Friends of the Earth v. Carey: Enforcing the Clean Air Act

In *Friends of the Earth v. Carey* [*Friends III*],[1] the Court of Appeals for the Second Circuit handed down perhaps the most definitive ruling concerning the Clean Air Act since the enactment of the 1970 Amendments.[2] The holding of the case indicates that transportation control plans, as outlined in the Clean Air Act,[3] are enforceable against the states and local governments.

I. INTRODUCTION

Congressional attempts to deal with air pollution were initiated in 1955 with the passage of the first air pollution control act.[4] That Act recognized the growing problem of air pollution and asked the states to take primary responsibility for its prevention and control. Several similar

1. 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3258 (U.S. Oct. 18, 1977).

2. Act of Dec. 31, 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. § 1857 (1970)).

3. Under 42 U.S.C. § 1857c-5(a)(2)(B) (1970), the states were authorized to include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, *including, but not limited to, land-use and transportation controls*" (emphasis added). The 1977 Amendments to the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977), altered this section to read as follows: "including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D)."

4. Clean Air Act, Pub. L. No. 84-159, 69 Stat. 322 (1955).

acts were passed in the ensuing 15 years,[5] but it was not until the passage of the 1970 Amendments to the Clean Air Act that federal policy was dramatically altered.

The 1970 Amendments eliminated state discretion in meeting the responsibility of reducing air pollution. Instead, the states were commanded to draft State Implementation Plans (SIPS) for the prevention and control of air pollution within a mandated period of time.[6] Included in the mandatory SIP preparation was a transportation control plan designed to reduce the levels of vehicular pollutants in the cities.[7]

Pursuant to the 1970 Amendments, New York City, with State assistance,[8] drafted a transportation control plan with the full support of the Lindsay Administration. At the time, carbon monoxide pollution in the City had risen well above the level of acceptability as defined by federal health standards.[9] In studying the plan, which was designed to meet the primary air quality standards as promulgated by the Environmental Protection Agency (EPA) Administrator in 1971,[10] the City concluded that motor vehicles were responsible for 95% of the carbon monoxide emissions, 65% of the hydrocarbon emissions, and 50% of the photochemical oxidants in the New York metropolitan area.[11] The plan also determined that the controls on new automobile emissions ordered by section 202 of the Clean Air Act[12] would only achieve about 40% of the reduction in pollutants necessary to fulfill the EPA's primary air quality standards.[13]

5. Act of June 8, 1960, Pub. L. No. 86-493 § 1, 74 Stat. 162; Clean Air Act Amendments, Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 89-272, 79 Stat. 992 (1965); Pub. L. No. 89-675, 80 Stat. 954 (1966).

6. 42 U.S.C. § 1857c-5 (1970). The states were commanded to "adopt and submit" to the Environmental Protection Agency a plan to implement the national primary ambient air quality standards within nine months after promulgation of such standards by the Administrator. The standards were initially promulgated in 1971. *See* 40 C.F.R. § 50.1-.11 (1975).

7. The 1977 Amendments to the Clean Air Act do not alter either 42 U.S.C. § 1857 c-5(a)(1) (1970), which directs the states to submit implementation plans, or 42 U.S.C. § 1857c-5(a)(1) (1970), which authorizes the EPA Administrator to approve or disapprove such plans.

8. Although the "Friends" litigation is primarily a proceeding against New York City, *Friends II* and *Friends III* name [Hugh] Carey, the Governor of New York State, as defendant. The State was a party defendant, but all court references to the State apply to the City as a municipality of the State. Furthermore, the State of New York did not seek to renege on the City's implementation plan. *See* Reply Brief for Plaintiffs-Appellants at 40, Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977).

9. By July, 1975, carbon monoxide levels in New York City had increased 25% since pre-plan days, and were then five times the level set by federal health standards. "These violations were significantly harmful to public health." Friends of the Earth v. Carey, 535 F.2d 165, 171 (2d Cir. 1976).

10. The Environmental Protection Agency promulgated national primary and secondary standards for six common air pollutants in 1971. *See* 40 C.F.R. § 50.1-11 (1975).

11. *See* Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (2d. Cir. 1974).

12. 42 U.S.C. § 1857f-1 (1970).

13. Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (2d Cir. 1974).

Therefore, pursuant to section 110(a)(2)(B) of the Clean Air Act,[14] New York prepared transportation controls for the City that consisted of four basic stages for a reduction in air pollutants.

The primary stage, designed to meet the original 1975 deadline[15] and approved by the EPA, would reduce taxicab cruising as well as achieve reductions in parking places in Manhattan business districts and daytime freight movements. Expanded use of exclusive bus lanes, increased bus service, and the imposition of tolls on certain bridges into Manhattan were also approved.[16]

The second stage was the maintenance stage, which included strategies aimed at preserving the 1975 air quality levels achieved by the primary stage. The third, the contingency stage, designed as an alternative if the primary stage should fail, would ban all private automobiles from Manhattan's business districts. The fourth consisted of secondary strategies thought to be beneficial but in need of further study.[17]

Upon EPA approval of the primary stage in June, 1973, a 1975 compliance date was set.[18] However, because of a worsening economic crisis, the City refused to implement the plan.[19]

The City's refusal caused several environmental groups[20] to initiate suit seeking the City's implementation of the transportation control plan. The ensuing "Friends" litigation produced three appellate court decisions, the most recent of which, *Friends of the Earth v. Carey* [*Friends III*], will stand as the final judicial word on the case. The October 17, 1977 Supreme Court ruling denied certiorari to *Friends III*.[21]

In *Friends III*, the City argues that the 1970 Clean Air Act Amendments are not a mandatory directive to the states, and therefore, failure to implement the transportation control plan is not a violation of the statute. An analysis of this issue involves a discussion of the legislative history and a careful reading of the applicable sections of the statute.

The City further argues that EPA enforcement of a state-drafted

14. 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

15. New York City's original compliance date to meet the primary ambient air quality standards as set by the Administrator was May 31, 1975, which included a nineteen-month extension for meeting both the photochemical oxidants and the carbon monoxide standards. *See* 38 Fed. Reg. 16,560-61 (1973). *See also*, Friends of the Earth v. EPA, 499 F.2d 1118,1121 (1974). A previously granted two-year extension pushing the compliance date back to May 31, 1977 was rescinded in Natural Resources Defense Council v. EPA, 475 F.2d 968 (D.C. Cir. 1973).

16. Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (2d Cir. 1974).

17. *Id.*

18. *Id.* at 1121,1123; 38 Fed. Reg. 16,560-61 (1973).

19. Beame v. Friends of the Earth, 8 ENVIR. REP. (Current Developments) (BNA) 941 (1977) (cert. denied). *See generally* Friends of the Earth v. Carey, 552 F.2d 25, 30 (1977).

20. Friends of the Earth was the only named plaintiff in *Friends I*. For a list of plaintiffs in *Friends III*, see note 25 *infra*.

21. Friends of the Earth v. Carey *cert. denied*, 46 U.S.L.W. 3258 (U.S. Oct. 18, 1977).

implementation plan is an unconstitutional infringement on state sovereignty. Analysis of this issue involves a discussion of *Brown v. EPA*.[22]

Finally, the citizen suit provision[23] must be examined; this provision was the vehicle through which plaintiffs initiated *Friends III*.

II. THE CASE

The initial Second Circuit opinion in the chronology was *Friends of the Earth v. EPA* [*Friends I*].[24] In *Friends I*, some of the plaintiffs in *Friends III*[25] brought suit seeking review of New York's transportation control plan on two grounds: first, plaintiffs argued that the plan was ambiguous because the proposed strategies did not indicate precisely what actions would be taken by the City and second, plaintiffs argued that the plan did not comply with the requirements of 110(a)(2)(B) "that it contain emission limitations, schedules and timetables for compliance with such limitations."[26]

The *Friends I* court upheld the four strategies of the plan in all material aspects while ordering the EPA Administrator to "explain further his determinations regarding the parking ban strategies, the necessary assurances concerning funding and personnel, and the twenty percent ban on taxicab cruising."[27] Immediate implementation of the plan was not ordered since the court found that jurisdiction in the case rested on section 307(b)(1) of the Clean Air Act,[28] which restricted review to the correctness of the Administrator's approval of a state plan. Nevertheless, the court held that:

> Congress has provided in the Clean Air Act specific measures for enforcing the plan. Under § 110 the Administrator can promulgate a revised plan if the original plan proves to be inadequate and the state refused to act. Under § 113 . . . the Administrator can bring suit . . . to enforce his orders or an implementation plan . . . Under § 304 . . .

22. 521 F.2d 827 (9th Cir. 1975). In *Brown*, the Court of Appeals for the Ninth Circuit held that the Constitution would not permit the EPA to force a state to implement a federal air quality implementation plan, Brown's relationship to *Friends III* will be discussed, as will other recent Supreme Court decisions dealing with the issue of state sovereignty. *E.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976); Fry v. United states, 421 U.S. 542 (1975).

23. 42 U.S.C. § 1857h-2 (1970).

24. 499 F.2d 1118 (2d. Cir. 1974).

25. Other plaintiffs in Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977) include Friends of the Earth New York Branch, Natural Resources Defense Council, Inc., Sierra Club, Citizens for a Better New York, Citizens for Clean Air, Inc., Committee for Better Transit, Inc., Environmental Action Coalition, Inc., Harlem Valley Transportation Association, Institute for Public Transportation, NYC Clean Air Campaign, New York State Transportation Council, North East Transportation Coalition, West Village Committee, David Sive, and Paul Dubrul.

26. 42 U.S.C. § 1857c-5 (a)(2)(B)(1970).

27. 499 F.2d 1118, 1129 (2d Cir. 1974).

28. 42 U.S.C. § 1857h-5(b)(1) (1971).

private citizens, subject to whatever constraints the Eleventh Amendment may provide, can bring suit in the district courts to enforce implementation plans.[29]

Pursuant to section 304,[30] plaintiffs then brought suit in District Court for the Southern District of New York, and sought an injunction against the defendants for their failure to implement the transportation control plan submitted by the City and approved by the EPA in accordance with section 110 of the Clean Air Act.[31] However, the court, noting the "highly technical nature of . . . the proof and the remedy sought,"[32] held that sufficient expertise was lacking and denied plaintiffs request for a mandatory injunction.

On appeal, the Second Circuit reversed the district court's ruling in *Friends of the Earth v. Carey* [*Friends II*].[33] The court held that according to the statute, "a plan, once adopted by a state and approved by the EPA becomes controlling and must be carried out by the state."[34] The court then ordered partial summary judgment be granted in favor of the plaintiffs, thereby enforcing the four strategies of the plan. In remanding the case, the Court of Appeals directed the district court to conduct hearings to insure that New York City was complying in all aspects with the air quality control plan.[35]

On remand, the district court modified the partial summary judgment against defendants previously entered by the Court of Appeals in *Friends II*.[36] Plaintiffs again appealed to the Second Circuit, which resulted in *Friends of the Earth v. Carey* [*Friends III*].[37] In *Friends III* plaintiffs sought to enforce the transportation control plan for the metropolitan New York area, the four strategies of which were drafted by the State and City of New York and approved in *Friends I*.

III. The Issues

A. *Renunciation of a Transportation Control Plan*

1. *The 1970 Clean Air Act Amendments*

Pursuant to the 1970 Clean Air Act Amendments the Administrator of the EPA is directed to publish proposed regulations prescribing a

29. 499 F.2d at 1128.

30. 42 U.S.C. § 1857h-2 (1970).

31. 42 U.S.C. § 1857c-5 (1970).

32. *See* Friends of the Earth v. Wilson, 389 F. Supp. 1394, 1396 (S.D.N.Y. 1974).

33. 535 F.2d 165 (2d Cir. 1976).

34. *Id.* at 169.

35. *Id.* at 180.

36. Friends of the Earth v. Carey 422 F. Supp. 638 (S.D.N.Y. 1976). The District Court held that: "the proper construction of § 304 is that citizen's suits are authorized against the states and their subdivisions, only to the extent that they are actual polluters, that is violators of emission standards or limitations." *Id.* at 643. *See generally* note 86 *infra*.

37. 552 F.2d 25 (2d Cir. 1977).

national primary ambient air[38] quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria had been issued prior to that date.[39] The primary standards are designed for the protection of public health[40] while the secondary standards are aimed at the protection of public welfare.[41] A reasonable time is allowed for comment after which the Administrator is directed to promulgate the standards.[42]

---

38. "Ambient air" is defined as outdoor air used by the general public. *See* Train v. Natural Resources Defense Council, 421 U.S. 60, 65 (1975).

39. 42 U.S.C. § 1857c-4 (a)(1)(A) (1970). The six pollutants are 1) sulfur oxide, 2) particulate matter, 3) carbon monoxide, 4) hydrocarbons, 5) nitrogen oxide, and 6) photochemical oxidants. *See* 40 C.F.R. pt. 50 (1975). The 1977 Amendments to the Clean Air Act alter section 109, 42 U.S.C. § 1857c-4 (1970) as follows:

AIR QUALITY STANDARDS

Section 109 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

(d)(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 108 and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 108 and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

(b) Section 109 of such Act is amended by adding the following new subsection at the end thereof:

(c) The Administrator shall, not later than one year after the date of the enactment of the Clean Air Act Amendments of 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 108 (c), he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

Pub. L. No. 95-95, § 106(a), 91 Stat. 685 (1977).

40. 42 U.S.C. § 1857c-4 (b)(1).

41. 42 U.S.C. § 1857c-4 (b)(2).

42. 42 U.S.C. § 1857c-4 (a)(1)(B).

Under section 110 of the Clean Air Act, the states, following notice and public hearing, and within nine months after promulgation of an air quality standard, are to adopt and submit to the Administrator a plan to implement those standards—both primary and secondary—in each air quality region of the state.[43] Within four months after the date required for submission of a state plan, the Administrator is to approve or disapprove the plan on the basis of eight listed criteria.[44] Primary standards are to be

43. "Air quality region" is defined under 42 U.S.C. § 1857c-2(c) (1970) as follows. "The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards."

44. The eight listed criteria under this section of the Clean Air Act as adopted in 1970 read as follows:

> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, *including, but not limited to, land-use and transportation controls*;
>
> (C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;
>
> (D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;
>
> (E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;
>
> (F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;
>
> (G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and
>
> (H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard of the availability of improved or more ex-

implemented "as expeditiously as practicable," but in any case within three years of the Administrator's approval of the plan.[45] Secondary standards are to be implemented within a reasonable time.[46]

A state can revise its implementation plan under section 110(a)(3) of the Act.[47] The Administrator will approve the revised plan if it meets the requirement of the eight listed criteria in section 110(a)(2) and is adopted by the state after a reasonable notice and public hearing.[48] Section 110(a)(3) is, therefore, an available tool for state revisions by the states themselves within the guidelines of the promulgated standards.

Perhaps the most controversial part of the Clean Air Act is section 110(c)(1)[49] which sets forth three conditions under which the Adminis-

---

peditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

42 U.S.C. § 1857c-5(a)(2) (1970) (emphasis added). The 1977 Amendments to the Clean Air Act, Pub. L. No. 95-95, § 108(a), 91 Stat. 685, amends section 110(a)(2)(B) above as follows:

(2) Section 110(a)(2)(B) of such Act is amended by striking out "land-use and" and by inserting after "transportation controls" the following: ", air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D)".

For other amendments to section 110, see 91 Stat. 685 (1977).

45. 42 U.S.C. § 1857c-5(a)(2)(A) (1970). *See* note 44 supra for the 1977 Amendments revision of this section.

46. *Id.*

47. 42 U.S.C. § 1857c-5(a)(3) (1970). The 1977 Amendments to the Clean Air Act amend this section by adding the following paragraph:

"(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c), shall be required to revise an applicable implementation plan because one or more exemptions under section 118 (relating to Federal facilities), enforcement orders under section 113(d), suspensions under section 110(f) or (g) (relating to temporary energy or economic authority) or orders under section 119 (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted."

48. *Id.* § 1857c-5(a)(3)(A).

49. 42 U.S.C. § 1857c-5 (c)(1) (1970). The 1977 Amendments to the Clean Air Act amend this section by adding the following sentence at the end thereof: "Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 121 (relating to consultation) or the consultation process required under such section 121 shall not be required to be promulgated before the date eight months after such date required for submission." Pub. L. No. 95-95, § 108(d)(1), 91 Stat. 685 (1977). Section 121 of the 1977 Amendments to the Clean Air Act provides as follows: "In carrying out the requirements of this Act requiring applicable implementation plans to contain — (1) any transportation controls, air quality maintenance plan requirements or preconstruction review of direct sources of air pollution. . .the State shall provide a satisfactory process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal land manager having authority over Federal land to which the State plan applies, effective with respect to any such requirement which is adopted more than one year after the date of enactment of the Clean Air Act Amendments of 1977 as part of such plan. Such process

trator can prepare and promulgate an implementation plan for a state: (1) if a state fails to submit an implementation plan within the nine-month period prescribed in the statute, (2) if the plan is not in accordance with the requirements as set forth in section 110(a)(2) of the Act, and (3) if a state fails to submit revisions within the time prescribed under the statute. Section 110(c)(1) represents a distinct break with the past practice of merely encouraging the states to implement controls over air quality. Here, for the first time, Congress has provided for the prevention and control of air pollution whether or not the states will carry the burden themselves. Furthermore, it is on the strength of section 110(c)(1) that *Brown* based its constitutional claim of federal interference with state sovereignty.

Another important section of the statute is section 110(e)(1) under which the Administrator is authorized to extend the three-year compliance period.[50] A two-year extension will be granted if the state cannot justifiably achieve the national standards within that time, but only if interim compliance measures are reasonable under the circumstances. The Clean Air Act[51] provides for federal enforcement of these provisions under section 113 if "any person" is in violation of an implementation plan. Under the Act, the term "person" includes a state, a municipality, and a political subdivision of a state.[52] The Administrator is required to notify the appropriate person or state, and if such violation continues past thirty days, the Administrator may issue an order demanding compliance with the requirements or bring a civil action.

Finally, section 307 of the Act[53] provides for judicial review of the Administrator's action in promulgating the national primary and secondary ambient air quality standards as well as a review of the Administrator's action in approving or promulgating any implementation plan. Any such petition for review must be filed within thirty days from the date of such promulgation under the statute.

2. *Intent of the Statute*

The 1970 Amendments to the Clean Air Act represented a clean severance with the past practice of voluntary state compliance in controlling air pollution. The initial legislation in this area, the 1955 Air Pollution Control Act, was merely a *recognition* by Congress that air

shall be in accordance with regulations promulgated by the Administrator to assure adequate consultation. Such regulations shall be promulgated after notice and opportunity for public hearing and not later than 6 months after the date of enactment of the Clean Air Act Amendments of 1977." *Id.* § 121.

50. 42 U.S.C. § 1857c-5(e)(1) (1970).

51. 42 U.S.C. § 1857c-8 (1970). For revisions to this section, see The Clean Air Act Amendments of 1977 Pub. L. No. 95-95, § 112(a), 91 Stat. 685.

52. 42 U.S.C. § 1857 h(e). *See* Brown v. EPA, 521 F.2d 827, 834 (9th Cir. 1975).

53. 42 U.S.C. § 1857h-5 (1970). For revisions to this section, see The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(a), 91 Stat. 685.

pollution endangered public health and welfare. This Act declared it to be the policy of Congress to protect the primary responsibilities and rights of the states and local governments in controlling air pollution, and authorized the Surgeon General to support research and aid states in the control and prevention of air pollution.[54]

In contrast, the Air Quality Act of 1967[55] represented a congressional shift from the 1955 status of recognizing the problem to a position of *encouraging* the states to cooperate with local governments for the prevention and control of air pollution. As in the 1955 Act, Congress determined that this ambitious project was the primary responsibility of state and local governments. Although the federal role was slightly enhanced due to a grant of limited powers of supervision, the enactment of the 1967 Air Quality Act did not fundamentally alter the state *voluntary* role in the prevention and control of air pollution.

However, voluntary measures were ineffective and with the enactment of the 1970 Clean Air Act Amendments, Congress clearly terminated the non-mandatory approach. Congress sought:

> [T]o speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again. The Air Quality Act of 1967 and its predecessor acts have been instrumental in starting us off in this direction. A review of achievements to date, however, makes abundantly clear that the strategies which we have pursued in the war against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been.[56]

The 1970 Amendments, characterized by some observers as "taking a stick to the states,"[57] unquestionably eliminated state discretion with regard to meeting their responsibility of controlling air pollution. As the Supreme Court later commented, "for the first time they [the states] were required to attain air quality of specified standards, and to do so within a specified period of time."[58] A program of compelled state action[59] thus replaced the previously unchallenged voluntary approach and terminated a fifteen-year period of congressional nudging that failed to produce consistent or comprehensive state programs to deal with air pollution.

---

54. Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322.

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

56. H.R. REP. No. 91-1146, 91st Cong., 2d Sess. at 1, *reprinted in* [1970] U.S. CODE CONG. & AD.NEWS 5356.

57. Justice Rehnquist is responsible for the phrase in his opinion in Train v. Natural Resources Defense Council, 421 U.S. 60, 64 (1975). *See also* Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?*, 76 COLUM. L. REV. 990 (1976).

58. Train v. Natural Resources Defense Council, 421 U.S. 60, 64-65 (1975).

59. Memorandum of Law for Plaintiffs-Appellants at 32, Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977).

Against this background of legislative history, New York City seeks to renounce its self-designed and properly approved transportation control plan. The City's avenue of review is contained in section 307 of the statute, authorizing judicial scrutiny of the Administrator's action in promulgating the national primary and secondary ambient air quality standards. Section 307 also provides for review of the Administrator's action in approving an implementation plan. However, the time period within which review must be sought under section 307 is only 30 days.

The Administrator promulgated the national primary and secondary ambient air quality standards in April, 1971,[60] and New York City's transportation control plan was approved in June of 1973.[61] Plainly, therefore, section 307 of the Act is no longer an available remedy for the City.

Furthermore, section 307, because it allows for due process, has been held to be a "bastion of enforceability."[62] If the 1970 Amendments are to be interpreted as outdistancing their predecessor acts as their legislative history unequivocally indicates, then allowance of the City to renege on a properly implemented transportation control plan would defeat the mandatory nature of the Amendments. Clearly, therefore, an analysis of the 1970 Clean Air Act Amendments leads to the conclusion that New York's transportation control plan is enforceable against the City.

B. State Sovereignty

1. Brown v. EPA

The constitutional issue raised in *Friends III* is whether federal enforcement of New York's transportation control plan is an impermissible interference with state sovereignty. The absence of a definitive ruling on the constitutional aspects of this problem caused New York to rely on *Brown v. EPA*,[63] in which the Ninth Circuit found state sovereignty

60. *See* Friends of the Earth v. EPA, 499 F.2d 1118, 1120 (2d Cir. 1974).

61. Upon EPA approval of the plan in 1973, New York was granted a nineteen-month extension for meeting both the photochemical oxidants and carbon monoxide emissions. *See* Friends of the Earth v. EPA, 499 F.2d 1118, 1123 (2d Cir. 1974).

62. *See* Friends of the Earth v. Carey, 552 F.2d 25, 34 (2d Cir. 1977); Union Electric Co. v. EPA, 427 U.S. 246 (1960); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

63. 521 F.2d 827 (9th Cir. 1975). For similar holdings to *Brown* see Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975). For a case with a contrary holding regarding federal enforcement of implementation plans against the states, see Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974). The Supreme Court did consider Brown v. EPA, 431 U.S. 99 (1977). Due to the fact that the Administrator had repealed his regulations, citing their need for reform, the case was considered moot.

infringement where the federal government drafted a transportation control plan for state implementation.

In the 1976 District Court ruling in the Southern District of New York, the court reasoned that the *Friends II* interpretation of section 304 of the Clean Air Act, permitting a citizen or the EPA to bring suit requiring the State or City to enforce a state-promulgated transportation control plan posed "the same constitutional hurdles as those suggested"[64] in the *Brown* case.

In *Brown*, California brought suit against the Administrator of the EPA to prevent the latter's promulgation of a transportation control plan for the State.[65] California's initial transportation control plan had been invalidated on the grounds that it did not provide for attainment and maintenance of the national standards for photochemical oxidants. Under section 110(c)(1) of the Clean Air Act, the Administrator is required to prepare and promulgate an implementation plan for a state when the state's plan is not in accordance with federal requirements.[66] At issue in *Brown*, however, is whether the EPA may impose upon the State, federal policy decisions designed to implement transportation control plans locally and through imposition of sanctions, require the State to enact and enforce appropriate measures to implement the federal plan.

The interpretation of section 110(c)(1) and the issue in *Brown* are distinctly different. The former is a permissible exercise of federal government power through the enforcement of pollution control standards on the citizenry under the commerce clause.[67] The latter, because of the Administrator's action in forcing the State to adopt federal regulations, raises questions of an infringement of state sovereignty under the Tenth Amendment.[68]

The court in *Brown* interprets the Act as not permitting such federal intrusion into state sovereignty "except to the extent that the pollution might be caused solely by a source or activity controlled by the state."[69] In other words, the court held that "a state may decline, without becoming liable to sanctions, to undertake a program of control suggested by the Administrator."[70] Therefore, the constitutional issue raised in *Brown*

64. Friends of the Earth v. Carey, 422 F. Supp. 638 (S.D.N.Y. 1976).

65. 521 F.2d 827 (9th Cir. 1975). The following regulations were involved in *Brown*, 38 Fed. Reg. 31,232, *as corrected* 38 Fed. Reg. 34124, 35467 (1973); 39 Fed. Reg. 1025, 1848 (1974).

66. 42 U.S.C. § 1857(c)(1)(B) (1970). *See* note 49 *supra*.

67. U.S. CONST. art. I, § 8, cl. 3.

68. U.S. CONST. amend. X.

69. 552 F.2d 25, 36 (2d Cir. 1977). This quote is a summary of the "Friends III" court's interpretation of Brown v. EPA.

70. Brown v. EPA, 521 F.2d 827, 840 (9th Cir. 1975).

is whether federal promulgation of transportation control plans for local [state] enforcement is an impermissible interference with state sovereignty.

The *Friends III* court, however, held its case to be clearly distinguishable from *Brown*. In *Friends III* the State of New York undeniably promulgated its own transportation control plan, which is in contrast to the federally promulgated plan at issue in *Brown*. Furthermore, the court in *Friends III* regarded the New York case as one of "cooperative federalism"[71] in which Congress had defined achieveable standards of air quality while the State had made the policy and procedural determinations in accordance with section 110 of the Clean Air Act.

2. The Commerce Clause

Congress is equipped with the necessary power under the commerce clause to enact national standards of air pollution prevention and control.[72] Air pollution is unquestionably interstate in character and congressional action is in the interest of public health and welfare.[73] The constitutional issue presented to the court in *Friends III* is whether the admittedly valid exercise of authority under the commerce clause nevertheless impermissibly interferes with the integral governmental functions of a state and its local governments.[74]

The most recent Supreme Court decision dealing with this issue is *National League of Cities v. Usery*.[75] At issue in *Usery* was the constitutionality of the 1974 Amendments to the Fair Labor Standards Act,[76] which extended the coverage of its minimum-wage and maximum-hour provisions to almost all public employees of state and local governments. Disregarding four decades of precedent,[77] the Court, in a 5-4 decision, held that the Constitution barred Congress from regulating interstate commerce *where the net result would be a drastic interference with integral state and local governmental functions*. The Court held that the Tenth Amendment limited federal power because:

> [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but be-

71. 552 F.2d 25, 37 (2d Cir. 1977).
72. *See* Gibbons v. Ogden, 22 U.S. (Wheat.) 1, 6 L. Ed. 23 (1824); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Fry v. United States, 421 U.S. 542, 547 (1975).
73. 42 U.S.C. § 1857c-4(b)(1)(1970).
74. 552 F.2d 25, 37 (2d Cir. 1977).
75. 426 U.S. 833 (1976).
76. 29 U.S.C. § 201 (Supp. V 1975).
77. *See* Fry v. United States, 421 U.S. 542 (1975); Maryland v. Wirtz, 392 U.S. 183 (1968); Wickard v. Filburn, 317 U.S. 111 (1942).

> cause the Constitution prohibits it from exercising authority in that manner.[78]

In applying this principle the *Friends III* court adopted the *Usery* balancing test that weighed the reason for the exercise of the federal commerce power against the extent of usurpation of state policymaking or invasion of integral state functions. The court in *Friends III* concluded that:

> The present case presents neither an interference with integral governmental functions of the City, nor a usurpation of State or City decision-making. On the contrary, the Plan reflects State and City policy decisions to be carried out by them according to their own dictates rather than those of the federal government.[79]

The court pointed out the fact that under section 110(a)(2) of the Clean Air Act, the Administrator is required to approve a state plan which satisfies the standards set by the federal government for attainment and maintenance of air quality.[80]

Finally, the court approvingly cited *Fry v. United States*[81] as an analogous case to *Friends III*. In *Fry*, which is distinguished by the court in *Usery*, the Economic Stabilization Act of 1970,[82] which authorized a presidential action to freeze wages and prices during a particularly critical period of inflationary turmoil, was upheld on the grounds that "effectiveness of federal action would have been drastically impaired"[83] if state employees were excluded from the Act. The *Friends III* court found the federal action in *Fry* consistent with the federal enforcement of the transportation control plan. The rationale was that (1) both concerned a serious problem to national well-being calling for collective federal action, (2) both involved programs limiting interference with state sovereignty, and (3) both preserved state policymaking.[84]

Therefore, the *Friends III* court concluded that the balancing test proposed in *Usery* weighed in favor of the exercise of the federal commerce power by finding that New York's forced compliance with the

78. 426 U.S. 833, 845 (1976). However, the Usery court was not unaware of the need for federal power in dealing with environmental issues as Justice Blackmun's concurring opinion noted: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in such areas as environmental protection, where the federal interest is demonstrably greater and *where state facility compliance with imposed federal standards would be essential.*" *See* 426 U.S. at 856 (emphasis added).

79. 552 F.2d 25, 37 (2d Cir. 1977). An argument by New York City claiming interference with integral governmental functions through the imposition of transportation controls is without merit. Transportation policy implementation in the City has long been considered a cooperative effort between local and federal authorities.

80. 42 U.S.C. § 1857c-5(a)(2) (1970).

81. 421 U.S. 542 (1975).

82. 12 U.S.C. § 1904 (1970).

83. 421 U.S. 542, 548 (1975).

84. 552 F.2d 25, 39 (1977).

approved transportation control plan did not constitute an invasion of its integral state functions.

C. THE CITIZEN SUIT PROVISION

The plaintiffs initiated *Friends II* and *Friends III* under the citizen suit provision of the Clean Air Act.[85] The section is an available citizen tool to force compliance with the national ambient air quality standards against either a person who is in violation of such standards, or against the Administrator if he should fail in enforcing the standards.[86] However, the City argues that the statute is unenforceable against it, and therefore that the use of section 304 is an improper utilization of the citizen suit provision.

Clearly, the provision is a recognition by Congress of both the urgency of the battle against air pollution and the necessity of uniting federal, local, and state governments if positive results are to be forthcoming.[87] In adopting the measure, the Senate noted that the federal agencies had been "notoriously laggard"[88] in abating pollution and requesting control measures. Congressional intent in enacting the provision is precisely set forth in the legislative history.

> In enacting § 304 of the 1970 Amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, the citizen suit provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.[89]

Nevertheless, heavy opposition to section 304 had been voiced during the congressional hearings on the bill.[90] Opponents emphatically argued that section 304 would hopelessly overburden the courts with

85. *See* text accompanying notes 30-37 *supra*.

86. The interpretation of section 304 in *Friends III* suggests that a citizen suit is a viable methodology to compel enforcement of New York's transportation control plan. However, section 304 sets out three situations where the citizen suit applies: suits against any person who has violated an emission standard, suits to enforce an administrative or state order, and suits to compel enforcement of a nondiscretionary function of the Administrator. Strangely enough, the citizen suit in *Friends III* fails to fall within any of the above-listed criteria. Rather, in *Friends III*, the court, in relying heavily on the policy considerations behind the Clean Air Act Amendments of 1970, has given section 304 an expansive interpretation with the apparent intention of deferring to congressional wishes. *See generally*, text accompanying notes 86-102 *infra*; Judge Duffy's opinion in Friends of the Earth v. Carey, 422 F. Supp. 638 (S.D.N.Y. 1976).

87. H.R. REP. NO. 91-1146, 91st Cong., 2d Sess. 5, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5356, 5360.

88. S. REP. NO. 1196, 91st Cong., 2d Sess. 36-39 (1970); *reprinted in* Natural Resources Defense Council v. Train, 510 F.2d 692, 724 (D.C. Cir. 1975).

89. *See* Natural Resources Defense Council v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975).

90. S. REP. NO. 1196, 91st Cong., 2d Sess. 36-39 (1970); *reprinted in* Natural Resources Defense Council v. Train, 510 F.2d 692, 725 (D.C. Cir. 1975).

environmental litigation. However, an analysis of section 304 dispels that apprehension.

Initially, section 304(b)[91] requires the plaintiff to give a 60-day notice prior to the commencement of suit and bars suit if the EPA Administrator or the state is diligently prosecuting a civil action to require compliance with the applicable standard. This section, the most subtle and yet the most revealing of the legislature's intent, is clearly designed to encourage administrative action in the enforcement of the Act.[92] Absent that, a citizen or citizens group is permitted to initiate legal action to force compliance with provisions of the Act.

Secondly, section 304(d) provides that "the court. . .may award costs of litigation. . .to any party, whenever the court determines that such award is appropriate."[93] The express purpose of the Clean Air Act of 1970 is the protection of the general health and welfare of the public.[94] The citizen suit provision is an extension of that intention rather than a tool to be used for individual gain. The section contains no provisions for awarding damages to the individual but rather courts will only award attorneys' fees for a citizen suit when the suit itself is in the public interest.[95]

Furthermore, the legislative history of the provision makes clear that groups filing harassing citizen suits will bear the burden of legal fees for the party against whom the suit is brought as well as covering their own costs.[96] These built-in checks on citizen suits should discourage all but the most obvious litigation, thereby leaving the courts free of an onslaught of citizen-initiated suits.[97]

Finally, section 304 is not a class-action provision[98] since a suit may only be brought to enforce provisions of the Act or requirements that are established as a result of the operations of the Act.[99]

It is fair to say, therefore, that the citizen suit provision of the statute is a major and innovative section of the Clean Air Act[100] designed to

91. 42 U.S.C. § 1857h-2(b) (1970).

92. S. REP. No. 1196, 91st Cong., 2d Sess. 36-39 (1970); *reprinted in* Natural Resources Defense Council v. Train, 510 F.2d 692, 723 (D.C. Cir. 1975). *See also* Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

93. 42 U.S.C. § 1857h-2(d) (1970).

94. 42 U.S.C. § 1857c-4(b)(1) (1970).

95. S. REP. No. 1196, 91st Cong., 2d Sess. 36-39 (1970).

96. *Id.* at 64-65.

97. *See* Sax & Conner, *Michigan's Environmental Protection Act of 1970; A Progress Report*, 70 MICH. L. REV. 1004 (1972). Sax and Conner argue that enactment of a similar citizen suit provision in the Michigan Environmental Protection Act of 1970 has not led to severe disruption of government

98. FED. R. CIV. P. 12.

99. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 280-81 (1970); *reprinted in* Natural Resources Defense Council v. Train, 510 F.2d 692, 728 (1975).

100. It is significant to note that section 304 of the Clean Air Act Amendments of 1970, 42

further insure the mandatory nature of the 1970 Amendments. In addition, traditional jurisdictional barriers to citizen actions, such as standing and amount in controversy have been discarded by section 304 in furtherance of congressional intent that the provision be a readily available tool.[101]

Clearly, *Friends III* is just the type of fact situation envisioned by the Congress. Reasonable and purposeful citizen suits used to require compliance with the provisions of the Act when state or administrative action is not forthcoming or clearly inadequate should result in successful and legally productive litigation.[102]

IV. CONCLUSION

The *Friends III* decision has concluded that the 1970 Amendments to the Clean Air Act are a mandatory directive to the states and that state-drafted transportation control plans are enforceable against the states. Furthermore, *Friends III* has met the complex question of state sovereignty and decided that no interference occurs as long as federal enforcement is directed at the citizenry and not at the states.

While the *Friends III* decision seems straightforward, its ties with *Brown v. EPA* are unavoidable. The Supreme Court's consideration of *Brown* last May left unanswered questions.[103] In short, the Supreme Court deferred consideration of the sovereignty issue and vacated the judgments of the respective courts of appeals on the grounds that the

U.S.C.§ 1857h-2 (1970), has been essentially reproduced in (1) the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1365 (Supp. V 1975); and (2) the Noise Control Act of 1972, 42 U.S.C. § 4911 (Supp. V 1975).

101. Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

102. *See* note 86 *supra*.

103. 431 U.S. 99 (1977). A more recent case dealing with the issues presented in *Brown* is District of Columbia v. Costle, 10 ENVIR. REP. (BNA) 1590 (D.C. Cir. 1977). *Costle* is a continuation of the litigation begun in District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975) in which the court upheld in part and vacated in part transportation control regulations promulgated by the EPA Administrator. As outlined in *Costle*, the EPA modified its regulations following the May, 1977 decision in *Brown*, by removing "(1) requirements that the states adopt regulations, (2) references to state legislative activity, and (3) certain details concerning implementation of the program and other administrative concerns." *See* 42 Fed. Reg. 30,504, 30,507-09 (1977). On the basis of these new regulations, the court in *Costle* holds the District of Columbia litigation regarding implementation of the disputed regulations to be moot.

Brown and *Costle* lead to an obvious conclusion that the sensitive issue of state sovereign ty, argued so strongly in these cases, is now moot. As alluded to in *Costle*, the EPA Administrator has promulgated new regulations for the implementation of transportation control plans more in line with federal power under the commerce clause. It would therefore seem to follow that transportation control plans (and the larger question of air quality control plans) are enforceable against the states regardless of the initial drafters. This conclusion presupposes that the amended EPA regulations fall within the Administrator's power to enforce a thorny question in light of recent history. For additional references to this ruling, *see generally* District of Columbia v. Costle, 10 ENVIR. REP. (BNA) 2022 (D.C. Cir. 1977).

EPA, which had directed the states to implement the federally-promulgated regulations through state legislation, had withdrawn its regulations citing their need for modification.

Last August, Justice Thurgood Marshall considered New York City's plea for a stay of enforcement in *Friends of the Earth v. Beame*[104] pending the Supreme Court's decision to grant certiorari to *Friends III*. Justice Marshall held that New York's "nonchalance" in filing for certiorari and for a stay, deflated their argument that irreparable harm would befall New York City if the plan were enforced.[105] Furthermore, Justice Marshall found the City's argument that further economic hardship would plague the City if it were required to implement the transportation control plan was negated by economic benefits from the plan such as the enhanced attractiveness of the City from the reduction in air pollution and faster delivery times for trucks resulting from the parking ban strategy. Justice Marshall also doubted the likelihood of the Court granting the case certiorari.[106]

Marshall's prognosis was correct as the Court refused to grant certiorari to *Friends III* in October, 1977, thereby affirming the decision of the Court of Appeals.[107] The New York question, therefore, is settled. The

104. 10 ENVIR. REP. (BNA) 1421 (1977).

105. *Id.* at 1422.

106. *Id.*

107. *See* 46 U.S.L.W. 3258 (U.S. Oct. 18, 1977). However, with the passage of the 1977 Amendments to the Clean Air Act, the powers of the Governor under section 110(c) 42 U.S.C. § 1857 c-5(c) (1970), have been increased with respect to the additional parking strategy and the bridge toll strategy. The relevant sections provide that:

> (4) In the case of any applicable implementation plan containing measures requiring—
>
> (C) The reduction of the supply of on-street parking spaces, the Governor of the State may, after notice and opportunity for public hearing, *temporarily suspend such measures* notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under section 110(a)(2)(I) is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.
>
> (5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated form such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).
>
> (B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after the date of the enactment of this subparagraph, be revised to include comprehensive measures (including the written evidence required by part D), to:
>
> (i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and
>
> (ii) implement transportation control measures necessary to attain and maintain national ambient air qualty standards,

City's self-designed transportation control plan is enforceable against it.

Likewise, the application of the state sovereignty issue borrowed from *Brown* is not a defense to state-designed implementation plans. Once approved, state plans are enforceable against the state or municipality, and the citizen suit provision is an available legal remedy to force state compliance.

However, because of the continued uncertainty surrounding the *Brown* litigation, implementation of transportation control plans will continue to lag. Those states which drafted their own transportation control plans should be aware that the "Friends" litigation has upheld the mandatory nature of the 1970 Amendments. On the other hand, states which neglected to draft plans, or whose plans failed to comply with the statute, are still without a clear precedent. Hopefully, a definitive ruling concerning the latter group will be forthcoming in the not-to-distant future.

Michael D. Doubleday

> and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

Pub. L. No 95-95, §§ 108(d)(4), 108(d)(5), 91 Stat. 685 (1977) (emphasis added).

Therefore, the suspended on-street parking strategy and the terminated bridge toll strategy will be subject to comprehensive measures (i) and (ii) above.