1-1-1997

Are Mandatory Transportation Control Measures Mandatory? A Look at Ninth Circuit Judicial Enforcement of TCMS

Geoffrey E. Bishop

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol37/iss3/4

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
COMMENTS

ARE MANDATORY TRANSPORTATION CONTROL MEASURES MANDATORY? A LOOK AT NINTH CIRCUIT JUDICIAL ENFORCEMENT OF TCMS

I. INTRODUCTION

There is no doubt that the Clean Air Act ("CAA")\(^1\) has prompted our country to make great strides in air pollution reduction, yet our increasingly transportation-oriented society has frustrated the CAA's success.\(^2\) Mobile sources, primarily automobiles, account for most of the ozone and carbon monoxide pollution in urban areas.\(^3\)

Transportation Control Measures ("TCMs") are one way the CAA attempts to reduce emissions from mobile sources.\(^4\) The CAA enumerates various TCMs,\(^5\) such as programs for improved public transit, that seek to either reduce or elimi-

---

2. Over 50 million more automobiles are on U.S. highways now than when the CAA was first promulgated in 1970. U.S. DEP’T OF TRANSP. AND U.S. ENVTL. PROTECTION AGENCY, CLEAN AIR THROUGH TRANSPORTATION: CHALLENGES IN MEETING NATIONAL AIR QUALITY STANDARDS (1993) [hereinafter DOT REPORT]. Automobile vehicle miles traveled increased nearly 50% between 1983 and 1990 compared to a 6-9% increase in population in the same period. DOT REPORT at 1.
3. DOT REPORT, supra note 2, at 2.
5. 42 U.S.C. § 7408(f)(1)(A) (1994). TCMs adopted by states may include, but are not limited to, the following: (i) programs for improved public transit; (ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger busses or high occupancy vehicles; (iii) employer-based transportation management plans, including incentives; (iv) trip-reduction ordinances; (v) traffic flow improvement programs that achieve emission reductions; (vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;
nate mobile sources. However, TCMs have been only marginally effective in reducing air pollution from mobile sources.

In 1990, Congress amended the CAA to better address pollution from mobile sources. While the amendments provided means to reduce automobile emissions, they loosened the states' requirements regarding TCMs. These amendments effectively de-emphasized the role of TCMs in attaining CAA standards. In 1994, following these amendments, the Ninth Circuit, in Trustees for Alaska v. Fink, held that a state's adherence to a TCM that it had adopted was not mandatory. Later the same year the court appeared to re-

(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;
(viii) programs for the provision of all forms of high-occupancy, shared-ride services;
(ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;
(x) programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas;
(xi) programs to control extended idling of vehicles;
(xii) programs to reduce motor vehicle emissions, consistent with subchapter II of this chapter, which are caused by extreme cold start conditions;
(xiii) employer-sponsored programs to permit flexible work schedules;
(xiv) programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity;
(xv) programs for new construction and major reconstructions of paths, tracks or areas solely for the use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest. For purposes of this clause, the Administrator shall also consult with the Secretary of the Interior; and
(xvi) programs to encourage the voluntary removal from use and the marketplace of pre-1980 model year light duty vehicles and pre-1980 model light duty trucks.

6. See infra Part III.B.
7. See infra Part III.B.
10. See infra Part III.A.
11. 17 F.3d 1209 (9th Cir. 1994).
12. Id. See infra Part III.C.2.
verse this decision in *McCarthy v. Thomas*\(^\text{13}\) by requiring another state to follow the TCM it had adopted.\(^\text{14}\) Due in part to the 1990 amendments and these recent decisions, it is unclear just how stringently a state must follow and implement a TCM that it has adopted.

This comment examines the judicial enforceability of TCMs once they have been adopted by a state. It begins by briefly tracing the development of the Clean Air Act, followed by a consideration of TCMs as a means of attaining the Act’s mandates, and case law interpreting states’ commitments to adopted TCMs.\(^\text{15}\) The comment then analyzes the Ninth Circuit’s treatment of TCMs in the post-1990 CAA amendments context, concluding that the 1990 amendments and case law from the Ninth Circuit have reduced the necessity of mandatory adherence to TCMs.\(^\text{16}\) Further, TCMs are no longer an effective means of achieving the CAA’s goal of reduced mobile source air pollution emissions.\(^\text{17}\) The comment thus suggests several alternative approaches that may reinstate the integrity, and strengthen the enforcement, of TCMs.\(^\text{18}\)

II. IDENTIFICATION OF PROBLEMS

1) Adopted TCMs are binding in order to aid enforcement of the CAA and further the general goal of increased air quality.\(^\text{19}\) Situations may arise where changed circumstances would make implementation of adopted TCMs infeasible or impractical and where such implementation would not only be detrimental to the community but would scarcely further CAA goals.

2) Where the court interprets the CAA to allow flexibility in one situation, it may inadvertently create a loophole.\(^\text{20}\) This may encourage states to attempt to bypass TCM implementation through clever State Implementation Plan ("SIP")\(^\text{21}\) drafting, thereby reducing the CAA’s effectiveness.

\(^\text{13}\) 27 F.3d 1363 (9th Cir. 1994).
\(^\text{14}\) Id. See infra Part III.C.3.
\(^\text{15}\) See infra Part III.
\(^\text{16}\) See infra Part IV.
\(^\text{17}\) See infra Part IV.
\(^\text{18}\) See infra Part V.
\(^\text{19}\) See infra Part III.
\(^\text{20}\) See infra Part IV.B.3.
\(^\text{21}\) See infra text accompanying notes 31-37.
III. BACKGROUND

A. The Clean Air Act

The Clean Air Act emanated from congressional findings that "the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare . . . ."22 Air pollution is created by both stationary sources23 and mobile sources.24 Automobiles are the primary mobile source that contributes to air pollution.25 The CAA requires the Environmental Protection Agency ("EPA")26 to establish National Ambient Air Quality Standards ("NAAQS") to reduce the levels of certain "criteria" pollutants.27 The EPA is required to establish primary and secondary standards for each criteria pollutant.28 The primary NAAQS is designed to protect public health by establishing the acceptable concentration of a pollutant in the ambient air measured over a designated time.29 The secondary NAAQS is intended to protect the public welfare by considering environmental and economic interests such as soil and water quality, recreational interest and industrial concerns.30 These standards are to be enforced by the states, under the direction of the EPA.31

---

23. CAA defines the term "stationary source" generally as "any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle . . . ." Id. § 7602(z) (1994).
24. See DOT REPORT, supra note 2, at 1.
25. Id. ("[F]or urban areas [mobile source emissions are] estimated at 40 to 50% for hydrocarbons (HC), which combine with oxides of nitrogen (NOx) to form ozone, 50% for NOx, and 80 to 90% for CO, and they can be higher in some areas.").
26. The Environmental Protection Agency was created in 1970 as an executive committee with power to enforce federal environmental legislation and promulgate regulations to aid enforcement of such legislation. ARTHUR EARL BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW (1993).
28. Id. § 7409(a).
29. Id. at (b)(1).
30. Id. at (b)(2).
31. Id. § 7410. The major elements required in a State Implementation Plan include enforceable emission limitations for the criteria pollutants, programs to monitor ambient air quality, programs to enforce emission limitations,
To ensure that the NAAQS are enforced, each state must create a State Implementation Plan. A SIP is a series of documents in which a state sets forth plans to implement, maintain and enforce the NAAQS within the state. The state must submit a SIP to the EPA for approval. If a SIP is approved by the EPA, it is incorporated as binding federal regulations. If a SIP is deficient, and a state fails to correct the deficiency within a specified period, the EPA may impose sanctions, including creating its own plan that establishes provisions which the state must follow. Such a federally prepared plan is called a Federal Implementation Plan ("FIP").

The original version of the CAA required a state to follow the SIP or FIP to meet certain NAAQS within three years of approval by the EPA. After many states failed to attain some or all of the NAAQS on time, Congress amended the Act in 1977, providing new deadlines for non-attainment areas. Under these deadlines, non-attainment states were to amend their SIPs in order to attain NAAQS "as expeditiously as practicable." This meant that CAA mandated attainment by December 31, 1982. If a state demonstrated that attainment was not possible by this date "despite the implementation of all reasonably available measures," the state was required to submit a second amendment to its SIP whereby the state's deadline was extended to "not later than December 31, 1987."

programs to control source emissions, and evidence of adequate state funding and authority to implement the plan. Id.

32. Id. at (a).
33. 42 U.S.C. § 7410(a)(1). Pursuant to § 7407, each state is divided up into air quality regions. See id. § 7407.
34. Id. § 7410(a). See also id. at (k).
35. Id. at (a)(2). See, e.g., Delaney v. EPA, 898 F.2d 687 (9th Cir. 1990), cert denied, 498 U.S. 998 (1991); McCarthy v. Thomas, 27 F.3d 1363 (9th Cir. 1994). See also supra Part III.C.
36. 42 U.S.C. § 7410(m). While the sanctions are given to the state, "such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency." Id.
37. Id. § 7509(b).
38. Id. § 7410(a)(2)(A).
39. Id. § 7511(a)(1). Non-attainment areas are areas that do not meet the NAAQS for a particular criteria pollutant. Id. § 7501(2).
40. Id. § 7502(a)(2)(A).
41. Id.
In 1990, after many states had still not attained some or all of the NAAQS, Congress once again amended the statute, this time extending attainment deadlines until as late as 2010, depending on "the severity of non-attainment and the availability and feasibility of pollution control measures." In 1990, Congress also modified the CAA by expanding the scope of the motor vehicle inspection and maintenance program. In addition, the amendments pertaining to non-attainment areas specifically require transportation controls to be implemented.

B. Role of TCMs

Much attention has been focused on mobile sources of air pollution. Because the CAA cannot directly control the number of automobiles, TCMs are available as an indirect means of controlling mobile source emissions. TCMs currently listed in the CAA, such as programs for improved public transit, cannot directly control the tailpipe emissions of automobiles. Instead, TCMs are either alternative forms of transportation that encourage people to drive less frequently or forms of automobile transportation management that enable people to drive more efficiently. A state can incorporate these measures in its effort to comply with the NAAQS.

43. Id. at (A). Non-attainment areas are divided into five categories based on the severity of non-attainment: Marginal, Moderate, Serious, Severe, and Extreme. The less severe the non-attainment, the sooner attainment must be met. See 2 Sheldon M. Novick, Law of Environmental Protection § 11.08[7] (1993) (explaining the distinction between non-attainment areas categories).


45. See Novick, supra note 43, § 11.08. Title II of CAA was created by the 1990 amendments to specifically address mobile sources. Id.

46. Id. at [7].

47. See John P. Dwyer, Environmental Federalism: The Practice of Federalism Under the Clean Air Act, 54 Md. L. Rev. 1183 (1992) (discussing Tenth Amendment barriers to direct federal control of automobile emissions).


49. See infra Part III.B.1.

1. **History of TCMs**

One effect of the first CAA amendments in 1977 was to curtail the use of TCMs.\(^\text{51}\) Congress was prompted to reduce the role of TCMs in these early amendments for two reasons. First, TCMs "were forced to carry a disproportionate burden of the emissions reductions required to achieve compliance with NAAQSs."\(^\text{52}\) Despite the fact that automobiles are the major source of four of the six criteria pollutants for which NAAQS were originally promulgated,\(^\text{53}\) "most states were unable to [directly] regulate either fuel economy or tailpipe emissions of new cars."\(^\text{54}\) The sole means of controlling automobile emissions for many states was by implementing TCMs.\(^\text{55}\) Since the CAA required states to create SIPs that would comply with the NAAQS regardless of cost and technological feasibility,\(^\text{56}\) states were forced to adopt drastic TCMs such as gasoline rationing and parking surcharges.\(^\text{57}\)

Second, the drastic TCMs adopted under the original CAA forced Americans to alter their automobile driving habits. In Los Angeles, for example, adopted TCMs were "intended to reduce vehicle miles traveled by eighty percent."\(^\text{58}\) Unwilling to implement such drastic measures, some states resorted to inaction.\(^\text{59}\) SIPs submitted for EPA approval by these states did not contain sufficient means to meet the NAAQS.\(^\text{60}\) This forced the EPA to promulgate FIPs in place of the deficient SIPs.\(^\text{61}\)

Congress responded with amendments to the CAA in 1974 and 1977 that restricted the ability of states to implement TCMs that would drastically alter automobile use.\(^\text{62}\) However, the amendments fell far short of eliminating TCMs altogether. Largely because the CAA is a technology forcing


\(^{52}\) Id. at 736.

\(^{53}\) See supra notes 23-24 and accompanying text.

\(^{54}\) Donnellan, supra note 51, at 736.

\(^{55}\) Id.

\(^{56}\) See infra Part III.B.2.

\(^{57}\) Donnellan, supra note 51, at 737.

\(^{58}\) Id. at 733.

\(^{59}\) Id. at 736.

\(^{60}\) Id. at 733.

\(^{61}\) Id.

\(^{62}\) Id.
statute, a rebuttable presumption that all TCMs listed under § 108(f) are reasonable was established. Congress removed this presumption when it amended the CAA in 1990. The EPA is now required to prepare information regarding the TCMs listed under the Act as an encouragement for states to consider adopting TCMs.

2. TCM Effectiveness

As required by § 108(f)(3) of the CAA, the Secretary of Transportation and the Administrator of the EPA submitted a report to Congress on the effectiveness of TCMs in August, 1993. The report surveyed the effectiveness of TCMs that have already been implemented by states as part of CAA compliance. The report found that most TCMs produce small emission reductions:

Recent modeling... shows that combinations of congestion reduction measures, including highway capacity expansion, and improvements to ridesharing programs, transit, and other TCMs, produce only 1 to 2% reductions in emissions without concomitant travel reduction efforts such as increased travel costs or restriction and policies to increase land use density.

The DOT Report further found that despite implementation of TCMs, transportation trends indicated that single occupant vehicles and vehicle miles traveled have been increasing while ridesharing and transit have been decreasing. Local control of land use planning, lack of public acceptance and increasing fiscal restraints also challenge TCM effectiveness.

A survey prepared as part of the DOT Report found that almost half of the metropolitan planning organizations stated

63. See infra Part III.B.3.
64. See infra text accompanying notes 89-91.
67. The report must “review and analyze[ ] existing State and local air quality-related transportation programs ...” Id. at (3)(A).
68. DOT REPORT, supra note 2, at 1. The results of the report generally cover a two-year period, from promulgation of the 1990 CAA amendments through the end of fiscal year 1992. Id.
69. Id. at 3.
70. Id. at 37.
71. Id. at 22-23.
that increased funding would be needed to fully implement all planned TCMs.\textsuperscript{72} In addition, "[n]early one-third responded that they have a backlog of transportation and air quality planning activities delayed due to insufficient funding."\textsuperscript{73}

The report\textsuperscript{74} concluded that TCMs are not effective and that "[b]etter understanding of the relationships among land use patterns, travel patterns and air quality will be needed to respond to the challenge of reducing transportation's contribution to air quality."\textsuperscript{75}

3. Technological Availability

A separate problem concerns the technology available to implement a particular TCM. In \textit{Union Electric Co. v. EPA},\textsuperscript{76} the Supreme Court affirmed that consideration of technological infeasibility should not interfere with CAA's air pollution reduction goals.\textsuperscript{77} Union Electric, an electric utility company, sought review of EPA's approval of a Missouri SIP, arguing that economic and technological difficulties prevented it from complying with the SIP.\textsuperscript{78} In rejecting this plea, the Court recognized that the state could consider such factors when it is formulating its SIP.\textsuperscript{79} However, it held that once a measure is adopted and approved by the EPA, it is binding and neither EPA nor appellate court review of an approved plan can set aside a SIP on grounds of technological or economic unfeasibility no matter when raised.\textsuperscript{80} In so holding, the Court sent a clear message that economic and technological

\begin{footnotesize}
\textsuperscript{72} Id. at 8.
\textsuperscript{73} Id.
\textsuperscript{74} The DOT Report was the first such report required under the CAA. 42 U.S.C. § 7408(f)(3) (1994). This Report warns that it may be too early to address whether TCMs will successfully meet the CAA goals because "most states and local areas around the country are just beginning to develop and implement transportation plans, projects, and programs to meet their CAA requirements." \textsc{DOT Report, supra} note 2, at 1. The CAA requires the submission of a similar report on TCM effectiveness every three years. The second report is to be submitted in 1996. 42 U.S.C. § 7408(f)(3) (1994). At the time this comment was set for publication, the 1996 report was not available.
\textsuperscript{75} \textsc{DOT Report, supra} note 2 at 23.
\textsuperscript{76} 427 U.S. 246 (1976), \textit{reh'g denied}, 429 U.S. 873 (1976).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 265.
\textsuperscript{80} Id. at 265-66.
\end{footnotesize}
feasibility concerns must not frustrate the prompt attainment of CAA's substantive goals.\textsuperscript{81}

4. Impracticality

Despite Union Electric, courts may be hard pressed to require TCMs that are obviously impractical. A federal district court noted this concern in Citizens for a Better Environment \textit{v.} Wilson.\textsuperscript{82} The district court held that SIP commitments made in 1982 were not obviated by the 1990 amendments, and it ordered the San Francisco Bay Metropolitan Transportation Commission to identify additional feasible TCMs in order to demonstrate reasonable further progress.\textsuperscript{83} If there were no additional feasible TCMs available, the burden was on the Commission to prove this.\textsuperscript{84} The court suggested that it might not require TCM implementation if the Commission could demonstrate that the TCM was infeasible but admonished that "[n]o court, of course, will require impracticable measures or measures that cause a substantially disproportionate hardship for the air quality benefits accrued, regardless of the ton per day shortfall. On the other hand, infeasibility means more than inconvenience, unpopularity, or moderate burdens."\textsuperscript{85}

C. The Ninth Circuit's Treatment of TCMs

The Ninth Circuit has had several more opportunities to consider TCMs than have other circuits.\textsuperscript{86} As a result, it has had much influence in shaping the current TCM scheme in the CAA.

\textsuperscript{81} Id. at 268-69.

\textsuperscript{82} 775 F. Supp. 1291 (N.D. Cal. 1991).

\textsuperscript{83} Id. at 1299. Every SIP for a non-attainment area must include enforceable measures that provide for reasonable further progress towards attaining the applicable NAAQS. 42 U.S.C. § 7502(c)(2) (1994). The term "reasonable further progress" means that a state must make "annual incremental reductions" in emissions until attainment of NAAQS. This prevents a state from waiting until just before the final NAAQS compliance date before implementing SIP requirements. Id. § 7501(1).

\textsuperscript{84} Citizens for a Better Env't, 775 F. Supp. at 1307.

\textsuperscript{85} Id. at 1307-08.

\textsuperscript{86} See infra Part IV.
1. Delaney v. EPA

In Delaney v. EPA,\(^{87}\) the court ordered the EPA to promulgate a federal implementation plan to replace Arizona's insufficient SIP.\(^{88}\) The EPA had designated portions of two Arizona counties\(^{99}\) as non-attainment areas.\(^{90}\) Arizona submitted a SIP to the EPA which was approved subject to certain conditions, despite the fact that the SIP did not contain all of the TCMs listed in CAA.\(^{91}\)

When citizens sued, contending that the EPA's decision to approve Arizona's apparently deficient SIP was arbitrary and capricious,\(^{92}\) the court looked to EPA guidelines to resolve the issue.\(^{93}\) In particular, the court relied on an EPA guidance document which explicitly stated that each of the TCM measures listed in CAA § 108(f)\(^{94}\) were presumed reasonably available.\(^{95}\) Further, a state could only reject one of these measures by showing that the measure either would not advance attainment, would cause substantial widespread and long-term adverse impacts, or would take too long to implement.\(^{96}\) The court held that "[t]he EPA must adhere to its own guidelines."\(^{97}\) Thus, Delaney set the stage for mandatory adherence to listed TCMs when a state prepares a SIP for a non-attainment area.\(^{98}\)

88. Id. at 695. The FIP was to utilize all available control measures to attain the carbon monoxide ambient air quality standard as soon as possible. Id.
89. Maricopa and Pima counties contain the cities of Tuscon and Phoenix, respectively. Id. at 689.
90. Id.
91. Id.
92. Id. CAA's citizen suit provision allows a citizen to bring a civil action against the Administrator of the EPA where "there is alleged a failure . . . to perform any act or duty . . . which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2) (1994).
93. Delaney, 898 F.2d at 690-91.
94. See supra note 5.
95. Delaney, 898 F.2d at 678.
96. The document states:
   If a state adopts less than all [reasonably available control measures] and demonstrates (a) that reasonable further progress and attainment of the [NAAQS] are assured, and (b) that application of all [reasonably available control measures] would not result in attainment any faster, then a plan with less than all [reasonably available control measures] may be approved.
97. Delaney, 898 F.2d at 693.
98. Id. at 695.
In response to Delaney, Congress overhauled § 108(f) as part of the 1990 amendments to the CAA.99 Congress provided that as part of the State’s SIP, each TCM listed in § 108(f) need only be considered, not necessarily adopted.100

2. Trustees for Alaska v. Fink

In Trustees for Alaska v. Fink,101 the court determined whether a state must strictly implement its adopted TCM.102 The city of Anchorage, Alaska, devised an air quality plan that included a plan to expand the mass transit bus fleet.103 At that time Anchorage was riding a wave of economic expansion fueled by the oil industry and the success of the Trans-Alaska pipeline.104 Times were so good that the state legislature abolished personal income taxes and voted to distribute a “Personal Fund dividend” check of $1,000 to each resident.105 In 1982, 86.2% of Alaska’s revenue came from the petroleum industry.106 During this economic boom, Alaska’s labor force, population and personal income increased faster than in any other state.107 Petroleum income fueled state spending and “spending for government operations, transfer payments, loan payments, and public works kept pace with state revenues.”108 The number of automobiles in the Anchorage areas also increased; this increase strained the city’s transportation infrastructure and contributed to decreasing air quality.109 At the time, expanding the bus transit system seemed the ideal way to quickly remedy Anchorage’s transportation problems while simultaneously reducing air pollution in order to meet CAA standards.

100. Id. See Novick, supra note 43, § 11.08[7].
101. 17 F.3d 1209 (9th Cir. 1994).
102. Id.
103. Id. at 1210. The program included expanding the mass transit bus fleet and service from 49 busses to between 124 and 161 busses. Id.
105. Id. at 273.
106. Id. at 272.
107. Id.
108. Id. at 273.
109. Id. at 272.
By 1986 an economic bust had begun.\(^{110}\) As oil prices dropped, "available state and federal funding shrank and plummeting oil prices prompted a local exodus, lowered property values and decimated tax revenues."\(^{111}\) As a result Anchorage could not procure the necessary funding to implement the bus expansion TCM.\(^{112}\)

When it adopted the bus expansion TCM, the city conditioned its commitment to the bus expansion program on funding becoming available, warning that the gap between expenses and fares must be closed and alternative sources of revenues uncovered before any expansion could occur.\(^{113}\) In ruling that the city of Anchorage would not be forced to administer the TCM absent necessary funds, the court looked to the specific language of the CAA.\(^{114}\)

Despite the argument that the statutory language\(^{115}\) was an unambiguous, unconditional command, the court found that the word "shall" signifies that a commitment must be made, but the nature of that commitment is left undefined.\(^{116}\) In assessing the nature of that commitment, the court then deferred to the EPA's interpretation to allow conditional commitment to a program that had not yet received funding.\(^{117}\) Further, the court referred to an EPA regulation stating that "[i]f a particular measure cannot be implemented because the necessary funds cannot be obtained . . . then the measure may justifiably be delayed."\(^{118}\)

Finally, the court recognized that "[a]lthough planning usually precedes funding, unforeseeable environmental or economic changes can and do disrupt those plans."\(^{119}\) The court then implied that Anchorage's economic bust was a par-

\(^{110}\) One economist predicted at the time that Alaska's oil boom would be followed by the most severe depression since the establishment of statehood in 1959. NASKE & SLOTNICK, supra note 104, at 273.

\(^{111}\) Trustees for Alaska v. Fink, 17 F.3d 1209, 1212 (9th Cir. 1994).

\(^{112}\) Id. at 1212-13.

\(^{113}\) Id.

\(^{114}\) Id. at 1211.

\(^{115}\) This now obsolete provision stated that a SIP "shall . . . commit the financial . . . resources necessary to carry out [the TCM]." 42 U.S.C. § 7502(b)(7) (1977), amended by 42 U.S.C. § 7502(b)(7) (1994).

\(^{116}\) Trustees for Alaska, 17 F.3d at 1211.

\(^{117}\) Id.

\(^{118}\) Id. (quoting 46 Fed. Reg. 7183 (1981)).

\(^{119}\) Id. at 1211-12.
adigm example of an unforeseeable change that would justify delay of TCM implementation.120

3. McCarthy v. Thomas

While Trustees for Alaska apparently carved out an exception to the strict adherence to an adopted TCM established in Delaney, the Ninth Circuit revisited the TCM commitment issue in McCarthy v. Thomas121 later that year.122

In McCarthy, Arizona's SIP, which included TCMs for Pima and Maricopa counties, was never fully approved by the EPA.123 The TCMs included plans to expand the Tucson city bus fleet by 59 buses (to a total of 199 buses) with ridership of 14.5 million per year by 1986.124 In Maricopa County the TCM provided for a 400-bus fleet with average daily ridership of 112,000.125 The state later submitted additional control strategy proposals after which the EPA fully approved the SIP.126 However, this EPA approval was vacated by the Ninth Circuit in Delaney v. EPA.127

The EPA responded by creating a FIP for Pima and Maricopa Counties and announced that it would leave intact or reapprove all measures that were in place in the Arizona SIP prior to Delaney:

While the Delaney court vacated EPA's approval of the Arizona plans, EPA does not intend, nor does it consider that the court intended it, to vacate the control measures in the Maricopa and Pima plans which were previously approved by EPA. The court set aside EPA's approval of the plans for failure to include additional measures . . . rather than because the measures submitted by the State were unworthy of approval for their effect in strengthening the SIP.128

120. Id. at 1212 ("The [1994] Los Angeles earthquake, with its imminent impact on traffic and transit patterns and state and local budgets, is another paradigm example.").
121. 27 F.3d 1363 (9th Cir. 1994).
122. Id.
123. Id. at 1365. The overall approval of Arizona's SIP was instead conditioned on the correction of deficiencies unrelated to the Maricopa and Tuscon mass transit bus TCMs. Id.
124. Id.
125. Id.
126. Id.
128. McCarthy, 27 F.3d at 1366 (citation omitted).
The appellants sought an injunction requiring Tuscon and Phoenix to implement the mass transit bus TCMs.\textsuperscript{129} The district court dismissed the claims, holding that the mass transit provisions were not binding because neither the revisions containing these provisions nor any other reference to mass transit control measures appeared in any final SIP or FIP.\textsuperscript{130} The Ninth Circuit disagreed:

A part of a state's proposal to the EPA that the EPA approves conditionally (with only minor deficiencies to be remedied) becomes part of the state's SIP. The EPA need not include specific reference to the approved provision in a later notice that purports to make the SIP or FIP complete, in order to include the earlier approved provision in the federally enforceable plan.\textsuperscript{131}

Therefore, the court held that the mass transit provisions had become part of the Arizona SIP when the EPA originally approved them.\textsuperscript{132} Further, the EPA's efforts to comply with the Delaney order did not disrupt these TCM provisions and, therefore, they still bind the cities of Tuscon and Phoenix.\textsuperscript{133}

D. Indirect Controls and Land-Use Planning

Other provisions in the CAA also affect the enforceability and effectiveness of TCMs by limiting the ability of the federal government to directly control mobile sources of air pollution and to directly affect local land-use planning.

Under the CAA, the EPA has no authority to require any indirect source review\textsuperscript{134} as a condition of approval for a state's SIP.\textsuperscript{135} By contrast, the CAA does allow direct control of mobile sources in certain situations. For example, § 182(d)(1)(B) requires employers to implement programs to reduce the number of miles driven by their employees in "severe areas."\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{129} Id. at 1367.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id. at 1373.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} An indirect source is any facility that attracts mobile sources of pollution. For example, parking garages and drive-in theaters are indirect sources. See 42 U.S.C. § 7410(a)(5)(C) (1994).
  \item \textsuperscript{135} Id. at (a)(5)(A).
  \item \textsuperscript{136} Id. § 7511a(d)(1)(B). Interestingly, the California Clean Air Act, CAL. HEALTH & SAFETY CODE §§ 39000-44474 (West 1996), contradicts its federal
In addition, § 131 of CAA expresses the limited nature of the federal government's involvement in local land-use planning. The notion is that the states are primarily responsible for their own land-use planning because this is a power generally reserved to the states. Congress has thus been careful not to interfere with local land-use planning decisions.

IV. ANALYSIS

Recent Ninth Circuit cases have interpreted the degree of commitment states must give to TCMs in the wake of the 1990 amendments. These cases suggest that despite rather absolute statutory language and a reinvigoration of the role of TCMs, enforcement of these TCMs may be on the decline.

A. Statutory Language

Section 110 of the CAA states that any SIP must contain "enforceable... control measures... as may be necessary or appropriate to meet the applicable requirements [of the CAA]." Thus, any TCMs that are included in a SIP must be enforceable. To assure that such a measure will be enforceable, the CAA requires that a SIP proposal provide "nec-
necessary assurances that the state . . . will have adequate person- 

nel, funding, and authority . . . to carry out such implementations plan[s]."\textsuperscript{144}

In most cases, the impact of this language is quite clear. A TCM will not be approved until the conditions of the statute are met.\textsuperscript{145} Once approved, a TCM is binding on the state.\textsuperscript{146} However, Trustees for Alaska held that a state could condition a commitment on funding where there was a good faith effort to obtain funding despite the statutory language.\textsuperscript{147}

B. Interpretation

The Ninth Circuit developed a hard line beginning with Delaney, holding that the statutory language was unambiguous and absolute.\textsuperscript{148} In Delaney, the court held that a SIP must include all reasonable control measures and that all TCMs listed in § 108(f) were presumed reasonable unless the state showed otherwise.\textsuperscript{149} Thus, the court sent a strong message that states must include reasonably available TCMs in their SIPs or risk the EPA taking control away by preparing a FIP to replace the state's deficient SIP.

In response, Congress amended § 108(f) in 1990. The amended section provides only that a state must consider such TCMs.\textsuperscript{150} This change signaled a new approach to TCM enforcement whereby Congress realized that not all TCMs may effectively promote the goals of CAA for every non-attainment area.\textsuperscript{151} The first case to express Congress' implicitly softer policy was Trustees for Alaska.

\textsuperscript{144} Id. at (E). Note that CAA is a technology-forcing statute and does not require the state to show that such an implementation plan is technologically feasible. \textit{See supra} Part III.B.3.

\textsuperscript{145} 42 U.S.C. § 7410.

\textsuperscript{146} Id. See, e.g., Delaney v. EPA, 898 F.2d 687 (9th Cir. 1990), cert. denied, 498 U.S. 998 (1990); McCarthy, 27 F.3d at 1363.

\textsuperscript{147} It remains to be seen if other courts would construe the statutory language in the same way.

\textsuperscript{148} \textit{See supra} Part III.C.1.

\textsuperscript{149} \textit{See supra} text accompanying notes 90-92.

\textsuperscript{150} Novick, \textit{supra} note 43, § 11.08[7].

\textsuperscript{151} The requirement in 42 U.S.C. § 7408(f) (1994) that a TCM effectiveness report be prepared every three years evidences congressional awareness of potentially dynamic TCM effectiveness.
1. Trustees for Alaska

In Trustees for Alaska, the Ninth Circuit parted with the traditional strict approach of enforcing TCMs by holding that a state could condition its TCM on obtaining funding. This ruling may mark a substantial turning point in judicial enforcement of TCM provisions. This new, flexible approach recognizes that strict adherence to an adopted TCM may unduly hinder a municipality without substantially furthering the air pollution reduction goals of the CAA. Further, the holding implicitly recognized that permitting Anchorage to abandon the bus program would not significantly frustrate the air pollution reduction goals of the CAA. Although not explicitly stated in the opinion, several factors influenced the court's holding.

First, the circumstances under which the bus transit TCM was originally adopted had changed. By the time the case was heard in court, a bus expansion program was not only financially infeasible but probably unnecessary as well. Even if the court had mandated that Anchorage implement its bus expansion project, there was no guarantee that this would reduce mobile source air pollution by reducing the number of automobiles on the road. The fact that Anchorage voters failed to approve bond measures or a gasoline tax to support the bus expansion project strongly suggests that the project was unpopular. The project's unpopularity is further supported by the fact that ridership and bus transit service hours declined. Thus, it was unlikely that a forced bus expansion would entice people to stop driving their cars and start riding the bus.

Second, after reevaluating the role of mass transit in fighting air pollution, Anchorage abandoned the bus expansion program in a new SIP that was concurrently being considered for approval by the EPA. The new SIP included

---

152. Trustees for Alaska v. Fink, 17 F.3d 1209, 1212 (9th Cir. 1994). See supra Part III.C.2.
153. See supra text accompanying notes 103-11.
154. See supra text accompanying notes 107-11.
155. Trustees for Alaska, 17 F.3d at 1212.
156. Id. at 1210.
157. Id. In fact, absent any increased ridership concomitant to the proposed expansion project, an increase in bus fleet size and service hours would likely add to mobile source air pollution by placing more vehicles on the road.
158. See supra Part III.C.2.
other, arguably more effective, measures for reducing air pollution in Anchorage.\textsuperscript{159} In its brief, the city argued that it could demonstrate compliance with CAA goals without expanding the bus transit program because of these other measures.\textsuperscript{160}

If the court had mandated that the city implement the bus program and the EPA had later approved the new SIP that required no bus program, the city would be stuck with a fleet of underutilized busses which it could not afford.\textsuperscript{161} Such a fleet would at best only marginally further the air pollution reduction goals of the CAA.\textsuperscript{162}

Third, in light of the court's holding in \textit{Delaney} that a SIP must include all § 108(f) TCMs absent a showing of unreasonableableness and the subsequent softening of this rule in the 1990 amendments,\textsuperscript{163} Anchorage may not have had a choice when the SIP was approved in 1982. At that time § 108(f) required that all listed TCMs, including utilization of mass transit,\textsuperscript{164} be included in the SIP unless the state could show that such TCM was unreasonable.\textsuperscript{165} The State may not have been able to show that a bus expansion program was unreasonable at that time because the oil-driven economic boom opened sources of private and federal funding.\textsuperscript{166}

Short of showing unreasonableableness, Anchorage included a condition that the bus expansion program could only become a reality if funding could be obtained.\textsuperscript{167} The court implicitly recognized that under the currently amended statute, such a bus system need only be considered, not necessarily included in the SIP, if other measures were adopted that would bring the city into CAA attainment.\textsuperscript{168}

\textsuperscript{159} Alaska's amended SIP, approved by the EPA in February, 1995, specifically rejected the bus expansion TCM. In its place the amended SIP adopted a permanent vehicle inspection and maintenance program, a plan to forecast vehicle miles traveled and an oxygenated gas program. \textit{40 C.F.R. § 52} (1995).

\textsuperscript{160} Appellees' Brief at 15-16, Trustees for Alaska v. Fink, 17 F.3d 1209 (9th Cir. 1994) (No. 92-36932).

\textsuperscript{161} See supra text accompanying note 114.

\textsuperscript{162} See supra text accompanying notes 70-71.

\textsuperscript{163} See supra text accompanying notes 99-100.


\textsuperscript{165} Id. at (f).

\textsuperscript{166} See supra text accompanying notes 104-07.

\textsuperscript{167} See supra text accompanying note 113.

\textsuperscript{168} See supra Part III.C.2.
Finally, if Anchorage were forced to implement the bus program, without first obtaining the proper funding, the debt would significantly add to the transit authority's operating deficit.\textsuperscript{169} The cost of the bus expansion TCM probably would only marginally aid the city in meeting its CAA's mandated attainment.

The court was able to accommodate all of these concerns because CAA's statutory language does not expressly prevent a state from conditioning its TCM on funding becoming available.\textsuperscript{170} In fact, the court found that existing language was ambiguous, and deferred to the EPA's interpretation that allowed for conditional commitments.\textsuperscript{171}

2. McCarthy not in Contradiction

The Ninth Circuit apparently changed its course three and a half months later by requiring TCM implementation in McCarthy v. Thomas.\textsuperscript{172} However, the court's holding\textsuperscript{173} was not a regression to pre-Trustees for Alaska enforcement of adopted TCMs. Trustees for Alaska was not merely an aberration in the Ninth Circuit's general precedent. While the court was sympathetic to the city of Anchorage's plea of impracticality, no such plea was rendered in McCarthy.\textsuperscript{174} In fact, while at least one commentator feels that McCarthy contradicts Trustees for Alaska,\textsuperscript{175} the two cases can easily be distinguished on their facts.\textsuperscript{176}

In Trustees for Alaska, the city of Anchorage was allowed to abandon its bus fleet expansion program because the court was convinced that the city put forth a good faith effort in

\textsuperscript{169} The transit authority projected an operation deficit of $25,000,000 by 1987. Trustees for Alaska v. Fink, 17 F.3d 1209, 1212 (9th Cir. 1994). An expansion from 49 busses to between 124 and 161 busses would likely triple the transit authority's deficit. \textit{Id.} at 1210.


\textsuperscript{171} See supra text accompanying notes 114-18.

\textsuperscript{172} 27 F.3d 1363 (9th Cir. 1994).

\textsuperscript{173} See supra text accompanying notes 130-33.

\textsuperscript{174} See supra Part III.C.2.

\textsuperscript{175} It has been argued that the Trustees for Alaska decision opens a loophole whereby states can avoid or at least defer TCMs that they have adopted by using conditional language where providing for that TCM. Mitchell, supra note 170, at 929. Thus, the McCarthy decision was in contradiction to that case or at least was attempting to close an apparent loophole that it had inadvertently opened in Trustees for Alaska. \textit{Id.; see also} Novick, supra note 43, § 11.08[7].

\textsuperscript{176} See supra Part III.C.2-3.
implementing the measure. The city never made an absolute commitment to the bus expansion project. This was deemed permissible because there was no express statutory language to the contrary. Language in the SIP warned that any "local funding requirement makes any provision of the entire [bus] supply extremely questionable." In addition, the record in that case showed that "available state and federal funding shrank and plummeting oil prices prompted a local exodus, lowered property values and decimated tax revenues." Thus, the Ninth Circuit in *Trustees for Alaska* recognized that "[a]lthough planning usually precedes funding, unforeseeable environmental or economic changes can and do disrupt those plans."

The holding in *McCarthy* reverted to the traditional mandatory enforcement analysis because the facts differed widely from those at issue in *Trustees for Alaska*. In *McCarthy*, there was no evidence that the Arizona cities suffered any environmental or economic hardship in implementing the planned bus services. The state's reason for not implementing the planned services in that case was its belief that the court's earlier ruling in *Delaney* released the State from the obligation to implement any of the provisions in that SIP. Nowhere in the subsequent, revised SIP and the EPA's federal implementation plan was the bus transit TCM specifically included. Therefore, the State rationalized that it no longer was obligated to implement the bus system. The Ninth Circuit, however, was convinced that the State was bound by its TCM because it was approved when the court, it was the ap-

177. *Trustees for Alaska v. Fink*, 17 F.3d 1209, 1212 (9th Cir. 1994).
178. *Id.*
179. *Id.* at 1211.
180. *Id.* at 1212.
181. *Id.*
182. *Id.* at 1211-12.
184. *See supra* Parts III.C.1, IV.B.
186. *McCarthy*, 27 F.3d at 1363.
187. *Id.* at 1367.
188. *See supra* text accompanying note 128.
proval of those conditions that was vacated, not the previously approved TCM.\textsuperscript{189}

In other words, the Ninth Circuit required Arizona to implement its TCM because it had previously been approved and the state showed no good faith reason why it could not implement the measure. This is a different situation from that in \textit{Trustees for Alaska}, where the Ninth Circuit allowed the state to abandon its TCM because it made a good faith showing that the measure could not be accomplished.

The Ninth Circuit has thus created a precedent of flexibility for cities which cannot make a TCM work and where the goals of the CAA will not be significantly frustrated. However, it will not allow states to simply renege on their commitments and frustrate the goals of CAA just because the measure is inconvenient, unpopular, or creates a moderate burden.\textsuperscript{190}

3. \textit{Potential Abuse of the Ninth Circuit's Flexibility}

It has been suggested that the \textit{Trustees for Alaska} decision creates a loophole open to abuse by municipalities that do not intend to carry through with their commitments.\textsuperscript{191} If a state can condition its TCM commitment on obtaining funding, it may be able to indefinitely delay implementation of that TCM.\textsuperscript{192} Such abuse would likely subvert the CAA's goals.\textsuperscript{193}

Although allowing a state to make a conditional commitment to a TCM may make it easier to convince a court that the state should be exonerated of its commitment when that condition is not met, such a condition will not convince a


\textsuperscript{190} See supra text accompanying note 85.

\textsuperscript{191} Mitchell, supra note 170, at 945-46.

\textsuperscript{192} While the Ninth Circuit has recognized the ability of a state to condition its implementation of a particular TCM on obtaining funding, the court stops short of releasing the state's obligation to implement the TCM outright. \textit{Id.} at 940-43.

\textsuperscript{193} Where a TCM is an integral part of a state's overall plan to meet NAAQS by a particular date, a significant delay in the implementation of that TCM may cause the state to fail to meet the NAAQS by the requisite date. If such a delay is judicially justified, such justification would render the air pollution reduction goals of the CAA toothless.
court by itself.\textsuperscript{194} Even if a state conditions its commitment, it still must show that it made a good faith effort to satisfy that condition. Such a showing could be made by evidencing reasonable steps towards TCM implementation similar to the steps taken by the city of Anchorage in \textit{Trustees for Alaska}.\textsuperscript{195}

Any potential loophole is small indeed. A conditional commitment by itself will not frustrate the purpose of the CAA\textsuperscript{196} since a state must still pass the good faith effort standard in order to delay the implementation of that commitment.\textsuperscript{197}

V. PROPOSAL

\textit{Trustees for Alaska} represents a shift away from the Ninth Circuit's strict approach to TCM compliance established in the \textit{Delaney} decision.\textsuperscript{198} The new, flexible approach recognizes that TCMs are not as effective in furthering the CAA's air pollution reduction goals as previously believed. Further, it allows some leniency where draconian TCM enforcement would be an undue burden. The court could not be so flexible with Arizona in the \textit{McCarthy} case because the municipalities made no effort to implement the TCM, let alone a good faith effort.\textsuperscript{199}

1. \textit{Retain Good Faith Standard}

The court should retain the flexible good faith effort standard when presented with a TCM commitment conditioned on funding. This will enable states to delay the implementation of TCMs upon a good faith showing of extreme detrimental circumstances.\textsuperscript{200} However, in interpreting a statute, the

\begin{itemize}
\item\textsuperscript{194} One commentator suggests that a conditional commitment is separate from a good faith effort, and that by condoning the permissibility of conditional commitments, the ninth Circuit has given a state the power to pick and choose which TCMs to implement, thereby subverting the CAA's goal of improving air quality. \textit{See} Mitchell, \textit{supra} note 170, at 945.
\item\textsuperscript{195} \textit{See} Trustees for Alaska v. Fink, 17 F.3d 1209 (9th Cir. 1994).
\item\textsuperscript{196} \textit{See supra} Part III.A.
\item\textsuperscript{197} Presumably, an unreasonable conditional commitment would preclude a state from later showing that it made a good faith effort to satisfy that condition. For example, if Anchorage had conditioned its TCM commitment on the sky falling, it could not show that it made a reasonable, good faith effort to satisfy the condition because the condition itself is unreasonable.
\item\textsuperscript{198} \textit{See supra} Part IV.B.1.
\item\textsuperscript{199} \textit{See supra} Part III.C.3.
\item\textsuperscript{200} \textit{See Trustees for Alaska}, 17 F.3d at 1211 n.4.
\end{itemize}
court can only go so far before it is in effect creating law and treading in the realm of the legislature, something it may not do.\textsuperscript{201} By allowing a state to delay TCM implementation, possibly indefinitely, the court is in effect relieving the state of its duty to implement a mandatory TCM. Such a reading comes precariously close to law-making.\textsuperscript{202}

2. Agency Clarification

To avoid judicial legislation, close any potential loopholes created by prior court decisions, and prevent the courts from having to decide whether the goals of the CAA are or are not being frustrated, the EPA should promulgate regulations that clarify the ambiguity surrounding TCM implementation policy. The regulations should explicitly adopt the good faith standard used in Trustees for Alaska, as well as provide an illustrative list of circumstances\textsuperscript{203} that would justify delay of TCM implementation. Such a regulation may state:

(a) A TCM adopted as part of a SIP that was approved by the EPA prior to 1990 must be implemented unless the state has made good faith efforts to implement that TCM and subsequently demonstrates that such TCM is unreasonable.

(b) In assessing the reasonableness of any particular TCM, the TCM is presumed reasonable unless demonstrated otherwise by the state.

\begin{itemize}
\item[\textsuperscript{201}]{A basic principle of constitutional law is that there is a separation of powers between the three branches of government: executive, judicial and legislative. Therefore, a judicial body may not, generally speaking, create law thereby performing the role of the legislature. For more discussion of the separation of powers doctrine, see, e.g., Gerald Gunther, Constitutional Law Ch. 6 (12th ed. 1991).}
\item[\textsuperscript{202}]{Another problem with statutory interpretation, such as that in Trustees for Alaska, is that interpretation allows the court to decide when the goals of CAA should be frustrated in order to serve justice to the complaining state. Such a decision should only rest with a political body that can take an accurate pulse of what the public thinks is admissible to frustrate the goals of the CAA—the legislature.}
\item[\textsuperscript{203}]{Federal regulations currently allow for delay of TCM implementation where necessary funding is not available. See supra note 116 and accompanying text. Legislative history suggests delay is also justified where TCMs are not reasonably available due to extraordinarily high economic or social cost. S. Rep. No. 127, 95th Cong. 1st Sess. 40 (1977). Unforeseeable environmental or economic changes in the community may also justify delay of TCM implementation, especially where the community's primary economic base collapses or there is a major earthquake. Trustees for Alaska v. Fink, 17 F.3d 1209, 1212 (9th Cir. 1994). See supra text accompanying notes 119-20.}
\end{itemize}
Such a statute would not only give states guidance if they run into problems in implementing their adopted TCMs, but would also give states much-needed guidance when deciding whether or not to adopt a given TCM. Further, such a regulation closes the door to potential abuse by states which would rather not implement an adopted TCM because of inconvenience or unpopularity.

3. Congressional Clarification

If the EPA is uncomfortable creating a standard by which to hold states accountable for TCM implementation, a similar provision, if enacted by Congress, would enhance the enforceability of TCM implementation and strengthen the goals of the CAA. The EPA would then be free to create regulations further addressing this provision.

Inclusion of such a provision in the CAA may be an especially timely move for Congress to make. The last amendments were in 1990. It is now 1996 and changes may be near. Inclusion of a provision addressing TCM implementation enforcement would clarify the ambiguity that has arisen in the Ninth Circuit.

4. Shift Enforcement Focus

An alternative approach would be for Congress and the EPA to concentrate their CAA efforts on direct pollution reduction controls such as the vehicle maintenance and zero emission vehicle programs, rather than on indirect TCMs. While CAA's air pollution reduction scheme has worked well for emissions from stationary sources, reduction of air pollution from mobile sources has been less successful. Such an approach, while not directly resolving the TCM enforcement ambiguity addressed in this comment, is supported by the 1993 DOT Report's finding that automobiles are becoming an increasingly large source of air pollutants addressed by the CAA.

205. Many TCMs, such as mass transit programs, only indirectly control mobile sources by attempting to create an incentive to reduce those sources. Such TCMs have not been effective because the CAA does not authorize related necessary direct mobile source regulation or land use controls. See supra Part III.D.
206. See DOT REPORT, supra note 2.
While TCMs are an essential part of CAA’s overall mobile source air pollution prevention scheme, municipalities should not be bound by commitments to such TCMs when the EPA has deemed them ineffective and/or the municipality adopts an alternative provision that, given fiscal circumstances, will better further the air pollution reduction goals of the CAA.

VI. CONCLUSION

The Ninth Circuit recognized in Trustees for Alaska that TCM enforcement can be flexible where justice requires it. The apparently contrary ruling in McCarthy later the same year evidences the court’s reluctance to go too far toward creating new law, a job reserved to legislators.

These cases not only emphasize the ambiguity surrounding the standard to which states will be held regarding federally binding TCMs, but also suggest that the court is ready to alleviate TCM obligations through liberal interpretation where justice demands. This approach may encourage states seeking to abandon their adopted TCMs to search for loopholes in the statute, thereby subverting the CAA’s substantive air pollution reduction goals.

While the court does not go so far as to entirely excuse a TCM requirement and, in doing so, completely undermine the CAA’s purpose, Congress and the EPA should take affirmative steps through regulations and/or statutes to reinstate the vigor of TCMs and, thereby, the vigor of the CAA.

Geoffrey E. Bishop

207. See supra Part III.C.3.