
IN THE
United States Court of Appeals
FOR THE CIRCUIT

No.

JIM J. TOZZI,
Petitioner,

v.

LEE M. THOMAS, Administrator,
U.S. Environmental Protection Agency, and
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Petition for Review of the U.S. Environmental
Protection Agency's Final Action on the
State of _____'s
Section 172 SIP Revisions

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
I. Nature of the Case	2
II. Jurisdiction	3
III. Stage II Vapor Recovery and Onboard Technology	3
IV. Statutory and Regulatory Background	4
V. Immediate Facts Giving Rise to This Case	9
VI. Standard of Review	9
A. Statutory Interpretation	10
B. Factual Issues	11
ARGUMENT	12
I. Section 172(b) of the Clean Air Act requires that State implementation plans for ozone nonattainment areas shall provide for the implementation of <i>all</i> reasonably available control measures as expeditiously as practicable, and EPA has no discretion to allow less than all such measures	12
A. The word "all" in section 172 is clear and unambiguous	14
B. A literal reading of the word "all" in section 172 does not lead to results which are absurd or plainly contrary to the legislative purpose	15

	<u>Page</u>
II. Stage II controls are presumptively a RACM, and EPA acted arbitrarily and capriciously in not requiring their inclusion in the SIP in the absence of fully articulated reasonable grounds for concluding that stage II controls do not meet the criteria for a RACM	17
A. A control measure is "reasonably available" if it is beneficial to air quality and will not result in adverse social or economic impacts which are substantial, widespread, and long-term	17
B. Congress recognized stage II controls as presumptively a reasonably available control measure	20
1. Section 108(f), 42 U.S.C. sec. 7408(f) (EPA information documents)	21
2. Sections 324 and 325, 42 U.S.C. secs. 7624, 7625 (cost-bearing, phase-in, and size exemptions for stage II)	22
3. Section 202(a)(5), 42 U.S.C. sec. 7521(a)(5) (automobile fill pipe standards)	29
C. EPA has previously determined that stage II controls are a reasonably available control measure	30
D. In-use experience with stage II controls has proven that they are a reasonably available control measure	33
E. EPA has the authority and duty to overrule an erroneous State determination that stage II controls are not a reasonably available control measure	35
III. EPA's ongoing study of onboard technology does not excuse the Administrator from requiring stage II controls as a reasonably available control measure	37

	<u>Page</u>
A. The Administrator has made a final determination under section 202(a)(6)	38
B. It is clear that Congress intended that any study of onboard controls under section 202(a)(6) should not delay implementation of stage II controls required under section 172	40
CONCLUSION	41
RELIEF REQUESTED	43

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<i>Addison v. Holly Hill Fruit Products, Inc.</i> 322 U.S. 607 (1944)	14
<i>Appalachian Power Co. v. EPA,</i> 477 F.2d 495 (4th Cir. 1974)	11
<i>Chevron, USA, Inc. v. Natural Resources Defense Council,</i> 467 U.S. 837 (1984), <i>reh. denied</i> , 468 U.S. 1227 (1984)	11
<i>Citizens to Preserve Overton Park v. Volpe,</i> 401 U.S. 402 (1971)	11
<i>Commissioner of Internal Revenue v. Brown,</i> 380 U.S. 563 (1965)	10, 11
<i>Consumer Product Safety Commission v. GTE Sylvania, Inc.,</i> 447 U.S. 102 (1980)	11
<i>Duke Power Co. v. NRC,</i> 770 F.2d 386 (4th Cir. 1985)	11
<i>Environmental Defense Fund v. EPA,</i> 465 F.2d 528 (D.C. Cir. 1972)	11
<i>Frank v. Volkswagenwerk, A.G. of W. Ger.,</i> 382 F. Supp. 1394 (E.D. Pa. 1974)	15
<i>Hasler v. Evans,</i> 314 F. Supp. 316 (D. Vir. Is. 1970)	15
<i>Howe v. Smith,</i> 452 U.S. 473 (1981)	11
<i>Moore v. Harris,</i> 623 F.2d 908 (4th Cir. 1980)	11
<i>National Steel and Shipbuilding Co. v. United States,</i> 419 F.2d 863 (Cl. Ct. 1969)	14

	<u>Page</u>
<i>Natural Resources Defense Council v. EPA,</i> D.D.C. No. 83-2011, Oct. 15, 1985 (Slip. Op.)	39-40
<i>Natural Resources Defense Council v. EPA,</i> D.C. Cir. No. 86-1010 (pending)	40
<i>National Steel, Great Lakes Steel v. Gorsuch,</i> 700 F.2d 314 (6th Cir. 1982)	10, 11
<i>North Dakota v. United States,</i> 460 U.S. 300 (1983)	11
<i>Rubin v. United States,</i> 449 U.S. 424 (1981)	11
<i>State Water Control Board v. Train,</i> 559 F.2d 921 (4th Cir. 1977)	11
<i>Texaco, Inc. v. Pigott,</i> 235 F. Supp. 458 (S.D. Miss. 1964)	15
<i>Train v. Natural Resources Defense Council,</i> 421 U.S. 60 (1975)	10
<i>Trans Alaska Pipeline Rate Cases,</i> 436 U.S. 631 (1978)	10
<i>TVA v. Hill,</i> 437 U.S. 153 (1978)	11
<i>United States v. Locke,</i> 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985)	10
<i>United States v. Premises Known as 8584 Old Brownsville Rd.,</i> 736 F.2d 1129 (6th Cir. 1984)	14-15
Statutes:	
5 U.S.C. 706(2)(A)	9-10

	<u>Page</u>
42 U.S.C. 7401 <i>et seq.</i>	2
42 U.S.C. 7408(f)	7-8, 21-22, 40
42 U.S.C. 7410(a)(2)(B)	5
42 U.S.C. 7410(a)(2)(H)	9, 35
42 U.S.C. 7410(c)(1)	35-36
42 U.S.C. 7410(e)	5
42 U.S.C. 7502	throughout
42 U.S.C. 7521(a)(5)	8, 29-30, 41
42 U.S.C. 7521(a)(6)	8, 37-42
42 U.S.C. 7607	3, 39-40
42 U.S.C. 7624, 7625	8, 41

Legislative History:

Cong. Res. Serv., Library of Cong., <i>A Legislative History of the Clean Air Act Amendments of 1977</i> (GPO 1979) (" <i>Leg. History</i> ")	throughout
H.R. Rep. No. 1175, 94th Cong., 2d Sess. (1976), <i>7 Leg. History</i> 6547	30, 40
H.R. Rep. No. 1742 (conference report), 94th Cong., 2d Sess. (1976), <i>5 Leg. History</i> 4287	17
Senate debate on Aug. 4, 1976, <i>6 Leg. History</i> 5456	23-24
Senate debate on Sept. 30, 1976, <i>5 Leg. History</i> 4432	19
H.R. Rep. No. 564 (conference report), 95th Cong., 1st Sess. (1977), <i>3 Leg. History</i> 537	17, 30, 40

	<u>Page</u>
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977), <i>4 Leg. History</i> 2468	26, 29, 40
S. Rep. No. 127, 95th Cong., 1st Sess. (1977), <i>3 Leg. History</i> 1371	17, 22, 36-37
Senate debate on June 8, 1977, <i>3 Leg. History</i> 712, 719-20	17, 19, 37
Senate debate on June 9, 1977, <i>3 Leg. History</i> 1022	29

Federal Register Materials

39 Fed. Reg. 4880 (Feb. 8, 1974)	6, 20
40 Fed. Reg. 47668 (Oct. 9, 1975)	6, 19, 20
41 Fed. Reg. 48044 (Nov. 1, 1976)	6, 20
43 Fed. Reg. 21673 (May 19, 1978)	30
44 Fed. Reg. 20372, 20375 (April 4, 1979)	13
44 Fed. Reg. 53761 (Sept. 17, 1979)	18, 31
46 Fed. Reg. 7182 (Jan. 22, 1981)	19, 32
46 Fed. Reg. 21628 (April 13, 1981)	39
49 Fed. Reg. 31706 (Aug. 8, 1984)	37

Miscellaneous:

"Memorandum on Acceptability of Implementation Plan Regulations in Nonattainment Areas," from Roger Strelow, EPA Assistant Administrator for Air and Waste Management, to Regional Administrators (Dec. 9, 1976)	6-7, 17-18, 20-21, 30
--	-----------------------

	<u>Page</u>
EPA, <i>Air Quality Criteria for Ozone and Other Photochemical Oxidants</i> , Review Draft (Nov. 1985)	16
National Academy of Sciences, <i>Ozone and Other Photochemical Oxidants</i> (1977)	16
B. Finlayson and J. Pitts, "Photochemistry of the Polluted Troposphere," <i>Science</i> , April 9, 1976	16
Radian Corp., <i>Case Studies of Air Pollution Control Technologies Innovations</i> , a report to the National Commission on Air Quality (1980)	20
EPA, <i>Hydrocarbon Control Strategies for Gasoline Marketing Operations</i> (April 1978)	31
EPA, <i>Workshop on Requirements for Nonattainment Area Plans - Compilation of Presentations</i> (April 1978) ...	31-32
<i>Inside EPA</i> , Jan. 24, 1986)	31
EPA, <i>Cost and Economic Impact Assessment for Alternative Levels of the National Ambient Air Quality Standards for Ozone</i> (Feb. 1979)	32
California Air Resources Board, <i>California Perspective on Controlling Gasoline Evaporative Emissions</i> (Mar. 1986)	33
EPA, <i>Evaluation of Air Pollution Regulatory Strategies for the Gasoline Marketing Industry</i> (July 1984)	33, 37, 41
California Air Resources Board, "Comments on EPA's Evaluation of Air Pollution Regulatory Strategies for the Gasoline Marketing Industry" (Nov. 1984)	33-34
California Air Resources Board, "Report to the Legislature on the Efficiency, Durability, and Cost Effectiveness of Gasoline Vapor Recovery Systems" (Jan. 1981)	34

	<u>Page</u>
<i>Metropolitan Washington Council of Governments, Stage II Vapor Recovery System Options for the Washington Metropolitan Area</i> (Sept. 1982)	34-35
Letter from David Hawkins, EPA Assistant Administrator for Air Noise, and Radiation, to Bailus Walker, Jr., Government of the District of Columbia (Dec. 28, 1978)	41

3. Was EPA's approval of the State implementation plan arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the plan does not provide for implementation of stage II vapor recovery measures in ozone nonattainment areas?

STATEMENT OF THE CASE

I. Nature of the Case

On _____, 1986, the U.S. Environmental Protection Agency published a final rule approving the State of _____'s revised State Implementation Plan ("SIP") for attaining the national ambient air quality standard for ozone. ____ Fed. Reg. ____ (_____, 1986). EPA required the State to revise its SIP because it had found that the existing SIP requirements for air pollution control measures were insufficient to achieve attainment of the ozone standard by the December 31, 1987, deadline dictated by the 1977 Amendments to the Clean Air Act, 42 U.S.C. sec. 7401 *et seq.* Petitioner is seeking judicial review of EPA's final rule and is asking that the court set it aside as arbitrary, capricious, an abuse of discretion, and not in accordance with the requirements of section 172(b) of the Clean Air Act. Section 172(b) requires that SIPs for ozone non-attainment areas provide for "implementation of all reasonably available control measures as expeditiously as practicable." 42 U.S.C. sec. 7502(b). Petitioner contends that stage II vapor recovery measures are presumptively a "reasonably available control measure", and therefore EPA acted unreasonably and contrary to law in approving, without consideration of the relevant criteria and without a reasoned basis, a SIP lacking provisions for implementation of such measures.

II. Jurisdiction

This action is being brought in the U.S. Circuit Court in the first instance pursuant to section 307 of the Clean Air Act, which provides that "[a] petition for review of the Administrator's action in approving . . . any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. sec. 7607.

III. Stage II Vapor Recovery and Onboard Technology

Ozone¹ which is considered a health hazard in ambient air at concentrations above the standard set under the Clean Air Act (0.12 ppm), is formed through complex photochemical atmospheric reactions involving volatile organic compounds ("VOCs"). In order to control ozone, VOC emissions must be regulated. Gasoline vapors emitted from the tanks of motor vehicles during refueling are a significant source of VOCs in urban areas. These motor vehicle refueling vapors can be controlled either by vapor recovery controls installed on the service station gasoline pumps or by controls installed on motor vehicles. Controls installed on the pumps are referred to as "stage II vapor recovery controls"²; controls on motor vehicles are referred to as "onboard controls."

Stage II vapor recovery operates in the following general way: Vapors emitted from the vehicle's fuel tank are captured by a flexible "boot" which surrounds the pump

¹Ozone is one of many "photochemical oxidants," which are regulated under the Clean Air Act.

²Stage I vapor recovery equipment controls vapors emitted during fuel transfer operations upstream in the gasoline marketing process, e.g., during loading of tank trucks at the refinery.

nozzle and interfaces with the top of the vehicle's fill pipe.³ The vapors are routed to the service station's underground tanks through either a double or coaxial hose on the pump and underground piping. Stage II systems have been in use in several California air quality regions and in the District of Columbia since the mid-1970s. Installation of stage II controls will begin soon in the St. Louis metropolitan area and in New Jersey.

Onboard systems operate in the following general way: Vapors are prevented from escaping from the vehicle's fill pipe by a tight seal between the pump nozzle and the filler pipe or by a "liquid seal" in the filler pipe. Instead of escaping, the vapors are routed from the gas tank through a line to a carbon canister under the hood, where they are captured. Then, when the vehicle is driven, the vapor molecules are stripped from the carbon by an air stream and pulled to the engine, where they are burned as fuel. Onboard technology is not in commercial use. Auto manufacturers and oil companies have developed and tested a number of prototypes, and the general principles of the technology are applied in systems now in use to control evaporative emissions from vehicles' engines, but a number of technical problems remain unresolved.⁴

IV. Statutory and Regulatory Background

Through the Clean Air Act amendments of 1970 Congress put into operation a joint federal and State program to control air pollution. The general structure of that pro-

³At least one prototype system now uses a coaxial nozzle without a flexible boot.

⁴The term "onboard controls" also encompasses alternatives such as the variable volume fuel tank or bladder. However, such alternatives are generally thought to rank far below the canister system described here in terms of technological feasibility.

gram continues today: The Administrator of EPA established national air quality standards for various pollutants, among which is ozone. The means for attaining the standards is decided upon by the States in the first instance. States develop State Implementation Plans (SIPs) for each air quality control region, which are reviewed by EPA to ensure that they are adequate to attain and maintain the various standards. If a SIP is found to be inadequate, EPA must require revision of the plan or promulgate federal regulations requiring measures sufficient to ensure attainment. If a State fails to submit a SIP, or fails to revise an inadequate SIP, the Administrator is required to promulgate an implementation plan for the State. Failure to attain the standards by the applicable deadline or to revise an inadequate SIP may also result in a construction ban and restrictions on funding for highways and sewage treatment facilities.

The 1970 amendments required States to adopt "such . . . measures as may be necessary to insure attainment"⁵ and did not refer specifically to stage II vapor recovery or onboard measures or to "reasonably available control measures."

The air quality standards established pursuant to the 1970 Act were to be achieved no later than three years after promulgation of the standards. The Administrator was authorized to extend this three-year attainment period if he determined that necessary technology was not yet available and the State had considered and applied in its SIP "reasonably available alternative means" for attaining the standard. 42 U.S.C. sec. 7410(e). Under this timetable, SIPs were submitted in 1972 and attainment was to be achieved by 1975. An extension would give a State until May 31, 1977 to achieve the standards.

⁵42 U.S.C. sec. 7410(a)(2)(B).

Between 1970 and 1977, development and implementation of stage II technology began in response to State regulations and proposed federal regulations. In 1972, the San Diego County Air Pollution Control District adopted regulations requiring stage II vapor recovery. The Bay Area Air Quality Maintenance District (California), the California Air Resources Board, and the District of Columbia adopted stage II regulations in 1973-74. The U.S. Environmental Protection Agency published proposed stage II regulations for transportation control plans in twelve air quality control regions, including two interstate regions, in 1973-74. See 39 Fed. Reg. 4880 (Feb. 8, 1974). The EPA regulations were repropoed in 1975, with coverage extended to an additional region, in order to clarify the degree of effectiveness required and to provide testing and certification procedures. 40 Fed. Reg. 47668 (Oct. 9, 1975). In 1976, EPA again repropoed the stage II regulations with revisions providing for installation of controls according to a phased schedule. The notice of proposed rulemaking stated that "the Agency remains convinced that [stage II] systems exist which can meet the emission standards at reasonable cost." 41 Fed. Reg. 48044 (Nov. 1, 1976).

In 1976, EPA issued guidance on control measures required in SIPs for nonattainment areas. The memorandum stated that SIPs for such areas must require "at a minimum, all reasonably available controls . . . as expeditiously as practicable" for all source categories. The memorandum referred specifically to stage II controls as "reasonably available controls", and noted that for those areas where EPA had proposed stage II regulations "there is inherently less flexibility in the definition by the State of reasonably available controls and specific justification will be needed before EPA could approve a [stage II] regula-

tion which exempts significantly more sources or which imposes controls significantly less stringent than the Federal regulations."⁶

As of 1977, air quality control regions in many States had failed to achieve the national standards, and Congress addressed this situation through amendments to the Clean Air Act which required States to impose additional measures in their SIPs.

The 1977 amendments required attainment of the national standards "as expeditiously as practicable, but . . . not later than December 31, 1982." 42 U.S.C. sec. 7502(a). With regard to SIPs for ozone nonattainment areas, the Administrator was authorized by section 172 to grant an extension to December 31, 1987, if he was satisfied that the State had demonstrated that it could not attain the standard by December 31, 1982, "despite the implementation of all reasonably available measures." 42 U.S.C. sec. 7502(b). Section 172 required that SIPs for ozone nonattainment areas which were granted an extension to 1987 "provide for the implementation of all reasonably available control measures as expeditiously as practicable. . . ." 42 U.S.C. sec. 7502(b)(2).

Several provisions in the 1977 amendments specifically addressed vapor recovery measures. Sec. 108(f) required the Administrator to publish and make available information regarding measures to reduce mobile-source-related pollutants, including "programs to control vapor emissions from fuel transfer and storage operations. . . ." 42

⁶Memorandum on Acceptability of Implementation Plan Regulations in Nonattainment Areas" from Roger Strelow, Assistant Administrator for Air and Waste Management, to Regional Administrators, Dec. 9, 1976, *BNA Environment Reporter*, "Current Developments" 1210 (1976).

U.S.C. sec. 7408(f). Section 202(a)(5) required the Administrator to prescribe fill pipe standards for new motor vehicles if he promulgated final regulations for stage II vapor recovery. 42 U.S.C. sec. 7521(a)(5). Section 202(a)(6) required the Administrator to study the feasibility and desirability of onboard controls, and to issue regulations prescribing standards for such controls if he determined that they were feasible and desirable. 42 U.S.C. sec. 7521(a)(6). Finally, sections 324 and 325 required federal stage II vapor recovery regulations to provide that costs of procurement and installation of such equipment would be borne by the owner of the station, that independent stations with monthly sales of less than 50,000 gallons per month would be exempted from all requirements, and that installation of controls at small independent stations would be phased-in over a three-year period. 42 U.S.C. secs. 7624, 7625.

By the end of 1982, thirty-five urban areas in the United States had not achieved the ozone standard and were granted extensions to 1987. Of these, only the District of Columbia and several areas in California had implemented stage II measures. Among the other areas, only Illinois, New Jersey, and New York committed to implement such measures as a condition of receiving an extension.⁷ In addition, there were eighteen urban areas that did not attain the standard by the end of 1982 and that did not request an extension. Subsequent to 1982, EPA notified these areas that their SIP ozone provisions were substantially inadequate and revisions were necessary. So far,

⁷The Illinois State Legislature subsequently enacted legislation prohibiting implementation of stage II controls unless they were mandated by EPA. Maryland has adopted similar legislation.

none of these SIP revisions have provided for implementation of stage II controls.

V. Immediate Facts Giving Rise to This Case

On _____, 1986, EPA notified the State of _____ pursuant to section 110(a)(2)(H) of the Clean Air Act (42 U.S.C. sec. 7410(a)(2)(H)) that it had found that its SIP was substantially inadequate to achieve the national ambient air quality standard for ozone and that the SIP must be revised to include additional measures adequate to achieve attainment.

On _____, 1986, the State submitted its SIP revisions to EPA. The revisions did not contain a commitment to stage II controls; rather, they listed stage II controls as a "contingency measure" that would be implemented if subsequently determined to be necessary to reach attainment. The SIP does not explain why stage II controls are not to be implemented as expeditiously as practicable.

On _____, 1986, EPA approved the State's SIP revisions. The notice of approval contains neither an explanation of why stage II controls are not regarded as a reasonably available control measure for the particular air quality control region nor any other justification for not requiring implementation as expeditiously as practicable.

VI. Standard of Review

EPA's final action in approving the State's SIP is reviewable under the Administrative Procedure Act, which authorizes and requires the court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discre-

tion, or otherwise not in accordance with law. . . ." 5 U.S.C. sec. 706(2)(A).

The present case involves both an issue of statutory interpretation (whether sec. 172 of the Clean Air Act requires SIPs for extension areas to include *all* "reasonably available control measures") and an issue of fact (whether EPA's action in not requiring an air quality control region to commit to implementation of stage II controls was clearly erroneous). The principles governing application of the APA provisions to the two types of issues differ somewhat in this case.

A. Statutory Interpretation

With regard to issues of statutory interpretation, one general principle is that the courts must defer to a reasonable agency interpretation, even though there may be, in the court's judgment, another interpretation which appears more reasonable. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 75 (1975); *National Steel Corp., Great Lakes Steel v. Gorsuch*, 700 F.2d 314, 321 (6th Cir. 1983).

This general principle does not come into play, however, if the statutory language is clear and unambiguous. In such a situation, the courts generally do not recognize any latitude for administrative interpretation, and the firmly established governing principle is that the statutory language must be given its plain and literal meaning unless that meaning would lead to absurd consequences or thwart the obvious purpose of the law. *United States v. Locke*, ___ U.S. ___, 105 S.Ct. 1785, 85 L.Ed.2d 64, 76-77 (1985); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner of Internal Revenue v. Brown*,

380 U.S. 563, 571 (1965); *State Water Control Board v. Train*, 559 F.2d 921, 924-25 n. 20 (4th Cir. 1977). When the terms of a statute are unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Howe v. Smith*, 452 U.S. 473, 483 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *TVA v. Hill*, 437 U.S. 153, 187 and n. 33 (1978). An administrative interpretation is entitled to deference only if the statute is ambiguous, *i.e.*, where the plain meaning is doubtful. *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), *reh. denied*, 468 U.S. 1227 (1984); *Moore v. Harris*, 623 F.2d 908, 918 (4th Cir. 1980).

B. Factual Issues

In determining whether an agency has acted arbitrarily or capriciously, the court must "engage in a substantial inquiry" to ascertain whether the agency has considered "the relevant factors" and whether there has been a "clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *Duke Power Co. v. NRC*, 770 F.2d 386, 398-90 (4th Cir. 1985); *National Steel, Great Lakes Steel v. Gorsuch*, 700 F.2d 314, 320-21 (6th Cir. 1982). In connection with consideration of "the relevant factors," the agency decision must "explicate fully its course of inquiry, its analysis and its reasoning." *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1974), and cases cited therein; *Environmental Defense Fund v. EPA*, 465 F.2d 528, 541 (D.C. Cir. 1972).

In the present case, Petitioner asserts that various provisions of the 1977 Clean Air Act amendments, taken to-

gether with the regulatory context for the legislation and the facts of in-use experience with stage II controls, raise a presumption that stage II controls are a "reasonably available control measure" required by section 172. Therefore, the reasonableness of any State or EPA justification for non-implementation, and the level of explication required, must be judged in light of that presumption.

ARGUMENT

- I. Section 172(b) of the Clean Air Act requires that State implementation plans for ozone nonattainment areas provide for the implementation of *all* reasonably available control measures as expeditiously as practicable, and EPA has no discretion to allow less than all such measures.

Section 172 states:

(a) *Expeditious attainment of national ambient air quality standards*

(1) The provisions of an applicable implementation plan . . . shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all

reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) *Requisite provisions of plan*

The plan provisions required by subsection (a) of the section shall —

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

42 U.S.C. sec. 7502.

Although the EPA has not explained in its final rule why it is not requiring that the SIP provide for implementation of stage II controls in the ozone nonattainment areas, one likely explanation is that the Agency believes that it does not have a duty to require all RACMs if, in its judgment, the State has demonstrated that it can reach attainment within a reasonable time without implementation of stage II measures. * Petitioner contends that the plain language of the statute forecloses EPA discretion to make such a judgment. As discussed above at pages 10-11, if the language of the statute is clear and unambiguous, it must

* Contrast the General Preamble for proposed rulemaking on the 1979 SIP revisions, 44 Fed. Reg. 20372, 20375 (April 4, 1979) ("Part D . . . does not require that all sources apply RACM if less than all RACM will suffice . . .") with the Final Policy for 1982 extensions and SIP revisions, 46 Fed. Reg. 7182 (Jan. 22, 1981) ("[A]ny request . . . for additional delay of attainment deadlines . . . should be considered only after it is clear that all available and implementable control measures will be adopted.").

be enforced literally unless a literal application would lead to results which are absurd or obviously contrary to the legislative purpose.

A. The word "all" in section 172 is clear and unambiguous.

This point should be indisputable. "All" may be the most unambiguous word in the English language. That its meaning is plain and does not admit of any interpretation has been consistently acknowledged in federal court decisions.

In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944), the Supreme Court confirmed that a Fair Labor Standards Act regulation which subjected a farm's laborers to labor standards if "all of its products" came from within ten miles meant all, not substantially all, products. The petitioner had contended that 96.5% or 98% could be considered "all".

In *National Steel and Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct.Cl. 1969), the court, in explaining the effect of the words "all reasonable effort" in a contract, wrote:

"All" is often used in writing intended to have legal effect as a preface to flexible or imprecise words, as in "all other property", "all the rest and residue", "all and every", "all speed", "all respect". Its purpose is to underscore that the intended breadth is not to be narrowed. "All" means the whole of that which it defines — not less than the entirety. "All" means all and not substantially all. [Footnotes omitted.]

To the same effect are *United States v. Premises Known as 8584 Old Brownsville Rd.*, 736 F.2d 1129, 1130 (6th Cir.

1984) ("all proceeds"); *Frank v. Volkswagenwerk, A.G. of W. Ger.*, 382 F. Supp. 1394, 1400 (E.D. Pa. 1974) ("all other persons"); *Hosier v. Evans*, 314 F. Supp. 316, 322 (D. Vir. Is. 1970) ("all children"); and *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) ("all property").

B. A literal reading of the word "all" in section 172 does not lead to results which are absurd or plainly contrary to the legislative purpose.

To the contrary, a literal reading is clearly consistent with the legislative purpose.

An extension beyond 1982 is the third extension for attainment of the ozone standard. (The first was 1975 to 1977; the second was 1977 to 1982.) In 1977, the ozone problem was clearly intractable despite EPA's previous approval of SIPs that were supposedly adequate to achieve attainment by 1975 and then by 1977. It seems clear that, as a condition for further extending the attainment date, Congress intended to ensure that EPA would not again approve inadequate SIPs on the basis of judgments that implementation of less than all reasonable measures would be sufficient.

Such EPA predictive judgments have necessarily been based on inadequate scientific data. Ozone and other photochemical oxidants are formed through complex processes which depend on the ratios of precursor emissions (principally VOCs and nitrogen oxides) and meteorological factors, such as intensity and duration of sunlight, wind speed and direction, temperature, and atmospheric mixing. Numerous models have been developed to attempt to quantify the amount of precursor emission reduction needed in a particular geographic location in order to ob-

tain a specific reduction in ozone, yet the process of ozone formation is still not understood completely and the models are recognized as inexact.⁹ In 1977, even less was known about ozone formation and how to calculate what reductions would be needed for attainment. For example, in that year, the National Academy of Sciences reported:

It is evident from an examination of the detailed mechanism [of photochemical oxidant formation] that many of the important reactions have not been well studied. . . . *As a result of these uncertainties, it is not possible to make accurate predictions of photochemical oxidant concentrations.* However, with another 5 yr. of progress similar to the last 5, it should be possible to construct chemical models that will permit ozone predictions accurate to within 30% for laboratory studies. [Emphasis added.]¹⁰

It is reasonable to assume, therefore, that Congress did not want to take any chances that extension areas would fail to attain the standard as a result of EPA's allowing less than all RACMs because it calculated that less than all would achieve attainment.

An examination of the legislative history of section 172 discloses numerous references to the "all reasonably available control measures" requirement for extensions beyond

⁹See, e.g., EPA, *Air Quality Criteria for Ozone and Other Photochemical Oxidants*, Review Draft, at 1-2 to 1-18 (Nov. 1985).

¹⁰National Academy of Sciences, *Ozone and Other Photochemical Oxidants* 27 (1977). See also, B. Finlayson and J. Pitts, "Photochemistry of the Polluted Troposphere," *Science*, April 9, 1976.

1982.¹¹ Not a single statement has been found in the reports and debates on the 1977 amendments which indicates that less than all RACMs could be accepted.

II. Stage II controls are presumptively a RACM, and EPA acted arbitrarily and capriciously in not requiring their inclusion in the SIP in the absence of fully articulated reasonable grounds for concluding that stage II controls do not meet the criteria for a RACM.

A. A control measure is "reasonably available" if it is beneficial to air quality and will not result in adverse social or economic impacts which are substantial, widespread, and long-term.

Although the term "reasonably available control measure" is not defined in EPA's regulations, the relevant criteria were clearly outlined during legislative consideration of the 1977 amendments and subsequent EPA policy guidance.

The concept of "reasonably available control measures" was apparently adopted by Congress from EPA's administrative guidance on acceptability of SIPs for nonattainment areas. For example, a guidance memorandum from Assistant Administrator Roger Strelow to Regional Administrators on December 9, 1976, contained the following explanation:

¹¹See H.R. Rep. No. 1742 (conference report), 94th Cong., 2d Sess. 49-50, 104 (1976), *A Legislative History of the Clean Air Act Amendments of 1977*, vol. 5, 4287, 4335-36, 4389 (Comm. Print, Sen. Comm. on Env., and Public Works, Aug. 1978; published by the Library of Congress and the Government Printing Office, 1979) (hereafter cited as "*Leg. History*"); Debate on June 8, 1977, 3 *Leg. History* 712, 719-20; S. Rep. No. 127, 95th Cong., 1st Sess. 37, 39-40 (May 10, 1977), 3 *Leg. History* 1411, 1413-14; H.R. Rep. No. 564 (conference report), 95th Cong., 1st Sess. (Aug. 3, 1977), 3 *Leg. History* 537.

1. Reasonably Available Control Measures

a. Stationary Sources

. . . In every case RACT should represent the toughest controls considering technological and economic feasibility that can be applied to a specific situation.

b. Mobile and Area Sources

As with point sources [i.e., RACT], measures which constitute reasonably available controls . . . may represent relatively stringent requirements which in many situations forces [sic] the application of measures not previously adopted or implemented in a particular area.¹³

Congress was aware of this specific guidance memorandum and adopted the concept of RACT and RACM from EPA, as has been acknowledged by the Agency.¹⁴

During debate on S. 252, the bill from which section 172 was primarily derived, Senator Muskie, Chairman of the Senate Committee on Environmental Pollution and principal sponsor of the bill, explained the meaning of "reasonably available control measure" as follows:

The definition of what is a reasonable measure will relate to the adverse social and economic impact that would occur through its use.

While it is not possible to completely define this concept, it is possible to provide some boundaries. The adverse impact must be widespread and general. It must also be of sufficient dura-

¹³Reprinted in *BNA Environment Reporter*, "Current Developments," p. 1210 (1976).

¹⁴44 Fed. Reg. 53761, 53762 and n. 2 and 3 (Sept. 17, 1979).

tion to cause substantial difficulties. Some dislocation and disruption frequently occurs during the beginning stages of any control program or any change in transportation patterns. This interim impact is not justification for ruling that a measure is unreasonable. The adverse impact must be of a continuing nature. The difficulties that initially occur during the transition period during implementation of strategies are not sufficient to meet this test.

Debate on June 8, 1977, 3 *Leg. History* 720. Senator Muskie had provided an identical explanation of the term the previous year during consideration of S. 3219. Debate on Sept. 30, 1976, 5 *Leg. History* 4432. None of his fellow senators ever questioned or expressed disagreement with Senator Muskie's explanation.

Subsequent to passage of the 1977 amendments, a definition of the term "reasonably available transportation measures" was provided by EPA in its Final Policy for approval of 1982 SIP revisions for ozone and carbon monoxide nonattainment areas:

Reasonably Available Transportation Measures

A measure that has been determined to be beneficial to air quality and which will not result in substantial and long-term adverse impacts. . . .

46 Fed. Reg. 7182, 7191 (Jan. 22, 1981).

Considering these criteria and the fact that EPA had announced as early as 1975 that it considered stage II an available and cost-effective measure that would make a substantial contribution to reduction of VOC and ozone levels¹⁵, the State and EPA have a heavy burden to justify non-implementation of such measures.

¹⁵See 40 Fed. Reg. 47668 (Oct. 9, 1975) (proposed stage II regulations for 12 air quality control regions).

B. Congress recognized stage II controls as presumptively a reasonably available control measure.

By the time Congress considered the 1977 amendments to the Act, there had already been a great deal of study of, and in-use experience with, stage II controls. EPA had published three sets of proposed federal rulemakings for stage II controls during the period 1973-1976,¹⁵ and two air quality control regions in California (the San Francisco and San Diego areas) and the District of Columbia had promulgated their own regulations and had begun implementation.¹⁶

In its 1975 proposed rulemaking notice, EPA stated:

Gasoline marketing controls [stage I and stage II] were incorporated into TCP's [Transportation Control Plans] because the sources released significant fractions of the AQCR [Air Quality Control Region] hydrocarbon burden and because control technology [sic] was more cost-effective than most other available strategies.

40 Fed. Reg. 47668. And in its 1976 proposed rulemaking notice, the Agency stated that it "remains convinced that [stage II] systems exist which can meet the emission standards at reasonable cost." 41 Fed. Reg. 48044.

In addition, Assistant Administrator Strelow, in his 1976 guidance memorandum that was called to the attention of Congress in hearings that year,¹⁷ wrote:

¹⁵See, e.g., 39 Fed. Reg. 4880 (Feb. 8, 1974); 40 Fed. Reg. 47668 (Oct. 9, 1975); 41 Fed. Reg. 48044 (Nov. 1, 1976).

¹⁶Radian Corp., *Case Studies of Air Pollution Control Technologies Innovations*, a report to the National Commission on Air Quality 6-7 (1980).

¹⁷See text at pp. 17-18 and fn. 13, *supra*.

In some areas the SIPs already contain EPA regulations representing reasonably available controls that *generally reflect a national definition of reasonably available controls* for that source category and that were arrived at by EPA after proposal and public hearing (e.g., *Stage I and II* gasoline marketing regulations in 16 AQCRs; transportation control measures in 28 AQCRs).

In these situations there is inherently less flexibility in the definition by the state of reasonably available controls and specific justification will be needed before EPA could approve a regulation which exempts significantly more sources, or which imposes controls significantly less stringent, than the Federal regulations. This justification should document the specific case-by-case economic, technical or other factors which cause the state's regulations, although significantly different from the Federal regulation, to include all that is reasonable for a specific area. [Emphasis added.]

The 1977 amendments included several provisions directed specifically to stage II controls and which reflected a Congressional assumption that stage II controls would generally be considered RACMs. Those provisions are discussed in the three sections that follow.

I. Section 108(f), 42 U.S.C. sec. 7408(f) (EPA information documents)

Section 108(f) directed the Administrator to publish and make available "(A) information . . . regarding processes, procedures, and methods to reduce or control each such [mobile-source-related] pollutant, including but not limited to . . . (ii) programs to control vapor emissions from fuel transfer. . . ."

In commenting on the provisions of S. 252 which became the amendments to section 172, the Senate Committee on Environment and Public Works also discussed the significance of the provisions which became section 108(f):

With respect to the reasonableness of measures, elsewhere in the bill EPA is required to prepare and issue a document analyzing various specified strategies. Inclusion of a measure in this statutory list of alternatives is not a determination that the strategy is reasonable, but it is assumed that most of the list will be found to be so:

. . .

2. programs to control vapor loss from fuel transfer. . . operations,

. . .

S. Rep. No. 127, 95th Cong., 1st Sess. 39 (1977), 3 *Leg. History* 1413.

As detailed in subsection II, C, below (p. 30), subsequent to passage of the 1977 amendments, EPA did indeed make and publish findings that stage II vapor recovery was a reasonably available control measure.

2. Sections 324 and 325, 42 U.S.C. secs. 7624, 7625 (cost-bearing, phase-in, and size exemptions for stage II)

Sections 323 and 324 reflected a Congressional expectation that federal vapor recovery regulations for SIPs would soon be promulgated. Section 323 provided that federal stage II regulations would require that owners of retail gasoline outlets, rather than lessees, bear the cost of procuring and installing the equipment, and that such

costs could be recovered by a pass-through in the price of gasoline. Section 3424 required that federal stage II regulations allow a three-year phase-in period for small independent gasoline marketers and exempt marketers having monthly sales of less than 50,000 gallons.

Exchanges during the 1976 and 1977 Congressional debates clearly reflect an expectation that stage II regulations would be promulgated either by EPA or the States.

During the 1976 debates, Senator Muskie, the leading Senate architect of the Clean Air Act amendments, explained why the Senate bill, S. 3219, did not contain provisions concerning compliance with vapor recovery requirements by small gasoline retailers:

MR. EAGLETON. I would like to ask the distinguished floor manager whether the committee considered the problems small gasoline retailers would have in complying with EPA's proposed new vapor recovery standards? Did the committee address this problem and is there anything in the bill before us which would give some relief to those independent small businessmen?

MR. MUSKIE. The committee spent a considerable time discussing the proposed regulations which would require retail gasoline outlets to equip their pumps with vapor recovery systems. *The committee agreed that it was an important initiative to take*, but there were questions about the effectiveness of the equipment which was being mandated by the regulations and also concern about the cost of the equipment to small operators. After extensive communication with the agency *the committee concluded that EPA was sensitive to these problems and would take due account of them in its final*

regulations. So the committee decided not to interfere in that process, but rather to trust that the problems would be worked out within the agency and I am confident that will be done.

MR. EAGLETON. As the Senator knows, I had considered offering an amendment to allow small retail operations a period of 4 years in which to fully comply with the proposed standards. But I appreciate the assurances given by the distinguished chairman that the problems have been brought to the attention of the EPA and the committee has expressed its concern that there be a satisfactory resolution of them. I will not press my amendment for that reason but will accept the committee judgment that this thing will be worked out.

MR. MUSKIE. I am confident that it will be.

Debate on Aug. 4, 1976, 6 *Leg. History* 5456 (emphasis added).

The substance of sections 324 and 325 as enacted first appeared in section 213 of the 1977 House bill, H.R. 6161. 4 *Leg. History* 2399. The House report shows, in extremely clear language, that the Committee regarded stage II controls as essential and understood that EPA had already determined that they were available and cost-effective and that they would be implemented in many ozone nonattainment areas.

Initially, plans to attain and maintain the national primary ambient air quality standard for photochemical oxidants relied on three basic strategies for hydrocarbon control — (1) new motor vehicle emission standards; (2) stationary source emission limits; and (3) transportation control measures.

Since 1970, it has become apparent that these strategies would not be adequate in many areas to assure timely attainment of the standards. This is due in part to certain delays in achieving compliance with each of these strategies, in part to the impracticability of implementing extremely stringent transportation controls in a short period of time, and to certain other factors.

Because of these considerations, it has been proposed that greater hydrocarbon control from stationary sources be achieved, particularly from sources or operations — such as fuel transfer operations — which are not presently subject to control. *At service stations, these control measures include vapor recovery systems applicable to two phases — transfer of fuel from delivery truck to storage tank and transfer of fuel from pump to customer's vehicle.*

This approach is regarded as a necessary, but not sufficient, strategy in many areas for attaining the national primary oxidant standard. The Environmental Protection Agency has concluded that vapor recovery is a cost-effective way to reducing hydrocarbon emissions and is essential in any area where the oxidant standard cannot be met in timely fashion by sole reliance on vehicle emission controls.

Thus, for instance, in San Diego it is estimated that hydrocarbon emission reductions of 109 tons per day would be necessary to achieve the oxidant standard by 1980. Because of the many sources of hydrocarbons, there is no one single strategy which alone could bring about attainment of the standards. Instead, many strategies for hydrocarbon reduction (and perhaps also

NO_x reduction) must be combined. The San Diego Air Pollution Control District has estimated that as much as 87 tons per day of HC emission reduction could be achieved by a combination of technological controls, which include 95 percent effective vacuum-assist vapor recovery measures.

A number of local air pollution control districts in California have already instituted such controls. However, one major problem has become evident in the implementation of these controls. That problem is the capital costs of control which currently must be borne by the owner or operator of the station. While large throughput stations can, in only a few years, recover the costs of control through sale of the gasoline made from the vapors [footnote omitted], the initial capital costs may be a problem for a service station owner, franchisee, or lessee.

In order to deal with this problem and to facilitate the implementation of the most effective vapor recovery systems which are available, the Committee adopted section 213 of the bill.

COMMITTEE PROPOSAL

Section 213 of the bill contains two measures to alleviate the problem of the capital cost impact of the vapor recovery requirements on service station owners, franchisees, lessees, and operators.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 299-300 (May 12, 1977), 4 *Leg. History* 2766-67 (emphasis added).

Additionally, in discussing related provisions of the bill concerning automobile fill pipe standards and study of on-board technology, the committee stated:

As indicated in the discussion of section 213 of the bill, that provision was intended *to assist in effectuating the requirements for vapor recovery systems* which would be 90-95 per cent effective, where such requirements are needed to attain and maintain national ambient air quality standards.

However, in order to make these vapor recovery systems work to maximum efficiency, a proper fit must be achieved between the fuel pump and the vehicle fill pipe. Thus, in the Committee's view the problem of vapor recovery from vehicle refueling operations is a problem which must be addressed by both vehicle manufacturers and fuel suppliers.

To facilitate an effective vapor recovery program and to assure that responsibility for executing such a program is properly assigned, the Committee adopted section [sic] 216 and 217 of the bill.

Id. at 303, 4 *Leg. History* 2770 (emphasis added).¹⁸

During Senate debate on S. 252, Senators Percy and Hart discussed the House provisions and expressed an understanding that vapor recovery controls were economically feasible and should not be delayed:

MR. PERCY. In the Senate version of the proposed Clean Air Act Amendments of 1977, there

¹⁸It should be noted that the reference in the report to applicability of vapor recovery programs only in areas where they were needed to reach attainment should not be read as implying that less than all RACMs could be required. The section 172 language concerning implementation of *all* RACMs was not included in the House bill; it was added by the Senate bill, S. 252.

is no consideration of a timely and rather complex topic: gasoline vapor recovery. However, section 213 of H.R. 6161, the House version of the proposed Clean Air Act amendments, does contain provisions which deal with gasoline vapor recovery.

I am seeking to learn whether or not it is true that section 213 of the House bill delays compliance with or may even eventually exempt companies which are not affiliated with petroleum refiners from compliance with vapor control requirements. In other words, is there a loophole in the House bill that is unintentionally being allowed to remain open? Is this a matter that was taken into account by the committee in reporting S. 252 to the Senate?

MR. HART. While I cannot speak for the other body, I can say that "independent small marketers of petroleum" is defined in section 213 in the House version to include any party not affiliated with a corporation refining 65,000 barrels or more of gasoline per day. (Sec. 25)

MR. PERCY. Section 213 of the House version requires that the Federal Trade Commission conduct a study to determine the impact of gasoline vapor control requirements on independent small marketers of gasoline. In reporting S. 252 to the Senate, was the committee aware that the Federal Energy Administration and the Environmental Protection Agency recently published studies on this subject?

MR. HART. Yes. The EPA published an Arthur D. Little study entitled "Economic Impact of Stage II Vapor Recovery Regulations: Working Memoranda, EPA-450/3-76-042." On November 26, 1976, the FEA published a similar study con-

ducted by Applied Urbanetics, Inc., entitled "Vapor Recovery Analysis," FEA Contract CO-06-60435.

MR. PERCY. *It is my understanding, Senator, that the FEA and the EPA studies show that vapor recovery requirements would have little or no impact on gasoline stations' economic viability, provided the FEA permits the cost of vapor recovery to be "passed through" to the consumer in the form of additional prices amounting to a fraction of a penny per gallon. Is this your understanding, Senator?*

MR. HART. Yes. If the station's gasoline market would withstand such a pass-through.

Debate on June 9, 1977, 3 *Leg. History* 1022.¹⁹

3. Section 202(a)(5), 42 U.S.C. Sec. 7521(a)(5) (automobile fill pipe standards)

Like sections 324 and 325, *supra*, the provisions authorizing the Administrator to promulgate standards which would assure a proper fit between automobile fill pipes and gasoline nozzles equipped with vapor recovery controls were intended to facilitate implementation of federal vapor recovery regulations. See the portion of House Report No. 294 quoted above at p. 27. See also, H.R. Rep. No. 1175, 94th Cong., 2d Sess. 252 (1976), 7 *Leg. History* 6801 (language identical to that in H.R. Rep. 294); H.R. Rep. No. 564, 95th Cong., 1st Sess. (1977), 3 *Leg. History* 538.

¹⁹The final language of section 324 specifically authorized pass-through of stage II costs.

C. EPA has previously determined that stage II controls are a reasonably available control measure.

As discussed previously at pages 20-21, the 1976 guidance memorandum by Assistant Administrator Strelow confirmed that stage II controls would generally be regarded as "reasonably available control measures", and Congress was aware of this EPA position. In addition, following passage of the 1977 amendments, EPA confirmed this position in at least four published documents:

(1) A February 24, 1978, policy memorandum from the Administrator to Regional Administrators on criteria for approval of 1979 SIP revisions, which was published in the Federal Register (43 Fed. Reg., 21673, May 19, 1978), explained that stage II controls would be required in SIPs providing for ozone attainment after 1982:

For mobile sources in urbanized area [sic] (population 200,000) SIPs must provide for expeditious implementation of reasonably available control measures. Each of the measures for which EPA will publish information documents during 1978 is a reasonably available control measure. These measures are listed on the following page:

1. To be published in February 1978:

a. . . .

b. Vapor recovery;

. . .

This list was the same as that contained in section 108(f), which has been discussed above at pages 21-22.

There can be no doubt that this reference to "vapor recovery" included stage II as well as stage I controls. The section 108(f) information document which the notice said would be published in February 1978 was actually publish-

ed in April 1978 and included extensive information on stage II technology and its effectiveness and costs.²⁰ EPA, *Hydrocarbon Control Strategies for Gasoline Marketing Operations* (EPA-450/3-78-017, April 1978).

(2) Also in April 1978, EPA published materials for a workshop on requirements for nonattainment area SIPs which contained the following visual presentation on "Transportation Related Issues":

LIST OF SELECTED REASONABLY AVAILABLE
TRANSPORTATION CONTROL MEASURES

- VEHICLE INSPECTION AND MAINTENANCE
- VAPOR RECOVERY FROM FUEL TRANSFER AND STORAGE AND FROM SOLVENT OPERATIONS

. . .

Workshop on Requirements for Nonattainment Area Plans — Compilation of Presentations 88 (OAQPS No. 1.2-103, rev. ed. April 1978).

(3) EPA's 1981 Final Policy on approval of SIP revisions for ozone and carbon monoxide nonattainment areas stated that "[a]ll plans must contain the three

²⁰During the last few years there have been requests by State and local air pollution officials that EPA mandate inclusion of stage II controls in ozone nonattainment area SIPs by issuing a CTG (control technique guidance document) for stage II controls. See *Inside EPA*, Jan. 24, 1986, pp. 4-5. Such requests reflect a misunderstanding of the historical function of CTGs. CTGs have historically been issued only to define RACT (reasonably available control technology) for stationary sources. See 42 U.S.C. sec. 172(b)(3). Stage II has historically been regarded as a mobile-source, a mobile-source-related, or a transportation control measure. For such measures, section 108(f) information documents were intended to serve the same purpose as CTGs serve for stationary sources. (However, see 44 Fed. Reg. 53762, Sept. 17, 1979, where EPA appears to have used the term CTG in reference to section 108(f) information documents.)

categories of minimum control measures described in this section." The third category provided:

D. Transportation Measures

The portion of the 1982 SIP addressing emission reductions to be achieved through the implementation of transportation measures must include the basic provisions listed below.

2. All reasonably available transportation measures. . . . Categories of reasonably available transportation measures are identified in section 108(f) of the Act. The submittal should present documentation, based on technical analysis, of the basis for not implementing any of the measures identified in this section.

46 Fed. Reg. 7182, 7185, 7187 (Jan. 22, 1981). Of course, vapor recovery, including stage II controls, was, as previously discussed, one of the measures identified in section 108(f).

(4) In February 1979, EPA published a study entitled *Cost and Economic Impact Assessment for Alternative Levels of the National Ambient Air Quality Standards for Ozone*, which examined the potential economic impacts of selected "reasonably available control measures." One of the measures examined was stage II controls. EPA doc. 450/5-79-002, pp. 5-5 to 5-11 (available through NTIS).

D. In-use experience with stage II controls has proven that they are a reasonably available control measure.

Stage II controls are currently being used in 26 counties in California and in the District of Columbia. Implemen-

tation began in both California and D.C. in 1974. Experience in all regions has confirmed that stage II controls are effective and economically practicable.

Numerous reports by California agencies have reached this conclusion. For example, a very recent report by the California Air Resource Board states: "As Stage II is a developed, proven, and available technology, we believe that it should be identified as a reasonably available control measure to assist other States in meeting Clean Air Act requirements." *California Perspective on Controlling Gasoline Evaporative Emissions*, CARB Tech. Rep. No. SS-86-01 (Mar. 1986). In its comments on EPA's *Evaluation of Air Pollution Regulatory Strategies for the Gasoline Marketing Industry* (July 1984), CARB stated: "If EPA pursues a strategy based on controlling ozone, Stage II is a better alternative than OC [onboard controls] because it is proven, is cost-effective, and can be implemented much sooner than OC." At p. 2 (Nov. 1984). The comments continued:

Stage II is now installed and in use on about 14,000 service stations in California and all of its major problems are already solved. Almost ten years of careful painstaking cooperative effort between government and industry lie behind the regulatory improvements the Stage II program has had since its inception. Many of the improvements were necessitated by unforeseeable problems. We are currently in our fourth generation of Stage II equipment and the latest generation incorporates features which will bring even greater success to the program. Field testing has begun on a fifth generation of Stage II equipment which will be safer than conventional designs but just as easy to use. With the stimulus of a larger market, the Stage II equipment manu-

facturers could develop even more effective products at less expense, but this is not reflected in the Report's treatment of Stage II. . . . The Stage II program can be administered by any state using already well developed equipment, certification and test procedures, and enforcement techniques. Other states will not have to repeat the development work pioneered in California.

Id. at 6-7.

Also, in a 1981 report to the California legislature, CARB reported:

Stage II vapor recovery continues to be an efficient and cost effective hydrocarbon emission control measure. In 1981, Stage II systems reduced hydrocarbon emissions by 48,000 tons (130 tons per day), and prevented the loss of 15 million gallons of gasoline. The average Stage II system costs about \$.30 per pound of hydrocarbons reduced and adds about one-third of one cent to the price of a gallon of gasoline.

"Report to the Legislature on the Efficiency, Durability, and Cost Effectiveness of Gasoline Vapor Recovery Systems" (Jan 1981).

Reports on experience with stage II controls in the District of Columbia are similar. In a 1982 report, the Metropolitan Washington Council of Governments found that "Stage II systems have overcome initial problems and are economically and technically feasible," and concluded:

Stage II systems have been shown to be cost-effective methods of substantially reducing hydrocarbon emissions attributable to gasoline service stations. In addition to their air quality

benefits, they conserve gasoline, reduce health risks, and have little or no fire safety problems. The California and District of Columbia experiences have demonstrated that, although not completely trouble-free, Stage II systems are a practical control technology.

Dept. of Environmental Programs, *Stage II Vapor Recovery System Options for the Washington Metropolitan Area*, 3, 20 (Sept. 1982).

E. EPA has the authority and duty to overrule an erroneous State determination that stage II controls are not a reasonably available control measure.

Section 172 states that all SIPs for ozone nonattainment areas "shall" include all reasonably available control measures. The Administrator's authority and duty to require revision of deficient SIPs or to promulgate federal SIP regulations to overcome a SIP deficiency is specifically provided in section 110 of the Act, 42 U.S.C. sec. 7410. Section 110(a)(2)(H) requires revision of SIPs "whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the . . . standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977." If the State does not correct a SIP deficiency, section 110(c)(1), provides for issuance of federal regulations:

(1) The Administrator shall . . . promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if -

(A) the State fails to submit an implementation plan which meets the requirements of this section;

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

42 U.S.C. sec. 7410(c)(1).

Congressional understanding that section 172 provided authority to the Administrator to overrule State determinations on "reasonably available control measures" was made clear during consideration of S. 252, the bill from which the current section 172 language was primarily derived. The Senate report on S. 252 stated:

It should be emphasized that this bill does not define reasonable measures. State and local officials, in cooperation with EPA must do this in order to preserve maximum flexibility to take into account varying local and regional conditions.

The Administrator's authority with respect to measures contained in plans submitted by the States is limited to requiring additional or more stringent measures he deems reasonable where such measures were not included by the State. The Administrator is not authorized to disapprove a plan on the grounds that it contains stringent measures which he believes are not reasonable. States have the right to require such stringent controls in order to make room for new developments or for other reasons it [sic] finds compelling.

S. Rep. No. 127, 95th Cong., 1st Sess. 40 (May 10, 1977), 3 *Leg. History* 1414. And, during subsequent consideration of the bill and report, Senator Muskie explained:

The selection of measures to be used is to be made initially by State and local governments.

The bill does not specify the "reasonable measures" to be adopted. However, the Administrator cannot reject any measure selected at the State or local level because he considers it to be unreasonable. If it is adopted by the State or regional agency, then it is reasonable.

Conversely, the Administrator may determine that all reasonable measures have not been adopted. In this case the Administrator is required to promulgate additional reasonable measures. The court will ultimately rule on any disagreement between the affected State or local agency and the Administrator as to the reasonableness of an EPA proposal.

Debate on June 8, 1977, 3 *Leg. History* 720.

III. EPA's ongoing study of onboard technology does not excuse the Administrator from requiring stage II controls as a reasonably available control measure.

EPA has been studying the feasibility and desirability of onboard technology since 1977 pursuant to section 202(a)(6) of the Act (42 U.S.C. sec. 7521(a)(6)). Most recently, the Agency requested comments on this subject in its *Evaluation of Air Pollution Regulatory Strategies for the Gasoline Marketing Industry* (1984). 49 Fed. Reg. 31706 (Aug. 8, 1984).

Section 202(a)(6) provides:

The Administrator shall determine the feasibility and desirability of requiring new motor vehicles to utilize onboard hydrocarbon control technology which would avoid the necessity of gasoline vapor recovery of uncontrolled emissions emanating from the fueling of motor vehicles. The Administrator shall compare the costs and effectiveness of such technology to that of implemen-

ting and maintaining vapor recovery systems (taking into consideration such factors as fuel economy, economic costs of such technology, administrative burdens, and equitable distribution of costs). If the Administrator finds that it is feasible and desirable to employ such technology, he shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, standards requiring the use of onboard hydrocarbon technology which shall not become effective until the introduction to [sic] the model year for which it would be feasible to implement such standards, taking into consideration compliance costs and the restraints of an adequate lead time for design and production.

While this section refers to onboard controls as a means of avoiding vapor recovery measures, for two separate reasons this must not be interpreted as authorizing delays in implementation of stage II measures which are otherwise required under section 172: First, the Administrator made the determination required by section 202(a)(6) in 1981, and a federal court has recently confirmed that that determination should be regarded as a final agency action. Second, it was clearly the intent of Congress that section 202(a)(6) should not delay implementation of stage II controls required by section 172.

A. The Administrator has made a final determination under section 202(a)(6).

On April 13, 1981, EPA published a Notice of Intent for actions it intended to take to relieve regulatory burdens on the motor vehicle industry. One of those actions was described as follows:

13. *Do not require use of onboard technology for the control of hydrocarbon emissions resulting from the fueling of motor vehicles.*

EPA is charged with determining the feasibility and desirability of requiring motor vehicles to be equipped to control hydrocarbon emissions during motor vehicle fueling. Section 202(a)(6) of the Clean Air Act. EPA has decided not to require motor vehicles to be equipped with this technology.

The Agency's findings will be published in the Federal Register in June 1981.

46 *Fed. Reg.* 21628, 21629, April 13, 1981 (original emphasis).

Although the June 1981 Federal Register notice promised in this decision has never appeared, the U.S. District Court for the District of Columbia has decided that the decision was a final agency action. *Natural Resources Defense Council v. EPA*, No. 83-2011, Oct. 15, 1985 (Slip Op.) The court found that the decision was a "final agency action" for purposes of section 307(b)(1) of the Clean Air Act, which grants jurisdiction to the U.S. Court of Appeals for review of final agency actions. The opinion explains:

Plaintiffs contend that the action taken by EPA on April 15, 1981 was not *final* and thus not appealable by persons affected under section 307(b)(1) of the Act, 42 U.S.C. sec. 7607(b)(1). They claim that the 1981 notice was a statement of intent only and not a final agency action fulfilling any duties under section 202(a)(6) of the Act, 42 U.S.C. sec. 7521(a)(6). The Court disagrees with plaintiffs' characterization.

This notice plainly states that EPA already has done all that section 202(a)(6) requires and no further action was intended at that time. The Court finds, therefore, that EPA issued a final decision in its April 15, 1981 announcement.

At 13-14 (original emphasis).²¹

B. It is clear that Congress intended that any study of onboard controls under section 202(a)(6) should not delay implementation of stage II controls required under section 172.

Section 202(a)(6) was derived from the House bills in 1976 and 1977 (H.R. 10498 and H.R. 6161, respectively). See H.R. Rep. 564, 95th Cong., 1st Sess. (1977) (conference report), 3 *Leg. History* 539. The House reports on both bills contained the following statement:

The Committee's action in providing the new authorities in sections [concerning fill pipe standards and study of onboard technology] . . . is not intended in any way to limit or affect the authority or duty of the Administrator with respect to the promulgation of vapor recovery regulations under the Clean Air Act.

H.R. Rep. No. 1175, 94th Cong., 2d Sess. 253 (1976), 7 *Leg. History* 6802; H.R. Rep. No. 294, 95th Cong., 1st Sess. 304 (1977), 4 *Leg. History* 2771.

This Congressional intention was clearly consistent with, and reinforced by, the numerous expressions of Congressional intent in connection with sections 108(f),

²¹NRDC has filed a jurisdictional motion with the U.S. Circuit Court in a related case (*NRDC v. EPA*, No. 86-1010), in which it has challenged this finding by the district court. EPA has opposed the motion.

202(a)(5), and 324, 325, discussed above, that stage II vapor recovery measures should generally be implemented as expeditiously as practicable in ozone nonattainment areas. Onboard controls are a long-range option. Allowing two years for a 202(a)(6) study, two years for development of federal regulations, three years for engineering and tooling by auto manufacturers (assuming no technical design problems), and approximately fifteen years for fleet turnover,²² Congress could see that onboard controls would require until at least 1999 to achieve 90% implementation under a best-case scenario. Obviously, since the goal was to achieve attainment in all areas by the end of 1987 at the latest, Congress did not intend that stage II controls be put off.²³

EPA recognition of these realities is shown by a 1978 letter to the Government of the District of Columbia in which Assistant Administrator David Hawkins assured a District official that "EPA believes that expansion of Stage II programs to cover the entire [D.C. Metro] marketing area is appropriate even if the Agency should decide to proceed with 'on-board' control requirements." Letter to Bailus Walker, Jr., Dec. 28, 1978.

CONCLUSION

The Clean Air Act requires implementation of *all* reasonably available control measures as expeditiously as practicable for ozone nonattainment areas. Given the many extensions already granted for such areas and the

²²EPA, *Evaluation of Air Pollution Regulatory Strategies for the Gasoline Marketing Industry*, pp. C-33 to C-38 (July 1984).

²³If a new 202(a)(6) decision to implement onboard controls were made today, it would take until at least 2006 to achieve 90% implementation.

complexities and uncertainties in predicting the amount of ozone reduction obtainable from specific control measures, a literal interpretation of the statutory language is eminently reasonable.

On the basis of the relevant criteria for reasonably available control measures, in-use experience with stage II controls in California and the District of Columbia, planned implementation of stage II controls in St. Louis, MO and New Jersey, Congressional recognition of stage II controls as feasible and cost-effective, and EPA determinations that stage II is a reasonably available control measure, EPA has a heavy burden to bear to avoid a finding that it has clearly erred in not requiring that implementation of stage II controls begin as soon as practicable.¹⁴ In the present case, the court must find that EPA acted arbitrarily and capriciously in approving the SIP revisions, since the final rule contains no justification whatsoever for non-implementation of stage II controls.

Finally, the onboard study provision of the Act cannot be invoked to excuse any further delays in implementation of stage II controls. The legislative committee reports clearly state that this provision is not to be interpreted so as to interfere with implementation of stage II controls, and to interpret the provision otherwise would be plainly contrary to the legislative intent to achieve attainment of the air quality standards by the end of 1987 at the very latest.

¹⁴Designation of stage II controls as a "contingency measure" certainly does not satisfy the statutory requirement for actual implementation "as expeditiously as practicable."

RELIEF REQUESTED

Wherefore, the Petitioner, Jim J. Tozzi, requests that this court:

1. Set aside the final rule of EPA which is the subject of this action;
2. Instruct the Administrator of EPA that the SIP at issue must provide for stage II measures in the ozone non-attainment areas absent a detailed analysis by the State and EPA demonstrating that such measures are not "reasonably available control measures" within the meaning of section 172 of the Clean Air Act, as that term has been defined in the legislative history and the Agency's published SIP review criteria;
3. Award costs of litigation, including reasonable attorney's fees, to Petitioner in accordance with 42 U.S.C. sec. 7606(f); and
4. Grant such other and further relief as this court may deem appropriate.

Respectfully submitted,

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