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CAN FEDERAL SANCTIONS FORCE STATES TO CLEAN THEIR AIR

MISSOURI V. UNITED STATES¹

by Theodore A. Kardis

I. INTRODUCTION

The Clean Air Act is one of the most pervasive and complex pieces of environmental legislation on the books today. Many states are struggling to meet its guidelines. Some are facing sanctions for failure to comply, while others have already felt the sting of EPA's whip. This non-traditional casenote explores a pending dispute between the state of Missouri and the federal government over Congress' constitutional authority to implement the Clean Air Act vis-a-vis the states.

II. FACTUAL BACKGROUND

When Governor Mel Carnahan signed Senate Bill 590 into law on June 3, 1994, he not only approved the Air Quality Attainment Act (AQAA), but also set a lawsuit into motion. The AQAA was intended to bring Missouri into compliance with the federal Clean Air Act Amendments of 1990, which requires the implementation of a basic vehicle inspection and maintenance (I&M) program by virtue of St. Louis' classification

as a "moderate" nonattainment area for ozone.²

The impetus for this legislative action can be traced to two EPA findings that cite deficiencies in Missouri's State Implementation Plan (SIP). In January 1993, EPA formally charged Missouri with failure to submit a revised I&M program.³ One year later, EPA, again, brought charges against Missouri. This time it was due to an incomplete VOC (volatile organic compound) reduction plan.⁴ In order to remedy these deficiencies and avoid sanctions, the legislature passed S.B. 590, thereby establishing the AQAA. An amendment to the bill, however, put a twist on the AQAA's implementation. The terms of the amendment specify that the AQAA shall not take effect until a particularly described lawsuit is filed in federal court by the attorney general on behalf of the state of Missouri.⁵

The amendment, codified at MO. REV. STAT. § 643.360, states that the lawsuit must request injunctive relief and must challenge the EPA's legal authority to

impose sanctions threatened by the EPA pursuant to the Clean Air Act.⁶ Specific allegations for the lawsuit were also suggested, including the general allegation that the sanctions potentially imposed on the St. Louis air quality control region by virtue of its nonattainment status were unreasonable in relation to the standards which determined that status.⁷ Specifically, the Legislature suggested that substantial evidence does not exist to relate St. Louis' air quality to the potential sanctions.⁸ In support of the allegation that the standards are arbitrary, the legislature set out factual allegations stating that only one of the seventeen St. Louis monitoring sites has registered more than the allowed number of exceedances over the last three years; and that purely local causes are responsible for the exceedances at the one site, thus making it an inappropriate barometer of St. Louis air quality.⁹ In support of the allegation that the potential sanctions are arbitrary, the Legislature offered several factual allegations, including the existence of local causes at the one site registering exceedances; that Missouri should be given time to correct those exceedances; that the expenditure of \$125 million to cure the exceedances at the one site is unreasonable; and that the mandatory 15% volatile organic compound (VOC) emission reduction might unreasonably require an emission reduction beyond attainment status.¹⁰

The Legislature's suggested allegations took a beating during the summer of 1994, just after Governor Carnahan had signed S.B. 590 into law. Of the

¹ No. 4:94 CV 1288 ELF [E.D.Mo. filed Nov. 4, 1994].

² See *infra* notes 26-29 and accompanying text.

³ Plaintiff's Proposed Findings of Fact and Conclusions of Law at 3, *Missouri v. United States* [E.D.Mo.][No. 4:94 CV 1288 ELF] [hereinafter Plaintiff's Proposed Findings].

⁴ *Id.*

⁵ MO. REV. STAT. § 643.360 [1994].

⁶ *Id.*

⁷ *Id.* The amended portion of the statute requires plaintiff to show why the EPA sanctions are unreasonable in relation to the standards by proving: 1) there is no sufficient evidence of a rational relation between ambient air and the penalties the state is seeking; 2) both the standards and the penalties are arbitrary; 3) the penalties are arbitrary and unreasonable for other reasons listed in the statute. *Id.*

⁸ *Id.* at § 643.360(1).

⁹ *Id.* at § 643.360(2)(a), (2)(b).

¹⁰ *Id.* at § 643.360(3)(a)(d).

seventeen monitoring stations throughout the St. Louis area, none can exceed the maximum VOC level more than three times during a three year period.¹¹ By the end of the summer of 1994, one site had recorded five violations, another four, and many others had recorded two.¹² This means that the St. Louis region will be upgraded from a "moderate" nonattainment area to a "serious" nonattainment area unless no ozone violations are recorded during 1996.¹³

Missouri's regulatory woes were further complicated by a July 1994 EPA finding that Missouri's SIP was deficient in regards to another criteria pollutant, nitrogen oxides (NO_x).¹⁴ Missouri must make a SIP revision which incorporates reasonably available control technology (RACT) to all major NO_x sources in the St. Louis nonattainment area by February 6, 1996 or face sanctions.¹⁵

Despite a summer full of exceedances at several different St. Louis monitoring sites, the Missouri Attorney General took its lead from the Legislature and filed the suggested lawsuit on November 4, 1994.¹⁶ The case went to trial on November 21, although no orders have yet been issued.¹⁷ The amendment to the AQAA provides that the act shall not be implemented as long as a temporary restraining order or injunction is in effect,¹⁸ however, no restraining order or temporary injunction was requested based on

the court's agreement to pursue an expedited decision. Nonetheless, as of this writing no decision has been handed down, and Missouri's determination not to seek a preliminary injunction becomes more significant in the interim preceding a ruling on the permanent injunction.

III. LEGAL BACKGROUND

A. Overview of Relevant Clean Air Act Provisions

The Clean Air Act (CAA) requires the EPA to adopt nationally uniform ambient air quality standards (NAAQS) for criteria air pollutants, one of which is ozone.¹⁹ The CAA further requires states to develop and submit state implementation plans (SIPs) to EPA for approval.²⁰ The SIP must specify measures to assure that air quality within the state will meet the NAAQS.²¹ Generally, a SIP must assign specific emission limitations to individual sources; establish timetables for compliance by those sources; set up procedures to review new sources; establish systems to monitor air quality; and provide for enforcement.²² The CAA even provides a process for defining the measures necessary for achieving the NAAQS: first, inventory emissions and project expected growth to establish the extent of the problem; second, choose control strategies for reducing emissions; and third, demonstrate that such measures will be adequate to achieve the NAAQS (e.g. using

modeling).²³ Once a SIP has been approved by the EPA, it is promulgated as a federal regulation, enforceable by the public. Moreover, the SIP system is a dynamic process; most states, including Missouri, amend their SIPs annually.

While the CAA was enacted in 1970, the 1977 CAA Amendments were significant in that they separated the country into areas not yet achieving the NAAQS ("nonattainment" areas), and areas in which air quality was better than the NAAQS (PSDs (for "Prevention of Significant Deterioration"))).²⁴ The 1990 CAA Amendments made significant changes in the nonattainment and PSD programs. Whereas the nonattainment program established in 1977 required "reasonable further progress" but left the term vaguely defined, the 1990 amendments allow the Administrator to require annual incremental reductions in emissions.²⁵ The 1990 Amendments even established a series of provisions relating specifically to ozone nonattainment areas which classified the areas into "marginal," "moderate," "serious," "severe," and "extreme," and established attainment deadlines for each.²⁶ As the St. Louis air quality control region is currently classified as "moderate" nonattainment area for ozone,²⁷ and is at significant risk of being reclassified as "serious," an overview of the mandated measures for each of these classifications is in order.

¹¹ William Allen, *Ozone Levels Enter Danger Zone Here Area Could Face Federal Sanctions*, ST. LOUIS POST DISPATCH, Aug. 21, 1994, at O1D.

¹² *Id.*

¹³ *Id.*

¹⁴ Plaintiff's Proposed Findings, *supra* note 3, at 3.

¹⁵ *Id.*

¹⁶ Plaintiff's Proposed Findings, *supra* note 3.

¹⁷ Fred Lindecke, *Trial Over Emissions Tests To Be Closely Watched*, ST. LOUIS POST DISPATCH, Nov. 18, 1994, at O9D.

¹⁸ Mo. REV. STAT. § 643.360.

¹⁹ 42 U.S.C. § 7409 (1988). Ozone, a criteria pollutant, is used as an indicator for smog. The source pollutant is a group of chemicals known as volatile organic compounds (VOCs), which react with nitrogen oxides (NO_x) to produce smog.

²⁰ 42 U.S.C. § 7410 (Supp. II 1990).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See 42 U.S.C. §§ 7470-7492 (1988) (listing PSD area requirements); *Id.* §§ 7501-7508 (listing nonattainment area requirements).

²⁵ 42 U.S.C. § 7501 (Supp. II 1990).

²⁶ 42 U.S.C. §§ 7511-7511f (Supp. II 1990).

²⁷ Plaintiff's Proposed Findings, *supra* note 3, at 2. The St. Louis area was so designated on November 6, 1991. *Id.*

If an area has been classified as a "moderate" nonattainment area, it must submit to EPA an inventory of actual emissions from all sources and revise it every three years; apply a reasonably available control technology (RACT) program to many VOC sources; implement a vehicle emission control inspection and maintenance (I&M) program; implement new source permitting programs; submit a SIP that will reduce VOCs fifteen percent in six years; and require the installation of gasoline vapor recovery systems at gas stations.²⁸ If an area has been classified as a "serious" nonattainment area, it must comply with all "moderate" area requirements (which incidentally are partially defined by the "marginal" area requirements) as well as implement a SIP with enhanced monitoring; make an attainment demonstration of the new SIP's effectiveness to the EPA using modeling or another approved analytical method; demonstrate a three percent reduction in baseline emissions each year, averaged over a three year period; implement an enhanced vehicle I&M program; incorporate a transportation control program into the SIP; and revise the SIP to include a clean-fuel vehicle program.²⁹

Another crucial provision added by the 1990 CAA Amendments provides for sanctions to be levied against the states for failure to attain the NAAQS.³⁰

Grounds for sanctions include failure to submit a SIP for a nonattainment area, failure to submit a SIP which includes all the required elements of a nonattainment SIP for that area and which meets certain minimum criteria, failure of the SIP to meet the proscribed nonattainment elements, failure to make other required submissions, and failure to implement the approved SIP.³¹ This starts the running of the "sanctions clock."³² If one of these grounds exists, the state has eighteen months to correct the deficiency.³³ If at that point the deficiency is still not corrected, the EPA must impose one of two sanctions.³⁴ However, if there is a lack of good faith on the part of the state or if the state is still noncompliant after an additional six months, both sanctions will apply until compliance is achieved.³⁵

There are two sanctions: highway sanctions and offsets.³⁶ The highway sanction allows the EPA to cut off federal funding to the area with the exception of safety-related projects.³⁷ However, the EPA has the authority to approve certain projects which it finds would improve air quality.³⁸ The offsets sanction would increase the offset ratio required in new source permitting to 2:1.³⁹ The EPA has decided that the offset sanction will apply eighteen months after the finding of a deficiency, and the highway sanction six months after that.⁴⁰ While the imposition of these sanctions is mandatory at the

proscribed intervals, the EPA has the authority to impose them sooner.⁴¹ Furthermore, this authority allows the EPA to expand the sanctions to the entire state, as opposed to only the nonattainment area.⁴²

B. Case Law

1. Tenth Amendment

The first of Missouri's legal challenges to the federal government's sanction authority is based on the Tenth Amendment, which reads: "[t]he powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."⁴³ The Tenth Amendment has meant different things to the Supreme Court at different times in its history, thus an examination of the various judicial interpretations of the Amendment is crucial.

Early Tenth Amendment jurisprudence seemed to clearly indicate that it did not constitute a limitation on the congressional exercise of powers delegated by the Constitution.⁴⁴ Later, in the 1930s, it was used by the Court as one of many grounds for invalidating New Deal legislation,⁴⁵ but this practice was soon abandoned.⁴⁶ Insofar as it operated as a check upon federal power, the Tenth Amendment laid dormant for a long period which ended suddenly with the modern day Supreme Court decision,

²⁸ 42 U.S.C. § 7511(a)(b) [Supp. II 1990]; *Id.* § 7511(a)(a).

²⁹ *Id.* §§ 7511(a)(a)(c).

³⁰ 42 U.S.C. § 7509 [Supp. II 1990].

³¹ *Id.* § 7509(a).

³² See 40 C.F.R. § 52.31 (1994).

³³ 42 U.S.C. § 7509(a) [Supp. II 1990].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* § 7509(b).

³⁷ *Id.* § 7509(b)(1)(A).

³⁸ *Id.* § 7509(b)(1)(B).

³⁹ *Id.* § 7509(b)(2).

⁴⁰ 40 C.F.R. § 52.31(d)(1) (1994).

⁴¹ 42 U.S.C. § 7410(m) [Supp. II 1990].

⁴² *Id.*

⁴³ U.S. CONST. amend. X.

⁴⁴ See *Gibbons v. Ogden*, 9 Wheat. 1, 196 (1824); *McCulloch v. Maryland*, 4 Wheat. 316, 404-07 (1819); and *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324-25 (1816).

⁴⁵ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936).

⁴⁶ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941).

National League of Cities v. Usery.⁴⁷ In *National League of Cities*, the Supreme Court invalidated portions of the 1974 amendments to the Fair Labor Standards Act (FLSA) as violative of the Tenth Amendment.⁴⁸ Specifically, the Court held that the FLSA amendments "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁴⁹ The Court recognized that the Tenth Amendment stood for the proposition that "...Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."⁵⁰ The Court held that the FLSA amendments interfered with traditional aspects of state sovereignty, one of which was the substantial costs imposed upon the states by the amendments.⁵¹ However, a four member dissent vehemently opposed the concept that the Tenth Amendment places independent limits on federal power, calling it an "ill-conceived abstraction."⁵²

The position of the *National League of Cities* dissent would ultimately win out nearly a decade later, but in the meantime the Court continued to refine its new found application of the Tenth Amendment. A particularly important decision is *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*⁵³ *Hodel*

involved a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act.⁵⁴ Although the Court did not find that the legislation was invalid, it set forth and applied three requirements for a successful Tenth Amendment challenge.⁵⁵ The first requirement is a "showing that the challenged statute regulates the 'States as States.'"⁵⁶ The second requires that "the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.'"⁵⁷ The third requirement is that "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"⁵⁸ The Court applied this test in a few subsequent decisions,⁵⁹ until the Tenth Amendment tide turned in 1985.

The vacillation of Tenth Amendment jurisprudence continued when the Supreme Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.⁶⁰ The Court rejected the prior analysis of whether a particular state governmental function was "integral" or "traditional".⁶¹ In deciding to overrule precedent, the Court seemed frustrated with the application of the doctrine first put forward by *National League of Cities*. It noted that while *National League of Cities* had attempted to use the Tenth Amendment to place a

limit on Congress' power, articulating this limit "in terms of core governmental functions and fundamental attributes of state sovereignty," that doctrine had "underestimated ... the solicitude of the national political process for the continued vitality of the States."⁶²

The Court concluded that the *National League of Cities* model was unnecessary, "impracticable," and "doctrinally barren."⁶³ However, a four justice dissent, composed of the remaining members of the *National League of Cities* majority, decried the abandonment of its model and pronounced that *Garcia* "effectively reduces the Tenth Amendment to meaningless rhetoric...."⁶⁴

In the wake of *Garcia*, it seemed as though the Tenth Amendment imposed no restrictions on Congress regulating the states as states. However, the Court would define some limits on Congressional power in *New York v. United States*.⁶⁵ Interestingly, the Court again visited the Tenth Amendment in the context of a challenge to environmental legislation, this time the Low-Level Radioactive Waste Policy Act.⁶⁶ Responding to speculation over the demise of the Tenth Amendment, the Court explained that while it does indeed restrain the power of Congress, the limitation does not spring directly from the text of the amendment, which is simply a "tautology."⁶⁷ Rather, as the Court

⁴⁷ 426 U.S. 833 (1976).

⁴⁸ *Id.*

⁴⁹ *Id.* at 852.

⁵⁰ *Id.* at 842-34 (quoting *Fry v. United States*, 421 U.S. 542, 547 (1975)).

⁵¹ *Id.* at 845-46.

⁵² *Id.* at 867 (Brennan, J., dissenting).

⁵³ 452 U.S. 264 (1981).

⁵⁴ *Id.*

⁵⁵ *Id.* at 287-88.

⁵⁶ *Id.* at 287 (quoting *National League of Cities*, 426 U.S. at 854).

⁵⁷ *Id.* at 287-88 (quoting *National League of Cities*, 426 U.S. at 845).

⁵⁸ *Id.* at 288 (quoting *National League of Cities* at 852).

⁵⁹ See *United Transportation Union v. Long Island RR. Co.*, 455 U.S. 678 (1982); *EEOC v. Wyoming*, 460 U.S. 226 (1983).

⁶⁰ 469 U.S. 528 (1985). The Court explicitly stated: "*National League of Cities v. Usery*, ..., is overruled." *Id.* at 557.

⁶¹ *Id.* at 546-47.

⁶² *Id.* at 556-57.

⁶³ *Id.* at 557.

⁶⁴ *Id.* at 560 (Powell, J., dissenting). Actually, Justice Blackmun, who concurred in *National League of Cities*, defected to write the majority opinion in *Garcia*.

⁶⁵ 112 S.Ct. 2408 (1992).

⁶⁶ *Id.*

elucidated, it "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the states."⁶⁸ More specifically, the Court characterized the issue before it as "whether Congress may direct or otherwise motivate the States to regulate in a particular field or in a particular way."⁶⁹ The Court proceeded to identify the principles which guided such an inquiry.

In identifying the first such principle, the Court resurrected the utility of *Hodel*, a pre-*Garcia* decision, by citing its language: "Congress may not simply 'commandeer' the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."⁷⁰ The other major principle identified by the Court is that Congress, using methods "short of outright coercion," may "encourage a State to regulate in a particular way."⁷¹ One such method, better discussed under the Spending Clause, is the attachment of conditions to the receipt of federal funds.⁷² The other constitutionally permissible method is offering states the "choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."⁷³

The Court actually invalidated one of the provisions of the Low-Level

Radioactive Waste Policy Act using this Tenth Amendment analysis. The Court held that the "take title" provision of the Act, which forced states to make a "choice" (sarcasm is the Court's) between accepting ownership of radioactive waste and regulating according to Congress' instructions, had crossed the line between encouragement and coercion.⁷⁴ Accordingly, the Court severed the provision from the rest of the Act since it infringed on the state sovereignty harbored by the Tenth Amendment.⁷⁵ While the Court has returned to a narrowly defined interpretation of the Tenth Amendment's limitation on Congressional power, the vacillation may not yet be over. As Chief Justice Rehnquist brazenly put it, *National League of Cities* "will, I am confident, in time again command the support of a majority of this Court."⁷⁶

2. Spending Clause

The second of Missouri's legal challenges to the federal government's sanction authority is based on the Spending Clause, which reads: "The Congress shall have power: [t]o lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout

the United States;"⁷⁷ The question of whether Congress can use its spending power to indirectly induce states to regulate has received much treatment by the Court this century. Generally speaking, the Court has answered this question in the affirmative.⁷⁸

In particular, the Court has held that "Congress may attach conditions on the receipt of federal funds,"⁷⁹ and that these conditions can influence the legislative choices of states.⁸⁰ In *New York*, the Court refined these pronouncements, stating that "[s]uch conditions must (among other requirements) bear some relationship to the purpose of the federal spending."⁸¹ The Court gave the rationale for this rule, explaining that without it, the spending power could "render academic the Constitution's other grants and limits of federal authority."⁸² The *New York* Court went on to restate the other limitations on the spending power: that the expenditure be for the general welfare;⁸³ that the conditions to receipt must be unambiguous;⁸⁴ and that the conditions must not violate any independent constitutional prohibition.⁸⁵

IV. SUMMARY OF PARTY POSITIONS

A. Missouri

Missouri asserts that the I&M program will be costly and furthermore that the residents of Missouri will blame their

⁶⁷ *Id.* at 2418.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2420.

⁷⁰ *Id.* (quoting *Hodel*, 452 U.S. at 288).

⁷¹ *Id.* at 2423.

⁷² *Id.*

⁷³ *Id.* at 2424.

⁷⁴ *Id.* at 2428.

⁷⁵ *Id.* at 2429, 2434.

⁷⁶ *Garcia*, 469 U.S. at 580 (Rehnquist, C.J., dissenting).

⁷⁷ U.S. CONST. art. I, § 8, cl. 3.

⁷⁸ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 478-80 (1980); *Massachusetts v. United States*, 435 U.S. 444, 461-62 (1978); *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974); *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 142-44 (1947).

⁷⁹ *South Dakota v. Dole*, 483 U.S. 203, 206 (1978). Interestingly, *Dole* concerned Congress' authority to withhold federal highway funds from states that refused to raise their drinking age to 21. The Court did not find this to be an unconstitutional exercise of Congress' spending power.

⁸⁰ *New York*, 112 S.Ct. at 2423.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2426; see also *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937).

⁸⁴ *Id.*; see also *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427-31 (1946).

⁸⁵ *Id.*; see also *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-70 (1985).

State elected officials rather than the federal government for the consequences of the I&M program.⁸⁶ Missouri also observes that it is faced with impending sanctions on several grounds.⁸⁷ Furthermore, Missouri alleges that it has spent large sums of money in order to elude sanctions.⁸⁸ In support of its request for an injunction, Missouri argues that should the EPA impose the offset sanction on the St. Louis nonattainment area, it would preclude future economic development in that area.⁸⁹ According to Missouri, the offset sanction surpasses permissible encouragement or inducement and amounts to an unconstitutional coercion, the faux "choice" prohibited by *New York*.⁹⁰ Specifically, Missouri contends that the offset sanction violates the Tenth Amendment.⁹¹ Irrespective of the Hobson's choice posed by the offset sanction, Missouri avers that the sanction would decrease air quality, thus having an effect counter to its purpose.⁹²

With regard to the highway sanction, Missouri makes the intuitive assumption that it will lose funding for many of its highway construction projects if the sanction is imposed, thus bringing many of these projects to a standstill.⁹³ Missouri asserts that the effect of this will spread from St. Louis to all of Missouri in the form of unemployment as well as decreases in gross regional product, personal income, and population.⁹⁴ Missouri makes the same *New York* faux

choice argument in response to these adverse effects, contending that they bring about an unconstitutional coercion to regulate under the Clean Air Act as they are directed to by Congress.⁹⁵ Missouri urges that the punitive nature of the highway sanction, which could potentially cut off all of Missouri's highway funding, rises beyond the Congressional inducement permitted by *New York* to the level of unconstitutional coercion.⁹⁶ Thus, Missouri concludes that the highway sanction also violates the Tenth Amendment.⁹⁷ In addition to making the Tenth Amendment argument, Missouri also challenges the highway sanction based on the Spending Clause. Missouri asserts that its conditional receipt of federal funds for its highways, based on its implementation of the federal government's CAA regulatory scheme, is not rationally related to any purpose of federal highway funding.⁹⁸ Missouri concludes that this is a violation of the Spending Clause, as interpreted by *New York*.⁹⁹ Peripherally, it also attempts to demonstrate the folly of the sanctions: that the highway sanction would lead to traffic congestion and increased auto emissions, thereby having a counterproductive effect on air quality.¹⁰⁰

Finally, in order to satisfy the elements necessary for an injunction, Missouri alleges that it will suffer irreparable injury in the form of pecuniary loss and

diverted human resources unless the highway and offset sanctions are both enjoined, and that no adequate remedy exists at law for these injuries.¹⁰¹

B. The United States

Missouri complained that the I&M program would be costly to the states and its citizens, thereby resulting in political fallout. The United States responded to this complaint by pointing to the fact that Missouri chose to shoulder an unnecessary burden by opting to purchase real estate, buildings, and equipment to conduct the program itself instead of privatizing it, a cost not required by the CAA.¹⁰² As to Missouri's claim that the offset sanction would preclude economic development in the St. Louis nonattainment area, the United States pointed out that the sanction only applies to new VOC and NO_x sources or such sources which are seeking a major modification, concluding that Missouri's assumption that all VOC and NO_x sources will be affected makes its economic impact assessment unreasonable.¹⁰³ Furthermore, the United States explains that even with the imposition of sanctions, Missouri could still promote economic expansion; major sources could "net out" by decreasing emissions elsewhere at a single plant; Missouri could seek approval for relaxation of its "dual source" definition, which would release some sources from the offset requirement; and Missouri

⁸⁶ Plaintiff's Proposed Findings at 4, *Missouri* (No. 4:94 CV 1288 ELF).

⁸⁷ *Id.*

⁸⁸ *Id.* at 6.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.* at 4-5, 7.

⁹¹ *Id.* at 8.

⁹² *Id.* at 5.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 5-6.

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* at 7.

⁹⁸ *Id.* at 6.

⁹⁹ *Id.* at 7.

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.* at 7-8.

¹⁰² Defendant's Proposed Findings of Fact and Conclusions of Law at 18-19, *Missouri v. United States* [E.D.Mo.][No. 4:94 CV 1288 ELF] (hereinafter "Defendant's Proposed Findings").

¹⁰³ *Id.* at 25.

could also use some of its VOC emission credits to attract new sources.¹⁰⁴ The United States contends that the economic impact of any sanctions could be further diminished if existing sources took advantage of the many ways to "avoid" offset requirements.¹⁰⁵ In addition, the United States observed that many sources of economic growth do not entail the production of ozone precursors, and would not, therefore, be affected by an offset sanction.¹⁰⁶

The United States argued that the imposition of either the highway or offset sanctions would not violate the Tenth Amendment.¹⁰⁷ In taking this position, the United States suggested that Missouri's claims that the sanctions would adversely affect its economy are legally irrelevant to the Tenth Amendment inquiry.¹⁰⁸ Rather, the United States argues that *New York* allows it to encourage particular regulation by the states through the use of incentives, and that it has not taken the impermissible step of directly compelling state implementation of a federal regulatory program.¹⁰⁹ Furthermore, the United States flatly denies Missouri's argument that it has been given an unconstitutionally coercive choice.¹¹⁰ The United States expands on this denial by asserting that while Missouri's choice is a difficult one, neither alternative is unconstitutional since Congress can both impose tighter limits on the dispensation of highway funds and dictate more rigid pollution controls.¹¹¹

The United States addressed

Missouri's contentions that offset sanctions would decrease air quality and that highway sanctions would lead to congestion and decreased air quality in much the same manner. It attacked the offset¹¹² and highway¹¹³ counterproductive sanction arguments by characterizing them as unsupported and unrealistic assumptions derived from flawed methodology.

Finally, the United States addressed Missouri's argument that the highway sanctions (not the offset sanctions) violated the Spending Clause of the U.S. Constitution. Essentially, the United States contended that it met the *New York* requirement that there be "some relationship" between the condition of implementation of federally mandated regulation and the purposes of the conditional highway funding.¹¹⁴ The United States identified this relationship as being between the objective of reducing air pollution from cars via encouraging state implementation of I&M programs and the inherent effect of increased vehicle use and pollution stemming as a product from federally-funded highway construction.¹¹⁵

V. COMMENT

A consideration of the objectives of the parties involved in this lawsuit is central to an understanding of what the future may hold for the St. Louis nonattainment area as well as other states with air quality control regions experiencing nonattainment problems. Missouri's case was considerably

stronger from an equitable standpoint before the multiple exceedances which occurred in the summer of 1994. The statutory allegation that the potential sanctions were arbitrary, due to the fact that only one site had recorded more than one exceedance prior to the summer of 1994, made the CAA appear quite draconian. However, due to the number of exceedances over the summer, that allegation no longer had a factual basis and was excluded from the actual suit. This left Missouri with a pair of tenuous arguments, one based on the Tenth Amendment, the other on the Spending Clause. Quite simply, Missouri was forced to prosecute the lawsuit by its legislature before it could implement the I&M program. Facing a round of sanctions, it had no choice but to attempt the challenge.

However, the challenge has held up the implementation of the enhanced I&M program. Timing is crucial, since St. Louis faces reclassification as a "serious" nonattainment area unless it can better control VOC and NO_x emissions. It is ironic that both sides agree that the I&M program is the most effective and efficient way to do so.¹¹⁶ In fact, the Missouri DNR has estimated that the I&M program alone can take St. Louis nearly halfway to its required emission reduction.¹¹⁷

If this is the case, why is Missouri dragging its feet by prosecuting this lawsuit? Based on the multiple exceedances in 1994, there is no reason to believe that the monitoring stations will remain

¹⁰⁴ *Id.* at 26-27.

¹⁰⁵ *Id.* at 28-29.

¹⁰⁶ *Id.* at 29.

¹⁰⁷ *Id.* at 69.

¹⁰⁸ *Id.* at 69-70.

¹⁰⁹ *Id.* at 70, 75-78.

¹¹⁰ *Id.* at 78.

¹¹¹ *Id.* at 78-79.

¹¹² *See id.* at 58-62.

¹¹³ *See id.* at 49-58.

¹¹⁴ *Id.* at 81.

¹¹⁵ *Id.* at 83.

¹¹⁶ Defendant's Proposed Findings at 15 (citing transcripts and depositions of plaintiffs' witnesses).

¹¹⁷ *Id.* at 16 (citing Plaintiffs' interrogatory responses).

silent this summer when no significant emissions reduction measures have been undertaken. Obviously, the I&M program should be implemented immediately if St. Louis is to have any chance of avoiding reclassification as a "serious" nonattainment area. Nothing prevents Missouri from implementing the I&M program while it awaits the outcome of the suit requesting the injunction. If it expends a significant amount of funds starting up the program and wins the injunction suit in the meantime, it could easily pursue a damages remedy at a later date.

The rhetoric in Plaintiff's Proposed Findings about the political consequences of the difficult choice Missouri is faced with seems out of place, at best. "Missouri's" concern that their state government will be held politically accountable for either the costly and controversial I&M program or the harsh sanctions which would follow from failing to implement it is self-interested and completely irrelevant to the Constitutional inquiry before the court. This is not to say that there are no relevant considerations flowing from the choice between federally mandated state regulation and sanctions, but only that the political consequences do not concern the real party in interest, Missouri.

Missouri's Tenth Amendment challenge is a colorable one, although it certainly would have stood a better chance under *National League of Cities* than under the current standards set forth in *New York*. With *National League of Cities*, the Tenth Amendment was revitalized as a check on Congressional

power running roughshod over state sovereignty. Certainly Missouri would rather be arguing that compliance with the CAA would impair its ability to structure integral operations in areas of traditional governmental functions. However, after *Garcia* overruled *National League of Cities*, Missouri is left with the nearly insurmountable task of convincing a *New York*-era court that both of its "choices" are unconstitutional. The federal government's power to set environmental compliance standards and encourage states to adopt them using the highway funds carrot is compelling and appears uncontroversial, especially now that the Tenth Amendment has returned to its dormant state. Since Congress chose an indirect method of inducing states to participate in the CAA, this is the only part of *New York* that Missouri can hang its hat on. Perhaps the Republican Congress or a Supreme Court which has returned the reins to Chief Justice Rehnquist will come to Missouri's rescue. Moreover, Missouri is not the only state to voice its concerns in court - Virginia has brought a declaratory judgment action which is currently under consideration by the Fourth Circuit which raises both of the constitutional challenges put forward by Missouri.¹¹⁸ It would seem as though Missouri will have a hard time beating Virginia to the Supreme Court if the Court is eager to grant certiorari on this issue.

Returning to the instant case, the Spending Clause challenge probably has a lesser probability of success than the Tenth Amendment argument. As a

check on Congressional power, the Spending Clause is even weaker than the hibernating Tenth Amendment. Facing a rather static standard, it will be hard for Missouri to win the argument that compliance with the CAA is totally unrelated to the purpose of federal highway funding.

All of this leaves Missouri with a delayed start on its enhanced I&M program, a program which could help pull St. Louis out of the nonattainment hole it has fallen into. For if it is not implemented soon, Missouri is only looking at the beginning of its SIP and sanction problems; reclassification to a "serious" nonattainment area is imminent.

VI. CONCLUSION

As more and more states experience CAA compliance difficulties, public attention is sure to be focused on the act by the lenses of sanctions and increasingly invasive regulation. Although constitutional challenges to the federal government's authority to impose sanctions as well as strict environmental standards are not likely to meet with success in the courts under the law as it stands today, times change. The continuously vacillating Tenth Amendment could swing into another active phase. The combination of a Republican Congress and President could sign unfunded mandates legislation that would placate the states with federal funding or decreased regulation. Clean Air Act reauthorization could weaken its regulatory effectiveness. Only time will tell whether the Clean Air Act will deliver what its title promises.

¹¹⁸ *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996).