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ENVIRONMENTAL LAW

McCARTHY v. THOMAS: ARE STATES BOUND WHEN APPROVAL OF AN SIP IS MERELY CONDITIONAL?

I. INTRODUCTION

In *McCarthy v. Thomas*,¹ the Ninth Circuit held that the Clean Air Act (hereinafter “CAA”) authorizes the Environmental Protection Agency (hereinafter “EPA”) to conditionally approve a State Implementation Plan (hereinafter “SIP”), thereby binding the states even if later EPA actions do not specifically reference the earlier conditionally approved provisions.² In

1. *McCarthy v. Thomas*, 27 F.3d 1363 (9th Cir. 1994) (per Wiggins, C.J., the other panel members were Wallace, J., and Garth, C.J., Senior United States Circuit Judge for the Third Circuit, sitting by designation)

2. *McCarthy*, 27 F.3d at 1373. State Implementation Plans are mandated under the CAA. See 42 U.S.C. § 7410 (1988 & Supp. V 1993). These plans are submitted by the individual states to the EPA. See *id.* § 7410(a)(1). The plans document how a state will comply with National Ambient Air Quality Standards [hereinafter “NAAQS”]. *Id.* The measures provided in each plan are decided by the individual state and are not dictated by the EPA. See *id.* § 7410. Under the CAA amendments in 1990, SIPs in nonattainment areas must include specific measures such as enforceable emission limits, economic incentives, and schedules for reaching compliance. See *id.* § 7502. The plans must ensure timely compliance with the imposed air quality standards. See *id.* § 7410. In addition, the plans are subjected to EPA approval. See *id.* § 7410(k). If the plans are not approved by the EPA then the state may be faced with penalties. See *id.* § 7413. Earlier revisions of the CAA allowed the EPA to impose a moratorium on construction projects in areas not in compliance with the CAA. See *Arizona v. Thomas*, 829 F.2d 834 (9th Cir.

McCarthy, the SIP which included transportation measures for Pima and Maricopa Counties in Arizona, had never been fully approved by the EPA, but had received a conditional approval.³ Since Arizona had difficulty complying with the CAA, the SIP was revised several times before the EPA granted full approval.⁴ The final plan, approved years later by the EPA, did not specifically include the transportation provisions originally provided by the state.⁵

The *McCarthy* decision puts the states on notice that commitments made in SIPs are legally binding notwithstanding the SIP is only conditionally approved. When a state proposes changes to its SIP, it does not get a new "bite of the apple," but must adhere to measures already accepted by the EPA.⁶

II. FACTS AND PROCEDURAL HISTORY

The appellants in *McCarthy* had sought an order from the district court compelling changes to the mass transit systems of the cities of Tucson and Phoenix.⁷ Arizona had proposed the transit provisions as part of the original SIP submitted to the EPA for Pima and Maricopa counties.⁸ The district court refused to grant the order.⁹

1987). The current version of the CAA allows the EPA to cut off federal funding to highway projects located in the nonattainment area. See 42 U.S.C. § 7509 (Supp. V 1993).

3. *McCarthy*, 27 F.3d at 1365.

4. See *id.* at 1367. As discussed in the facts of *McCarthy*, a number of law suits were litigated involving the SIPs for Pima and Maricopa counties. See *id.* at 1366.

5. *Id.* at 1372. See *infra* note 7 for a discussion of the mass transit provisions that are being contested in *McCarthy*.

6. See *McCarthy*, 27 F.3d at 1373.

7. *McCarthy v. Thomas*, 27 F.3d 1363, 1364, 1367 (9th Cir. 1994). The mass transit plans were submitted for Pima and Maricopa counties in 1979. *Id.* at 1365. The transit provision for Pima county was to increase the Tucson transit system to a fleet of 199 buses which would have required the city to add 59 buses. *Id.* Total ridership goals were also included in the plan which called for a yearly ridership of 14.5 million by the year 1986. *Id.* The plan for Maricopa County would have increased the number of buses in Phoenix to 400 with a daily ridership of 112,000. *Id.* By the time *McCarthy* was decided, Tucson had a bus fleet of 168 buses and a yearly ridership of 13.6 million. *Id.* at 1367. Phoenix had a fleet of 369 buses with a daily ridership of 103,000. *Id.*

8. See *id.* at 1365.

9. *Id.* at 1367.

The transit provisions were proposed to help reduce the levels of air pollutants in Pima and Maricopa Counties.¹⁰ The Environmental Protection Agency (hereinafter "EPA") had designated these counties as nonattainment areas for carbon monoxide (hereinafter "CO") in 1978.¹¹ To reduce the CO levels in these counties, Arizona had submitted the transit provisions as one element in their overall control strategy.¹² Arizona first submitted the overall plan in 1979, and received conditional approval by the EPA in 1982.¹³

The EPA did not grant full approval of the SIP due to concerns unrelated to the mass transit provisions.¹⁴ Arizona took no action to address the EPA's concerns until the EPA imposed sanctions limiting construction of new sources of CO emissions.¹⁵ After failing in an attempt to block the sanctions, Arizona responded to the EPA's concerns.¹⁶ A revised SIP was submitted to the EPA and approved in 1988.¹⁷ The EPA approval was documented in the Federal Register, but the summary did not refer to the mass transit measures that had been approved in 1982.¹⁸

10. *See id.* at 1365.

11. *Id.* at 1365. Carbon monoxide is one of the criteria pollutants that is controlled under the CAA. *See* 42 U.S.C. § 7407(d)(4)(a). For most urban areas a major source of carbon monoxide comes from automobile emissions. *See generally* WILLIAM H. RODGERS, ENVIRONMENTAL LAW, Chapter 3 (1994). An area is designated as being in "nonattainment" when it fails to meet the air emission standard for a criteria pollutant. *See* 42 U.S.C. § 7501(2).

12. *See McCarthy*, 27 F.3d at 1365.

13. *Id.* The EPA denied full approval because of deficiencies in the plan that it wanted the state to correct. *Id.*

14. *Id.* The summary of the facts provided in the opinion does not identify the deficiencies in the SIP that the EPA wanted corrected. *See id.* However, the summary clearly states that the deficiencies did not concern the provisions for transit improvements. *See id.*

15. *Arizona v. Thomas*, 829 F.2d 834, 835 (9th Cir. 1987). The EPA imposed sanctions because it found that the SIP submitted by Arizona did not result in timely compliance with the air quality standards for carbon monoxide. *See id.* at 835. Arizona had argued that the EPA should have allowed it to revise its plan prior to imposing the sanctions. *Id.* The court held that because one of the goals of the CAA was timely compliance, the actions of the EPA were not "arbitrary or capricious". *Id.* at 840.

16. *See McCarthy*, 27 F.3d at 1366.

17. *Id.* at 1366 (citing 53 Fed. Reg. 30220, 30224 (1988)).

18. *Id.* (citing 56 Fed. Reg. 3219, 3220 (1991)). All proposed rulemaking and other pending decisions of the EPA are listed in the federal register prior to final approval. *See generally* PERCIVAL et al., ENVIRONMENTAL REGULATION LAW, SCI-

The approved SIP was challenged in *Delaney v. Environmental Protection Agency*.¹⁹ The citizen plaintiffs in *Delaney* petitioned the court to vacate the SIP for Pima and Maricopa counties.²⁰ The plaintiffs alleged that the EPA actions were unreasonable since the SIP did not meet the CAA's statutory deadlines for compliance.²¹ The Ninth Circuit upheld the challenge and vacated the final EPA ruling that had approved the Arizona SIP.²²

In response to the Ninth Circuit decision in *Delaney v. Environmental Protection Agency*, the EPA issued a Federal Implementation Plan (hereinafter "FIP").²³ The FIP covered Pima and Maricopa counties, and incorporated by reference all of the provisions that had been included in the SIP vacated by the Ninth Circuit decision.²⁴

The mass transit provisions that were originally proposed in 1979 had never been fully implemented.²⁵ As a result, the

ENCE, AND POLICY, Chapter Five (1992). This is done so that interested parties will have the opportunity to comment on proposed actions. *See id.* In addition it informs interested parties of actions that have been approved by the EPA. *See id.*

19. *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990). The *Delaney* court reviewed the control provisions in the SIP aimed at lowering CO levels in Maricopa and Pima counties. *See id.* at 691-95. The *Delaney* plaintiffs argued that additional control measures were needed in the SIP to accelerate the attainment of CO emissions. *See id.* at 692.

20. *Id.* at 688.

21. *Id.* at 689-90. The 1977 amendments to the CAA required states to be in compliance with air quality standards by 1982. *Id.* Arizona had failed to meet this date for CO levels for Pima and Maricopa counties. *See generally id.* at 689-91. The *Delaney* court held that Congress's intent was that states not in compliance with the CAA must meet the standards as soon as possible. *Id.* at 691. For a good discussion of the problems involved in bringing nonattainment areas into compliance with the CAA, see generally RODGERS, *supra* note 11, at 210-22.

22. *Id.* at 694.

23. *McCarthy*, 27 F.3d at 1367 (citing 56 Fed. Reg. 5458, 5459 (1991)). Under the provisions of the CAA the EPA has the ultimate responsibility to see that states meet the guidelines of the act. *See* 42 U.S.C. § 7410 (1990). If the state plans fail to meet the statutory guidelines then the EPA is required to promulgate an FIP. *See id.* § 7410(c)(1). The Ninth Circuit held that the plan provided by Arizona did not comply with the CAA. *Delaney*, 898 F.2d at 695. As a result the EPA was required by the act to generate an FIP for the state. *Id.*

24. *McCarthy*, 27 F.3d at 1366.

25. *Id.* at 1367. To meet the original transit goals, Tucson needed to add an additional 31 busses to its fleet, and increase yearly ridership by one million passengers. *See id.* at 1365, 1367. Phoenix also needed to increase its fleet by 31 busses and increase ridership by 9,000 passengers a day to meet its goal. *See id.*

McCarthy appellants filed a lawsuit in the United States District Court for the District of Arizona, seeking an injunction against the cities of Tucson and Phoenix.²⁶ The district court dismissed the suit, ruling that the mass transit provisions were not enforceable since they were not part of a final approved plan.²⁷

The citizens appealed to the Ninth Circuit Court of Appeals.²⁸ The Ninth Circuit reversed the district court's decision, but did not impose the injunction sought by the appellants.²⁹ Instead, the Ninth Circuit remanded the case to the district court to fashion the final remedy.³⁰

The *McCarthy* court held that the EPA's conditional approval of the SIP was binding and thus, the state was responsible for the transportation control measures.³¹ The court reasoned that enforcement of the measures set forth in the earlier conditionally approved revision of the SIP was not dependent on whether the transportation control measures were included in the final approved plan.³² The fact that these measures were never deleted was sufficient to put the state on notice that the state was still responsible for their implementation.³³ Furthermore, the court held that changing the party responsible for the SIP from the state to the EPA, by imposing an FIP,

26. *Id.* at 1367.

27. *Id.* The district court ruled that the earlier provisions were not binding since the EPA's plan in 1991 did not specifically reference them. *Id.* The district court reasoned that "final" approval meant that the plan would not require any further revision. *Id.* Therefore, since the plan submitted in 1982 was acknowledged to require further revision it could not be defined as final. *See id.* In the alternative, the district court reasoned that even if the mass transit provisions submitted in 1982 were enforceable, the Ninth Circuit subsequently vacated the plan. *See id.* at 1370. Therefore, the district court held that once the plan was vacated, the mass transit provisions would need to be re-submitted and approved to be enforceable. *Id.*

28. *See Id.* at 1367.

29. *McCarthy*, 27 F.3d at 1373. The decision to remand without requiring the state to comply with the provisions may have been to allow the parties to work out other possible settlements.

30. *Id.*

31. *Id.*

32. *See id.* at 1370. *See generally* RODGERS, *supra* note 11, at Chapter Three for a discussion of the EPA approval process for SIPs.

33. *See id.* at 1370 n.2.

did not relieve the state of its earlier commitments.³⁴

III. THE CLEAN AIR ACT: BACKGROUND

The Clean Air Act was first enacted in 1963, making it one of the earliest environmental statutes.³⁵ Since 1963, the CAA has been revised on several occasions, each revision has attempted to provide more comprehensive controls for reducing air pollution.³⁶ The 1990 amendments made significant changes to the statute, and clarified the EPA's authority to conditionally approve SIPs.³⁷

A. 1990 CAA AMENDMENTS: IMPACT ON CONDITIONAL APPROVAL OF SIPs

Prior to the 1990 amendments, a number of lawsuits were litigated regarding the authority of the EPA to review and approve SIPs.³⁸ Two common questions involved the extent of public participation required for SIP reviews, and the possibility that SIPs could be subdivided with only parts being approved.³⁹ The concern in these suits, as echoed in *McCarthy v. Thomas*, was that piecemeal approval may result in the avoidance of stricter procedural requirements.⁴⁰

However, the EPA's power to approve portions of SIPs with provisions pending appears to have been cemented through the 1990 CAA amendments.⁴¹ A basis suggested for

34. *See id.*

35. *See generally* WILLIAM H. RODGERS, ENVIRONMENTAL LAW, Chapter Three (1994). The CAA was preceded by the Air Pollution Control Act of 1955. *See id.* at 130. However, the Air Pollution Control Act left most of the responsibility for air pollution control with the states. *Id.*

36. *See generally id.* at Chapter 3 for a thorough overview of the 1990 CAA amendments.

37. *See generally id.* at 196-214.

38. *See generally* WILLIAM H. RODGERS, ENVIRONMENTAL LAW, at 196-202 (1994).

39. *See generally id.*

40. *See id.* at 201 n.32 (citing *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984)). The court disallowed the EPA to let states avoid stricter procedures by calling their action a partial approval. *Bethlehem Steel Corp.*, 742 F.2d at 1035.

41. *See* 42 U.S.C. § 7410(k)(3)-(4). These provisions give the EPA authorization

allowing this type of piecemeal approval was to protect the EPA's administrative discretion.⁴² Since the SIP consists of many diverse elements, the EPA needs the ability to approve portions of plans that promote improved air quality.⁴³ The *McCarthy* court's analysis interprets provisions of the CAA that had been in effect prior to the 1990 amendments.⁴⁴

B. GOALS OF THE CLEAN AIR ACT

The CAA is structured to address pollutants which pose significant risks to human health and the environment.⁴⁵ These "top offenders" are defined in the CAA as "criteria pollutants."⁴⁶ The CAA required the EPA to develop a list of these pollutants by January 30, 1971.⁴⁷ Initially, the EPA listed five types of substances as criteria pollutants: sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants.⁴⁸ Since that time, only lead and nitrogen oxides have been added to the list while hydrocarbons have been removed from the list.

The criteria pollutants are controlled through the use of National Ambient Air Quality Standards (hereinafter "NAAQS").⁴⁹ NAAQS are uniform emission limitations set by the EPA for each of the criteria pollutants.⁵⁰

for partial and conditional approvals of SIPs. *See id.*

42. *See* RODGERS, *supra* note 35, at 202.

43. *See id.* at 202.

44. *See* *McCarthy v. Thomas*, 27 F.3d 1363, 1368 (9th Cir. 1994).

45. *See generally* 42 U.S.C. § 7409 (1988 & Supp. V 1993).

46. *See* 42 U.S.C. § 7408(a)(1).

47. *See id.* § 7408. Currently the substances included on the list are: sulfur oxides, particulates, carbon monoxide, photochemical oxidants, nitrogen oxides, and lead. *See* PERCIVAL et. al., ENVIRONMENTAL REGULATION LAW, SCIENCE AND POLICY, at 771 (1992).

48. RODGERS *supra*, note 35 at 156-61. The first five criteria pollutants were sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants. *Id.* Nitrogen oxides were added to the list by the EPA in 1971. *Id.* Lead was also added to the list in 1978 due to litigation. *Id.* Subsequently hydrocarbons have been dropped from the list of criteria pollutants. *Id.*

49. *See* 42 U.S.C. § 7409.

50. 42 U.S.C. § 7409(a) and (b). NAAQS consist of a primary air quality standard and a secondary air quality standard for each criteria pollutant. *See id.* The primary standards are set to allow an adequate margin of safety requisite to protect the public health. *See id.* The secondary ambient air quality standards specify

In broad terms, the SIPs are a vehicle for "implementation, maintenance, and enforcement" of the NAAQS for each state.⁵¹ The SIP requirements are set forth in Section 7410(a)(2) of the CAA, with the major elements as follows: enforceable emission limitations for the criteria pollutants; programs to monitor ambient air quality; programs to enforce emission limitations; programs to control source emissions; and evidence of adequate state funding and authority to implement the plan.⁵²

The EPA reviews and approves SIPs prepared by the state to ensure that the SIP complies with the CAA.⁵³ If the EPA finds that the SIP is inadequate, the EPA has different enforcement options available under the CAA.⁵⁴

C. ENFORCEMENT OF THE CLEAN AIR ACT

Initial responsibility for enforcement of the CAA is left to each state.⁵⁵ Each state develops an SIP showing how it will achieve and maintain the ambient air quality standards for every quality control region in the state.⁵⁶ Each SIP must include a demonstration of not only how the air quality limits will be reached, but how the limits will be maintained.⁵⁷

The SIP is submitted to the EPA for approval, and once approved by the EPA, the SIP is binding upon the state.⁵⁸ A

a level of air quality to protect the public welfare from any known or anticipated adverse affects. *See id.*

51. 42 U.S.C. § 7410(a)(1). Under section 7407 of the CAA, each state is divided up into air quality control regions. *See* 42 U.S.C. § 7407. Air quality control regions were first required under the Air Quality Act of 1967. *See* RODGERS *supra* note 35, at 131. An air quality region is defined by both scientific factors, such as meteorological characteristics, as well as political factors. *Id.* The EPA has identified 247 air quality control regions in the United States. *Id.* A specific air quality region could have different designations for each criteria pollutant. *Id.* at 132. As an example, the area could be designated as an attainment area for nitrogen oxides while being a non-attainment for carbon monoxide. *See id.*

52. 42 U.S.C. § 7410(a)(2).

53. *See id.* at § 7410(k).

54. *Id.* at § 7411(m) and § 7413.

55. *See id.* § 7410 (1988 & Supp. V 1993).

56. *See* 42 U.S.C. § 7410(a)(1).

57. *See id.* § 7410(a)(2).

58. *See Id.*

state's failure to comply with the provisions of the SIP may result in the imposition of sanctions by the EPA.⁵⁹ In addition, citizen suits may be filed against the state or the EPA administrator for failure to enforce the provisions of the CAA.⁶⁰

The EPA, upon initial review, may reject the plan presented by the state as inadequate to meet the requirements of the statute.⁶¹ Upon rejection, the plan is returned to the state for revision.⁶² Once the state is delinquent in submitting the original or the revised SIP, the EPA is required to generate a Federal Implementation Plan.⁶³

IV. THE COURT'S ANALYSIS

The Ninth Circuit reviewed existing case law and held that statutory interpretations by federal agencies, if reasonable, should receive deference.⁶⁴

A. THE CLEAN AIR ACT ALLOWS CONDITIONAL APPROVAL OF SIPs

The Ninth Circuit began its analysis by reviewing the decision reached by the district court.⁶⁵ The district court ruled that provisions of a state or federal plan are not enforceable until specifically included in a final approved plan.⁶⁶ The

59. 42 U.S.C. §§ 7411(m) and § 7413. These sections discuss federal enforcement of the CAA. *See id.*

60. 42 U.S.C. § 7604. This provision applies to any failure by the EPA in enforcing the CAA. *See generally* RODGERS, *supra* note 37, at Chapter 3. For example, a citizen suit may be brought against the EPA for improperly approving a SIP or against the state for not implementing its SIP. *Id.* When brought against the state, the citizen suit is acting for the EPA which has failed to perform their administrative duties. *Id.*

61. *See* 42 U.S.C. § 7410(k). This section of the CAA outlines the EPA review of a SIP. *Id.*

62. *See* 42 U.S.C. § 7410(k)(5).

63. *See id.* § 7410(c). The FIP is written to deal with those portions of the SIP found to be inadequate. *Id.* In the present case, a FIP was written only to deal with CO levels for Pima and Maricopa counties. *McCarthy*, 27 F.3d at 1367.

64. *McCarthy v. Thomas*, 27 F.3d 1363, 1368-70 (9th Cir. 1994).

65. *See id.* at 1367.

66. *Id.*

use of conditional approval was merely a shorthand method indicating that final approval would be forthcoming when remaining conditions were met.⁶⁷

The Ninth Circuit reasoned that this approach would be potentially counter-productive to the statutory process of ensuring compliance with the Clean Air Act.⁶⁸ The Ninth Circuit reasoned that the Environmental Protection Agency routinely receives numerous revisions to implementation plans.⁶⁹ By following the district court's ruling, and not combining measures from earlier plans, Arizona would still fail to comply with the CAA.⁷⁰ Under the district court's reasoning, no version of the plan, even that accepted by the district court, included enough measures to meet air quality standards for carbon monoxide.⁷¹

B. THE EPA CAN APPROVE SIPs THAT ARE SUBSTANTIALLY COMPLETE

In reviewing previous Ninth Circuit cases interpreting the provisions of the CAA regarding EPA approval of State Implementation Plans, the Ninth Circuit found that *Kamp v. Hernandez* was controlling.⁷²

In *Kamp*, the Ninth Circuit held that an SIP may receive EPA approval even if it does not fully comply with the CAA.⁷³

67. *See id.* at 1368.

68. *Id.* at 1370.

69. *See id.* at 1369-70. In the fact section of the opinion, the Ninth Circuit outlines the involved proceedings that have occurred in developing the implementation plan for Arizona. *See id.* at 1365.

70. *Id.* at 1370. The district court did find that a final plan existed for complying with the air quality standards of the CAA. *See id.* at 1367. The EPA argued that the plan referenced by the district court was itself incomplete. *See id.* at 1370. This plan also relied on other provisions which were not explicitly contained in the plan. *Id.* Using the logic of the district court, no final approved plan would exist for Arizona. *Id.*

71. *See id.* at 1370.

72. *Id.* at 1368 (citing *Kamp v. Hernandez*, 752 F.2d 1444 (9th Cir. 1985)).

73. *See Kamp*, 752 F.2d at 1455. *Kamp* involved the EPA's approval of SIPs submitted by Arizona to limit sulfur dioxide emissions from copper smelters. *See Id.* at 1446. The EPA's approval of the plan was challenged by a resident of Arizona. *Id.* One of the contentions raised by the resident was that the plan approved by the EPA was not final. *See id.* at 1449. The plan did not account for

An SIP's absolute compliance with Section 7410(a)(2) of the CAA is not required before the EPA can confirm the SIP.⁷⁴ The EPA can approve a substantially complete implementation plan if the state provides the EPA assurances that the plan will be promptly finished.⁷⁵ The *Kamp* court added that the EPA could not consider the plan substantially complete if the plan circumvented the requirements of the CAA.⁷⁶

In comparing *Kamp* to *McCarthy*, the Ninth Circuit found that both plans were substantially complete.⁷⁷ Whether the EPA approved the plan as final with actions pending, as in *Kamp*, or conditionally approved with actions pending, as in *McCarthy*, was irrelevant.⁷⁸ In either case, the plans would be equally enforceable.⁷⁹ The Ninth Circuit held that the plan submitted in 1982 by Arizona was "substantially complete."⁸⁰ Applying the holding in *Kamp*, the Ninth Circuit found that the mass transit provisions were part of an enforceable plan and were binding on the cities.⁸¹

sulfur dioxide emissions that escape during the smelting process. *See id.* at 1453. The plan did require that Arizona study and submit revised measures to show how these emissions would be controlled. *See id.* at 1449. The court found this type of contingent or "conditional" approval to be allowed by the CAA. *Id.* at 1454.

74. *Id.* at 1455. This section of the CAA provides the elements that each state must include within its SIP. *See* 42 U.S.C. § 7410(a)(2) (1988 & Supp. V 1993).

75. *See Kamp*, 752 F.2d at 1453-54.

76. *See id.* at 1455. The *Kamp* court did not define what made a plan substantially complete. The author believes from the holding in *Kamp* that this decision would depend on the facts of the particular case. Per the 1990 amendments to the CAA, the EPA can conditionally approve a plan if the state commits to adopt specific enforceable measures by a certain date. 42 U.S.C. § 7410(k)(4).

77. *McCarthy*, 27 F.3d at 1368. The court looked to the conditional approval that the EPA made in 1982. *See id.* at 1368. The deficiencies that the EPA had found in the plan were deemed to be minor by the court. *Id.* at 1368. The Ninth Circuit in *Kamp* held that the EPA could approve plans that were substantially complete. *Kamp*, 752 F.2d at 1455. Since the deficiencies in *McCarthy* were deemed as minor, the EPA approval was binding on the state. *See McCarthy*, 27 F.3d at 1369. Calling the approval conditional did not impact its effect on the state. *Id.*

78. *McCarthy*, 27 F.3d at 1369.

79. *Id.*

80. *Id.* at 1368-69.

81. *McCarthy*, 27 F.3d at 1369. The court's holding in *Kamp* was that the EPA has the authority to approved SIPs that are substantially complete. *Kamp*, 752 F.2d at 1455.

C. AGENCY READING OF STATUTE NEED MERELY BE REASONABLE AND NEED NOT CONSTITUTE THE ONLY INTERPRETATION

The Ninth Circuit analyzed the reasonableness of the EPA's view that the CAA authorized the EPA to conditionally approve SIPs.⁸² The court looked at the agency's action in light of the pre-1990 provisions of the CAA, which allowed the EPA to approve any "submitted plan or portion thereof."⁸³ The Ninth Circuit concurred with the EPA's interpretation that ratifying a portion of a plan would be meaningless unless the endorsed portion was binding.⁸⁴ Pursuant to this interpretation, the Ninth Circuit held that the portion of the plan that is confirmed by the EPA becomes binding on the date it is approved.⁸⁵ The court found that endorsing measures which partially ensure compliance in nonattainment areas was similar to approving a portion of a plan.⁸⁶ Therefore, the court found that the EPA had authority under the CAA to ratify provisions of a plan even if the plan as a whole was incomplete.⁸⁷

The court found an alternate basis allowing conditional approvals of SIPs in Section 7410(c)(1) of the CAA, which defines when the EPA must issue a Federal Implementation Plan (hereinafter "FIP").⁸⁸ A state can stop the EPA from issuing

82. *McCarthy*, 27 F.3d at 1368.

83. *Id.* at 1369 (citing 42 U.S.C. § 7410(a)(2) (1988)).

The CAA underwent major revisions in 1990. See generally RODGERS, *supra* note 35, at Chapter 3. The 1990 amendments to the CAA clarified the EPA's authority to either partially or conditionally approve plans. See *McCarthy*, 27 F.3d at 1369 (citing, 42 U.S.C. § 7410(k)(3) and 42 U.S.C. § 7410(k)(4)). The SIPs litigated in *McCarthy* were prepared prior to the 1990 amendments to the CAA. See *id.* at 1365-67.

84. *McCarthy*, 27 F.3d at 1369.

85. See *id.* The court stated that conditional measures become part of the final plan when the EPA approves the measures. *Id.*

86. *McCarthy*, 27 F.3d at 1369.

87. See *id.* The court viewed the CAA as allowing the EPA to approve implementation plans incrementally. *Id.*

88. See *id.* (citing 42 U.S.C. § 7410(c)(1) (1988)). As discussed in the background section of this summary, the state is the party responsible for implementing measures in the SIP to meet NAAQS. 42 U.S.C. § 7410(a)(1) (1988 & Supp. V 1993). The EPA is required to issue a FIP only if the state fails to submit a plan that the EPA can approve. See 42 U.S.C. § 7410(c). The state can stop the EPA from issuing a FIP if it corrects its plan. *Id.* The state can submit corrections up till the time that the EPA issues its FIP. *Id.* When that occurs, the FIP is bind-

an FIP if the state corrects the deficiencies in the plan.⁸⁹ The Ninth Circuit interpreted Section 7410(c)(1) as allowing the EPA to confirm a plan with conditions, prior to granting full approval.⁹⁰ This reading of the CAA was viewed as reasonable by the court since the CAA already allowed the EPA to approve portions of plans.⁹¹

In *McCarthy*, the EPA acted to endorse mass transit provisions to help achieve air quality standards for CO.⁹² At the same time, the EPA stayed final approval until additional control measures were added.⁹³ The EPA had noted only minor deficiencies in their action, confirming the SIP for Pima and Maricopa counties.⁹⁴ The Ninth Circuit deemed that the EPA's actions were a reasonable interpretation of the CAA.⁹⁵ In reaching this decision, the Ninth Circuit stated that the reading of the statute by the EPA need merely be reasonable and need not constitute the only interpretation.⁹⁶

The court then summarized actions taken by the EPA in the present case.⁹⁷ The EPA was provided with a plan for Maricopa and Pima counties to help those counties meet air quality standards by increasing mass transit in Tucson and Phoenix.⁹⁸ These measures, approved by the EPA in the "notice of final rulemaking" published in the Federal Register in 1982, were to take effect with full approval pending.⁹⁹ The Ninth Circuit found that these actions were reasonable and fully consistent with the interpretation of the CAA made by the EPA.¹⁰⁰ The Ninth Circuit therefore held that the agency

ing on the state. *Id.*

89. *McCarthy*, 27 F.3d at 1369 (citing 42 U.S.C. § 7410(c)(1) (1988)).

90. *Id.*

91. *See id.* In addition the court noted that this incremental approach would help ensure that NAAQS would be met expeditiously as required by the CAA. *Id.* (citing 42 U.S.C. § 7502(a) (1988)).

92. *Id.* at 1365.

93. *Id.*

94. *See McCarthy*, 27 F.3d at 1368.

95. *Id.* at 1369-70.

96. *See id.* at 1369 (citing *City of Seabrook v. EPA*, 659 F.2d 1349, 1356 (5th Cir. 1981)).

97. *McCarthy*, 27 F.2d at 1369.

98. *Id.* (citing 47 Fed. Reg. 19328, 29534 (1982)).

99. *Id.* at 1365 (citing 47 Fed. Reg. 29532-29534 and 47 Fed. Reg. 19326-28 (1982)).

100. *Id.* at 1369, 1370 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense*

action should be given deference.¹⁰¹

D. PIMA AND MARICOPA COUNTIES ARGUMENT

The cities' first argument relied on the decision of the Ninth Circuit in *Delaney v. Environmental Protection Agency*.¹⁰² In *Delaney*, concerned citizens attacked the EPA's approval of the SIPs for Pima and Maricopa counties.¹⁰³ The appellants in *Delaney* argued that the SIPs approved by the EPA did not include adequate control measures for CO.¹⁰⁴ In its analysis, the court listed the particular pollution control measures for CO that were included in the SIPs.¹⁰⁵ The *Delaney* court also noted that specific recommendations to expand mass transit in Maricopa and Pima counties had been rejected by the state.¹⁰⁶ The cities relied on the statements in *Delaney* to show that mass transit improvements were not part of the approved SIPs for Pima and Maricopa counties.¹⁰⁷

However, the Ninth Circuit distinguished the mass transit measures discussed in *Delaney* from those in *McCarthy*.¹⁰⁸ The Ninth Circuit stated that the mass transit measures referenced in *Delaney* were additional measures that the state had considered.¹⁰⁹ Therefore, the rejection of these later provi-

Council, 467 U.S. 837 (1984)).

101. *Id.* at 1370. In *Chevron* the Court had adopted a two part test for reviewing agency decisions. See *Chevron*, 467 U.S. at 842. See generally PERCIVAL et al., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY, 746-54 (1992) for a discussion of the *Chevron* holding. The first part of the *Chevron* test looked to the statute to determine if it were clear on its face. See *id.* If the statute was not ambiguous, agency decisions were to be given deference unless they were found to be an abuse of discretion. See *id.*

102. *McCarthy v. Thomas*, 27 F.3d 1363, 1371 (citing *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990)).

103. See *Delaney*, 898 F.2d at 692.

104. *Id.* at 691-92.

105. *Id.* at 691. The court listed three control measures as being included in the EPA approved SIPs for Pima and Maricopa counties: 1) gas stations must sell only oxygenated fuels in the winter when CO levels are the highest; 2) large employers must encourage car pooling; and 3) automobile inspections must test car emissions while under load and at idle. *Id.*

106. See *id.* at 692.

107. *McCarthy*, 27 F.3d at 1371 (citing *Delaney*, 898 F.2d at 691).

108. *Id.*

109. See *id.* at 1370. The mass transit measures discussed in *Delaney* came from studies done in 1987 and 1988. See *Delaney*, 898 F.2d at 691. The mass

sions had no impact on the earlier mass transit provisions approved by the EPA.¹¹⁰

The City of Tucson asserted that the mass transit provisions were not valid, based on the Ninth Circuit's decision in *Arizona v. Thomas*.¹¹¹ The *Arizona* court found that the SIPs for Pima and Maricopa counties were inadequate, and upheld the imposition of sanctions by the EPA against Arizona.¹¹² Tucson argued that if an SIP was judged to be inadequate, all previous provisions included in those plans were voided.¹¹³ However, the court stated that Tucson applied too "expansive" a reading to the holding in *Arizona*.¹¹⁴ The decision reached in *Arizona* only upheld the EPA's determination that the SIP for Pima and Maricopa counties would not achieve air quality standards in a timely manner.¹¹⁵ The EPA's use of sanctions was, therefore, upheld by the court in that case.¹¹⁶ The decision in *Arizona*, according to the Ninth Circuit, did not disturb any prior control measures approved by the EPA.¹¹⁷

Finally, Tucson relied on *California ex rel. California Air Resources Bd. v. EPA*¹¹⁸ to support the proposition that disapproved or deleted provisions of a state implementation plan are not enforceable.¹¹⁹ In *California Air Resources Board*, Nevada and California both had SIPs that included the Lake Tahoe

transit improvements were not the same as the ones committed to in 1979. *McCarthy*, 27 F.3d at 1371.

110. *Id.* at 1371.

111. *Id.* (citing *Arizona v. Thomas*, 829 F.2d 834 (9th Cir. 1987)). *Arizona* challenged the EPA's right to impose bans on construction of new sources of CO. *Arizona*, 829 F.2d at 835. These sanctions were imposed by the EPA after a finding that the Arizona SIP was inadequate. *Id.* *Arizona* argued that the EPA should have allowed Arizona a chance to revise the SIPs prior to imposing the sanctions. *See id.* at 837-38. *Arizona* based this argument on the fact that the EPA had conditionally approved the SIPs. *Id.* at 838. The court held that the Arizona SIPs were inadequate, and allowed the EPA to impose the sanctions. *See id.* at 840.

112. *See Arizona*, 829 F.2d at 840.

113. *McCarthy*, 27 F.3d at 1371.

114. *Id.* at 1371.

115. *Id.*

116. *Arizona*, 829 F.2d at 840.

117. *McCarthy*, 27 F.3d at 1371.

118. *California ex rel. California Air Resources Bd. v. EPA*, 774 F.2d 1437 (9th Cir. 1985).

119. *McCarthy*, 27 F.3d at 1372 (citing *California Air Resources Bd.*, 774 F.2d 1437).

Basin area which borders the two states.¹²⁰ The states were in court challenging the adequacy of each other's SIP for this region.¹²¹ The *California Air Resources Board* court held that a state does not have to include all pollution control measures from an earlier plan in future revisions.¹²² The *McCarthy* court distinguished *California Air Resources Board* by noting that the mass transit measures proposed by Maricopa and Pima counties had never been deleted.¹²³ Therefore, Tucson's reliance on *California Air Resources Board* was misguided.¹²⁴

In addition to Tucson's arguments, the City of Phoenix raised two additional challenges.¹²⁵ The first was that the mass transit provisions of 1982 were invalid since they did not comply with the CAA.¹²⁶ Phoenix argued that the CAA required that measures submitted in implementation plans be backed up by written evidence.¹²⁷ The written evidence would include information showing local government support for the measures, and a timetable and schedule for compliance.¹²⁸ The city reasoned that because the transit measures approved by the EPA in 1982 failed to meet this requirement, they were never enforceable.¹²⁹ The court dismissed this argument as being untimely because Phoenix had sixty days to object to the EPA approval after it was granted in 1982.¹³⁰ By failing to

120. *California Air Resources Bd.*, 774 F.2d 1437. The EPA had approved the SIPs for both California and Nevada that included the Lake Tahoe Basin. *Id.* at 1439. Both states were challenging the EPA's approval of the other's SIP for this region. *Id.* Each state was contesting that the other state's SIP was inadequate to meet the air quality standards for the Lake Tahoe Basin. *See id.* at 1440 and 1442. The court upheld the EPA's approval of both state's SIPs. *See id.* at 1443.

121. *California Air Resources Board*, 774 F.2d at 1439.

122. *See McCarthy*, 27 F.3d at 1372. The decision in *California Air Resources Board* was that a state should be allowed the flexibility to experiment with its pollution control measures. *See California Air Resources Board*, 774 F.2d at 1442. Such experimentation may mean that certain measures once thought to be beneficial are dropped, and replaced with new measures. *Id.*

123. *McCarthy*, 27 F.3d at 1371.

124. *See Id.*

125. *Id.*

126. *Id.* at 1372. Phoenix' argument attacked the EPA conditional approval of the SIP more on procedural than substantive grounds. *Id.*

127. *McCarthy*, 27 F.3d at 1372.

128. *Id.*

129. *Id.*

130. *Id.* *See generally* PERCIVAL, *supra* note 101 at Chapter 5 for an overview of the administrative process for approval of agency regulations.

object, Phoenix waived the right to challenge that approval.¹³¹

Phoenix' second argument questioned the court's interpretation of the CAA, claiming that the court's reading would place a significant burden on states when challenging agency action.¹³² Phoenix argued that the court's view would require an extended search of past EPA approvals to determine the current enforceable pollution control measures.¹³³ The Ninth Circuit indicated that Phoenix overstated the difficulty of this task because this information could be found by looking at the Code of Federal Regulations and the Federal Register.¹³⁴ Also, the court reasoned that the state could look to its own files to determine what provisions were submitted to the EPA.¹³⁵

E. THE COURT'S HOLDING: EPA'S CONDITIONAL APPROVAL OF AN SIP IS BINDING AND DOES NOT RESULT IN THE DELETION OF THE TRANSPORTATION PROVISIONS FROM THE SIP

The Ninth Circuit analyzed the issues raised and held that the district court's ruling was based on an incorrect premise.¹³⁶ The court found that measures approved conditionally by the EPA are binding on the state.¹³⁷ These measures remain in later plans without requiring the EPA to specifically reference them in later notices of final approval.¹³⁸ The mass transit measures were enforceable when incorporated into the SIP in 1982, and since the provisions were never deleted, are still enforceable.¹³⁹

131. *McCarthy*, 27 F.3d at 1372.

132. *See id.* Phoenix' claim was that the EPA's record made it difficult to track current enforceable measures. *See id.*

133. *Id.*

134. *Id.* at 1372-73.

135. *Id.*

136. *McCarthy v. Thomas*, 27 F.3d 1363, 1373 (9th Cir. 1994). The district court did not view the mass transit provisions as being part of any plan receiving final approval by the EPA. *Id.*

137. *Id.* at 1373.

138. *Id.*

139. *Id.* Although the court found that the provisions were still enforceable, the court stopped short of forcing the cities to comply with the measures. *See id.* Instead the court remanded the case to the district court to determine the final

V. CONCLUSION

The Clean Air Act has broad and ambitious goals to protect the public health and welfare.¹⁴⁰ However, its implementation has taken many years, ignited much litigation, and its goals have still not been fully achieved.¹⁴¹ Each state is given the opportunity to devise its own plan for reaching these goals.¹⁴² However, full compliance with the CAA requires some tough policy decisions and sacrifices on the part of the state that may impact economic growth. After twenty years, many states remain without acceptable plans in place to cope with air pollution.¹⁴³

In *McCarthy*, the Ninth Circuit was unsympathetic to Arizona's plea that it was unfair to hold it hostage to provisions submitted years in the past.¹⁴⁴ A state's decision to commit to provisions to help lower air pollution binds the state to these measures until they are complete.¹⁴⁵

The Ninth Circuit's decision puts the states on notice that the court will not permit them to circumvent standards for controlling air pollution. A state cannot claim that each time it submits a new plan to the Environmental Protection Agency (hereinafter "EPA") the slate is wiped clean, and all previous plans are no longer applicable. This interpretation grants the state too much discretion, and would thwart Congress and the EPA in achieving the ever elusive goals of the CAA.

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remedy. *Id.* The author believes that this was most likely done to allow the state the opportunity to reach a settlement with the citizen group.

140. See generally WILLIAM H. RODGERS, ENVIRONMENTAL LAW, Chapter Three (1994).

141. See generally PERCIVAL et al., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY, Chapter Six (1992).

142. See 42 U.S.C. § 7410 (1988 & Supp. V 1993). This section outlines the steps that a state must consider in preparing its plan for complying with the CAA. See *id.*

143. See generally RODGERS, *supra* note 140, at Chapter Three. This chapter has a thorough discussion of the various policy decisions and economic impacts of compliance with the CAA. See *id.*

144. See *McCarthy v. Thomas*, 27 F.3d 1363, 1373 (9th Cir. 1994).

145. *Id.*

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