvals, however, are not federal activities: "[w]here the Federal action is a permit, license, or other approval for some aspect of a nonfederal un-

169. 42 U.S.C. § 7410.

170. 58 Fed. Reg. 63,214, 63,218 (Nov. 30, 1993).

171. *Id.* at 63,225. For example, federal agencies would include the emissions associated with the actual construction of a highway plus the increased vehicle travel to and on the highway.

172. *Id.* Emission estimations described in NEPA documents are considered reasonably foreseeable.

173. *Id.*

174. Permits issued for the dredging and filling of navigable waters are issued by the Army Corps of Engineers pursuant to section 404 of the Clean Water Act. See 33 U.S.C. § 1344 (1988).

175. 58 Fed. Reg. 63,214, 63,223 (1993).

176. *Id.* at 63,223-63,224. NPDES permits are National Pollution Discharge and Elimination System issued pursuant to section 402 of the Clean Water Act. 33 U.S.C. § 1342 (1988).

dertaking, the relevant activity is the part, portion, or phase of the nonfederal undertaking that requires the Federal permit license or approval.”¹⁷⁷ Thus, conformity does not require the federal government to consider all emissions associated with a predominantly nonfederal project where its only participation is the granting of permits or approvals. Conformity only requires consideration of the emissions relating to the permit or approval. EPA’s definition of federal action helps bring conformity into reality by limiting what emissions agencies must consider. If the agency had to consider all of the emissions, more projects would be rejected and the conformity determination would take more time.

EPA has defined the scope of conformity determinations to include federal activities in both nonattainment and attainment areas.¹⁷⁸ EPA proposes to apply conformity procedures only to those attainment areas whose air quality is approaching nonattainment.¹⁷⁹

Federal actions can escape the conformity requirement in two ways. First, if the estimated emissions falls within the De Minimis Emission exclusion, no conformity determination is required.¹⁸⁰ EPA included this exception to lessen the burden of conformity and assure that major federal actions are adequately addressed. Second, the conformity regulations consider several situations where conformity is presumed.¹⁸¹ These situations include response actions under CERCLA,¹⁸² sewage treatment works projects under the CWA, temporary federal actions in response to emergencies, and research and

177. 58 Fed. Reg. 63,227.

178. *Id.* EPA intends to promulgate separate conformity regulations for attainment areas.

179. *Id.*

180. *Id.* at 63,228. De minimis levels are based on the CAA’s major stationary source definitions. Ozone levels range from 10 to 100 tons per year (VOC and NOx) depending on the level of nonattainment. For lead, the de minimis level is 25 tons per year. *Id.* at 63,228-63,229.

181. *Id.* at 13,850, 63,229.

182. Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) is a comprehensive remedial Act designed to expediently respond to releases of hazardous substances. 42 U.S.C. §§ 9601-9675.

investigation activities where no environmental detriment will occur.¹⁸³

States must adopt enforcement provisions which will make mitigation measures necessary for conformity determinations.¹⁸⁴ Written mitigation measures must be submitted by project sponsors prior to a conformity determination.¹⁸⁵ EPA can enforce the mitigation commitments against the project sponsor.¹⁸⁶ In addition, within one year of the publication of the final conformity regulations, states are required to adopt conformity requirements, consistent with the final conformity regulations, in their SIP.¹⁸⁷ Once such requirements are included in a state's SIP, it becomes enforceable by the state, federal agencies and citizen suits.¹⁸⁸

The federal agency must provide EPA and state and local agencies 30 days notice of the proposed federal action.¹⁸⁹ In addition, the federal agency must also provide the same entities with 30 days notice after making a final conformity determination.¹⁹⁰ Public participation is available during the draft conformity stage.¹⁹¹ At least 30 days must be provided for written public comments.¹⁹² The federal agency must make public its final conformity decision.¹⁹³

The conformity requirement of the Act may be the determinative factor with regard to every action the state takes that may effect air quality. A state's goal is to achieve the air quality standards as expeditiously as practicable, but no later than the statutory deadline. A state must take into consideration the effects a proposed project may have on the state's compliance with air quality standards. For example, if a proposed highway or building project will increase air pollutant

183. *Id.*

184. *Id.* at 63,235.

185. *Id.*

186. *Id.*

187. *Id.* at 63,247, 63,237 (to be codified in 40 C.F.R. pt. 51, subpart W).

188. *Id.* at 63,235.

189. *Id.* at 63,236.

190. *Id.*

191. *Id.* at 63,251.

192. *Id.*

193. *Id.*

emissions, the project may not be undertaken since it will not be considered a reasonable step toward the state's goal. If a state is not in conformity with the Act, there will be adverse consequences. The non-conforming state will be in violation of the Act, and federal funding will not be available for future projects. In addition, a citizen suit to compel conformity, as well as sanctions administered by EPA, may also be initiated against the state.

A. Funding Under the CAA

There are several sources of funding for transportation planning, and all may be denied on the basis of non-conformity. The EPA is authorized to distribute grants of up to three-fifths of the cost of implementing transportation control programs to air pollution control agencies.¹⁹⁴ Funding under this program, however, is unlikely to be appropriated due to the federal deficit and other budgetary constraints.¹⁹⁵

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) is the main source of federal funding for state transportation control planning.¹⁹⁶ ISTEA functions as a "currency vehicle" to help support CAA undertakings.¹⁹⁷ The EPA has stated that state and local officials should consider use of ISTEA funds as part of the multi-modal transportation planning/programming process.¹⁹⁸ MPOs allocate these funds among long-range transportation plans. In order for these funds to be available, however, the conformity requirements of the Act dictate that the projects designated by the MPOs to receive such funding must conform to the SIP and the Act. Once this criteria is met, funding under ISTEA is distributed according to each state's share of non-attainment area population, weighted by pollution severity.¹⁹⁹

194. 42 U.S.C. § 7405(a).

195. *Guide, supra* note 32, at 14. A state may also allocate its own funds for projects.

196. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended at 49 U.S.C. § 101).

197. *Guide, supra* note 32, at 14.

198. See 58 Fed. Reg. 145 (1993) (codified at 23 C.F.R. § 140.301).

199. *Guide, supra* note 32, at 14. A 0.5% minimum apportionment is guaranteed to each state. *Id.*

ISTEA has authorized \$156 billion for surface transportation for the fiscal years 1992 through 1997.²⁰⁰ Within ISTEA, there are four main programs from which funds can be allocated to the states. The National Highway System (NHS) program was established to provide an interconnected system of principal arterial routes.²⁰¹ Twenty-one billion dollars have been allocated to the NHS for the fiscal years 1992 through 1997,²⁰² and are to be spent on highway transportation improvements.²⁰³ Up to fifty percent of the NHS funds a state receives may be transferred to support other transportation needs such as mass transit.²⁰⁴

ISTEA also created the Surface Transportation Program (STP). This program has been allocated \$23.9 billion²⁰⁵ to provide block-type funding for highway or transit capital projects.²⁰⁶ The STP funds have broader application than the NHS funds because the STP funds can initially be allocated for mass transit facilities, thereby avoiding the transfer of funds from other projects.²⁰⁷

Transportation control methods are directly funded by the Congestion Mitigation and Air Quality Improvement Pro-

200. Stephen L. Kass & Michael B. Gerrard, *Clean Air, ISTEA and New York Transportation*, N.Y.L.J., June 29, 1992, at 3. It is estimated that New York will receive \$11.9 billion, to be proportioned equally among highway and mass transit needs. *Id.*

201. Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, 1991 U.S.C.C.A.N. (105 Stat.) 1914, 1923.

202. *Id.* at 1918-19.

203. *Id.* at 1925. Specifically, funds are to support construction, reconstruction resurfacing or rehabilitating of highway segments, operational improvements, highway safety improvements, transportation planning, start-up costs for transportation managing, carpool and vanpool projects, and bicycle and pedestrian walkways. *Id.*

204. *Id.* "Flexibility" refers to the availability of funds for all modes of transportation, including transit and nonmotorized transportation projects, and the availability of some transit capital funds to road projects." *Planning, Flexibility Focus of Interim Guidance*, BULLETIN (Surface Transp. Policy Project, Washington, D.C.), Apr. 23, 1992, at 1.

205. Twenty-three billion dollars has been allocated to STP for the fiscal years 1992 to 1997. Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, 1991 U.S.C.C.A.N. (105 Stat.) 1914, 1919.

206. *Id.* at 1927. See also 58 Fed. Reg. 145 (1993).

207. Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, 1991 U.S.C.C.A.N. (105 Stat.) 1914, 1927.

gram.²⁰⁸ Under this program, \$5.9 billion is available for state allocation for fiscal years 1992 through 1997.²⁰⁹ Funding will be allocated to the states only if the proposed project is likely to contribute to the attainment of air quality standards, or is part of an approved SIP.²¹⁰ No funds will be provided for the construction of additional single occupancy vehicle lanes.²¹¹

Finally, the Interstate Maintenance Program (IMP) makes available \$17 billion for preventive maintenance on interstate roads as well as for the reconstruction of bridges, interchanges and over-crossings along interstate routes. However, these funds may not be used for the construction of new travel lanes, other than high occupancy vehicle lanes or auxiliary lanes.²¹²

The funding programs under ISTEA all center around CAA concerns and are subsequently dependent on a state's compliance with the Act's substantive requirements. MPOs and other transportation planners have a difficult task ahead of them. Not only may non-conforming states be limited in highway or mass transit systems planning, they may also be limited in other areas of growth. The Act requires that all federally funded construction projects, whether highways, government buildings or private construction,²¹³ conform to the Act and the SIP. A state will not be able to support a building or roadway construction project if it postpones attainment of the national ambient air quality standards beyond the attainment deadline. In light of the current state of the economy, states may find this to be a debilitating requirement.²¹⁴

208. *Id.* at 1932-33.

209. *Id.* at 1919.

210. *Id.*

211. *Id.*

212. *Id.* at 1934.

213. Private construction must be federally funded to be subject to the Act, such as federal funding to build low cost housing.

214. Although funding under ISTEA may seem plentiful, it is only a fraction of what is needed. Therefore, states like New York cannot afford to be denied any ISTEA funds.

B. Enforcement: General Citizen Suit Provisions

Non-conformity may lead to civil or criminal actions against a state.²¹⁵ The citizen suit is a forceful tool that has the potential for frequent use under the Act. The 1990 amendments enhanced the citizen suit provisions, thereby granting citizens greater access to judicial redress.

The Act authorizes civil suits against: 1) any "person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation;" 2) the Administrator of EPA for failure to perform a mandatory duty under the Act; or 3) any person who constructs or proposes to construct any new or modified major stationary emissions source without a permit or in violation of a permit.²¹⁶ To bring a claim under the "emission standard or limitation" provision, a plaintiff must allege a violation of "a specific strategy or commitment in the SIP and describe, with some particularity, the respects in which compliance with the provision is deficient."²¹⁷ A citizen suit to enforce a NAAQS cannot be maintained under section 7604 because an air quality standard is not included within the definition of an "emission standard or limitation."²¹⁸ Therefore, a claim against the state arising under section 7604 must allege a violation of a SIP commitment.

215. See generally 42 U.S.C. §§ 7604, 7413. It is interesting to note that EPA may bring an action for failure to comply if the state is not enforcing its SIP requirements. Actions against private individuals are not covered in this article.

216. 42 U.S.C. § 7604(a)(1). Plaintiffs must provide the defendant with a sixty-day notice of intent to commence an action in United States district court. *Id.* § 7604(b)(1)(A).

"Emission standard or limitation" is broadly defined to encompass "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard," a "control or prohibition respecting a motor vehicle fuel or fuel additive," or any "condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans," or requirements relating to ozone protection or permits. *Id.* § 7604(f).

217. *Coalition Against Columbus Ctr. v. New York*, 967 F.2d 764, 769 (2d Cir. 1992) (quoting *Council of Commuter Orgs. v. Metropolitan Transp. Auth.*, 683 F.2d 663, 670 (2d Cir. 1982)).

218. *Id.* at 769-70.

A citizen suit against the city of New York was defeated in *Coalition Against Columbus Center v. New York*,²¹⁹ in which the plaintiffs were residents and local business owners from the Columbus Circle area of Manhattan. The City of New York sold three and a half acres of land to developers who proposed a project that would replace the New York Coliseum and a twenty-six story office building with a seventy floor residential, office and retail building and a new parking garage.²²⁰ The plaintiffs alleged violations of section 3.6(A) of New York State's 1984 SIP,²²¹ which required mitigation measures to be implemented in the event that a proposed project's Environmental Impact Statement (EIS) identified a violation or exacerbation of the carbon monoxide standard.²²² The project's EIS estimated that the carbon monoxide level would reach 12.9 ppm in 1993 without the project, and 13.3 ppm within the project.²²³

The court determined that section 3.6(A) was specific enough to be considered a condition or requirement of a SIP within the meaning of "emissions limitations and standards."²²⁴ Furthermore, the court held that section 3.6(A) did not merely restate the NAAQS, but made a commitment to take affirmative steps to achieve the NAAQS and reduce air

219. 967 F.2d 764 (2d Cir. 1992).

220. *Id.* at 766.

221. *Id.* at 768. Although the 1990 amendments were in effect, New York was not required to submit a revised SIP until November 15, 1992. *Id.* at 772. Until that time, the Act contained a savings clause which declared that any approved existing SIP commitment would remain in effect until a subsequent SIP revised or repealed the commitment. 42 U.S.C § 7410(n)(1).

222. 967 F.2d at 767.

223. *Id.* at 768. The district court held that the proposed project had "no legally cognizable effect on [the] carbon monoxide emissions at the site." *Coalition Against Columbus Ctr. v. City of New York*, 769 F. Supp. 478, 484 (S.D.N.Y. 1991). When determining the legal emission effect, EPA uses a rounding method whereby integers with fractional parts of .5 ppm or greater are rounded up. *Id.* See also 40 C.F.R. § 50.8(d). Here, the 12.9 ppm of CO without the project area had a legal emissions effect of 13 ppm, and the 13.3 ppm within the project area had a legal emissions effect of 13 ppm. Therefore, no legal emissions effect occurred. 769 F. Supp. at 484; see also 40 C.F.R. § 50.8(d).

224. 967 F.2d at 771.

pollutant emissions.²²⁵ The plaintiffs had authority to sue under section 7604 of the Act because they alleged a violation of a transportation control measure which fell within the broad definition of "emissions standard or limitation."²²⁶

The plaintiffs, however, did not prevail because the court gave an equally broad reading to the Act's requirements. The State undertook an area-wide control program to control and mitigate CO emissions.²²⁷ As part of this program, the State relied on the Traffic Congestion and Pollution Relief Study (Traffic CPR), sponsored by the New York City Department of Transportation.²²⁸ This study was designed to identify areas within New York City that exceeded the CO standard.²²⁹ The plaintiffs contended that this study did not satisfy section 3.6(A).²³⁰ In particular, the study itself was two years behind schedule and did not mandate implementation of any mitigation plans.²³¹

Although the trial court held that the State's actions were insufficient under section 3.6(A),²³² the Court of Appeals found that the City did not fail to fulfill its commitment under section 3.6(A).²³³ The court noted that the City must make efforts to ensure compliance with the NAAQS as expe-

225. *Id.*

226. 42 U.S.C. § 7604(a)(1).

227. 769 F. Supp. at 485.

228. *Id.*

229. *Id.* at 486.

230. *Id.* at 488.

231. *Id.* at 488-89. The court concluded that the City was far from implementing any guidelines for the attainment of air quality standards, in light of its inability to supply the court with any basis for a realistic timetable for development, proposal, adoption and implementation of ameliorative measures. *Id.*

232. *Id.* at 489. The trial court held that the City must take measures that are "reasonably calculated to lead to NAAQS compliance 'as soon as possible.'" *Id.* at 487. Following the December 1987 attainment deadline imposed by the January 1984 SIP, the court held that the Traffic CPR study was not an action that would lead to attainment of the NAAQS by the deadline. *Id.* at 487, 489.

233. 967 F.2d at 775. The holding of the Court of Appeals was premised on the finding that the 1990 amendments extended the attainment deadline to December 1995, even though the State is to operate under the current SIP until the 1992 SIP was approved. *Id.* at 772. To reach its conclusion, the court interpreted congressional intent to give states more time to meet their obligations. *Id.* at 773.

ditionously as practicable or by the statutory deadline.²³⁴ Because the Court of Appeals ruled that the State had to meet the 1995 attainment deadline pursuant to the 1990 amendments, the steps taken by the State were found to be sufficient, and did not constitute a failure to fulfill or a repudiation of the commitment.²³⁵

Under the Act, states are required to submit detailed SIPs. For example, pursuant to section 7511a(d), severe ozone non-attainment areas must adopt specific transportation control measures (TCM).²³⁶ Section 7408(f) and EPA guidance documents list the possible TCMs that states may implement. In the November, 1992 SIP, states were to list the specific measures they adopted. If these measures are not implemented, a citizen suit could be commenced for a failure to fulfill or a repudiation of a SIP commitment. Consequently, the specific SIP requirements mandated by the Act create a stricter standard with which states must comply in fulfilling their SIP commitments.

With the broadening of the citizen suit provision to include suits for past violations in conjunction with specific SIPs, citizen suits now pose a potential threat to states. States may face citizen suits for failure to comply with a SIP or to attain reasonable progress toward compliance with the NAAQS.

As a result of the enhanced citizen suit provisions, bringing a civil suit may be an attractive way for citizens to shape local transportation policies. For example, on September 22, 1992, the New York, New Jersey and Connecticut Departments of Transportation received a letter of intent to sue from the New York/New Jersey/Connecticut Transportation Campaign (Campaign).²³⁷ This citizen suit alleged that the

234. *Id.* at 774.

235. *Id.*

236. 42 U.S.C. § 7511a(d)(1).

237. Dennis Hevesi, *Six Environmental Groups Intend To Sue States on Car Pollution*, N.Y. TIMES, Sept. 23, 1992, at B5. The Campaign is a coalition comprised of members of six environmental groups: Connecticut Fund for the Environment, Conservation Law Foundation, Association of New Jersey Environmental Commissions, New Jersey Environmental Lobby, New Jersey Public Interest Research Group, and Environmental Defense Fund. *Id.*

MPO's in the respective states failed to comply with section 176(c) of the CAA²³⁸ because they implemented plans and programs that did not conform to the SIP.²³⁹ The Campaign alleged that "[the state's] conformity analysis d[id] not demonstrate that the . . . long range transportation plan will contribute to annual reductions in emissions of VOCs and NOx . . . and CO from motor vehicles, in violation of the conformity requirements of the Clean Air Act."²⁴⁰ Specifically, it was alleged that the States used incorrect methods to calculate the 1990 baseline emissions values for VOC and NOx.²⁴¹ Following discussions with the states, the Campaign agreed to forego its right to initiate a suit on the condition that the Campaign work with the MPO's in formulating plans to reduce VOC and NOx.²⁴²

The Campaign is an organization of six environmental, civil and planning organizations, which illustrates the potential power of citizen action to influence state transportation planning. The objective of the Campaign is to achieve a regional transportation system that reduces congestion, sprawl, air pollution, energy consumption and deterioration of the region's urban centers.²⁴³ The Campaign has designed a Citizen Transportation Action Plan. This plan has two basic purposes. First, it is designed to increase awareness in the metropolitan region regarding how transportation systems within the region should be reformed, and aid the regional MPO and DOT in creating ideas for long-term transportation

238. 42 U.S.C. § 7506. Section 176(c) prohibits the federal government from supporting, financing or approving any activity that does not conform to an implementation plan.

239. Letter from James Tripp et al., Environmental Defense Fund, to Thomas Downs, Franklin White & Emil Frankel, Commissioners, New Jersey, New York & Connecticut Departments of Transportation 1 (Nov. 25, 1992) [hereinafter letter from Tripp] (on file with *Pace Environmental Law Review*).

240. Raymond Ruggiere, *NYMTC Notified of EDF's Intent to Sue*, in COUNCIL CONTACT (New York Metro. Transp. Council, New York, N.Y.) Jan. 1993, at 1.

241. See Letter from Tripp, *supra* note 239, at 2.

242. *Id.*

243. Memorandum from New York/New Jersey/Connecticut Transp. Council to Professor David Wooley, Pace Univ. Sch. of Law 1 (1992) (on file with *Pace Environmental Law Review*).

plans.²⁴⁴ Second, the plan is to create a process for citizen education and involvement in transportation, land use and related planning and investment decisions in the region.²⁴⁵

The Act allows citizen groups such as the Campaign easier access to the legislative process and, for better or worse, greater participation in the judicial process. States could elect not to work with concerned citizen groups. However, by doing so they face the possibility of citizen suits as well as sanctions or civil penalties imposed by EPA.

VI. Conclusion

State implementation plans under the Act require states to implement specific programs designed to enhance the ambient air quality. Due to the severe and rapid degradation of the nation's air quality, strong national regulations such as the Act are needed to ensure the future health of the environment and of the human population. Clean air, however, comes with a price. It is unlikely that states will be able to comply with the Act, due to the intricate interwoven system the Act has created. Because there are many entities factored into transportation planning, deadlines will be difficult to meet. EPA has already missed several deadlines relating to guidance documents, thereby adding to the increased burden on the states to create and implement transportation programs within sufficient time for them to be effective.

The lack of adequate funding presents another problem. Although ISTEA provides significant funding, it is only a fraction of what is needed. Without funding, states will not be able to expeditiously implement every program needed to comply with the Act. This failure may put states in non-compliance, which could lead to the withholding of future funds, civil suits, penalties or sanctions.

The 1990 Clean Air Act Amendments are likely to create a new cooperative effort between state and local governments and citizens in order to overcome the difficulties the Act imposes on the states. Although there are trying times ahead, a

244. *Id.* at 4.

245. *Id.*

strict hand may be needed to ensure livable, breathable and healthy air.