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Federal Implementation Plans for Controlling Carbon Emissions from Existing Power Plants: A Primer Exploring the Issues

By Daniel P. Selmi

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Executive Summary: Much has been made of late about EPA's authority to develop federal implementation plans (FIPs) to achieve the state-based GHG emissions reduction targets the agency is preparing establish under Clean Power Plan. Led by Senator Mitch McConnell, objectors have loudly urged states not to submit plans at all. Instead, they have argued, states need not be concerned about EPA imposing FIPs on their states. In turn, EPA has announced that it will release a draft federal implementation plan this summer.

Since 1970, Section 110 the Clean Air Act has required EPA to implement a FIP if a state implementation plan (SIP) fails to include measures that will assure attainment of the national ambient air quality standards. The FIP/SIP dynamic under Section 110 is well-established. The analogous provisions of Section 111 of the Act, by contrast, which give the Administrator "the same authority" as she would have under Section 110 to prescribe a plan where a state "fails to submit a satisfactory plan" to meet standards set under Section 111, are new regulatory terrain.

Because FIPs are not well-known, Daniel Selmi, a Visiting Scholar at the Center and Professor of Law at Loyola Law School, Los Angeles, has prepared a "primer" that answers basic questions about FIPs. The essay is organized into three parts: (1) the circumstances under which EPA will promulgate a FIP under Section 111; (2) the content and effect of such a FIP; and (3) the enforcement of a FIP. The discussion is written in an accessible, plain language style that will be understandable to both lawyers and non-lawyers.

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FEDERAL IMPLEMENTATION PLANS FOR CONTROLLING CARBON EMISSIONS FROM EXISTING POWER PLANTS: A PRIMER EXPLORING THE ISSUES

*Daniel P. Selmi**

The Environmental Protection Agency (EPA) has set a target date of summer 2015 for adopting final regulations under Section 111 of the Clean Air Act¹ that will limit greenhouse gas emissions from existing power plants. A number of politicians² and commentators³ have argued that states should refuse to comply with those upcoming EPA regulations. In turn, EPA has announced that it will issue draft regulations for so-called “Federal Implementation Plans” (“FIPs”).⁴ EPA would implement these FIPs in states that do not adopt their own plans complying with EPA’s rules.

Because the FIP process may play an important role in the implementation of the rules regulating existing power plants, this essay explores the basic issues that a FIP presents within the context of those rules. The essay is intended as a general source of information on the legal background of FIPs for both lawyers and non-lawyers. Where definitive legal statements about FIPs are possible, the paper gives them. Where outcomes on legal issues are less clear, the essay outlines the parameters of the uncertainty. It presents this information in a “question and answer” format and does not assume basic knowledge of the FIP process under the Clean Air Act (“Act”).

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¹ 42 U.S.C. § 7411.

² See Coral Davenport, *McConnell Urges States to Help Thwart Obama ‘War on Coal,’* N.Y. Times (Mar. 19, 2015) 1, http://www.nytimes.com/2015/03/20/us/politics/mitch-mcconnell-urges-states-to-help-thwart-obamas-war-on-coal.html?_r=0 (Senator McConnell “has taken the unusual step of reaching out to governors with a legal blueprint for them to follow to stop the rules in their states.”)

³ See Peter S. Glaser et al., *EPA’s Section 111(d) Carbon Rule: What if States Just Said No?*, The Federalist Society (Nov. 2014), <http://www.fed-soc.org/publications/detail/epas-section-111d-carbon-rule-what-if-states-just-said-no>. See Aaron Larson, *States Can “Just Say No” to the EPA’s Carbon Rule, Expert Says*, Power Magazine (Feb. 10, 2015), <http://www.powermag.com/states-can-just-say-no-to-the-epas-carbon-rule-expert-says/>.

⁴ See U.S. Environmental Protection Agency, EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards, 2, <http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-carbon-pollution-standards-key-dates> (listing Summer 2015 as the date EPA “plans to propose a federal plan for meeting Clean Power Plan goals. . .”)

The questions addressed are grouped into three categories: (1) the circumstances under which EPA will promulgate a FIP; (2) the content and effect of a FIP; and (3) the enforcement of a FIP.

1. THE CIRCUMSTANCES UNDER WHICH EPA WILL PROMULGATE A FEDERAL IMPLEMENTATION PLAN

1.1 What action or inaction by a state triggers a Federal Implementation Plan under Section 111?

Answering this question requires an introductory discussion of the framework established by Section 111 for regulating existing sources of air pollution. EPA contends that Section 111 authorizes it to adopt goals that limit the total amount of carbon emissions from power plants.⁵ States then prepare plans establishing “standards of performance” that ensure these statewide limitations are met:

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any [specified] air pollutant... and (B) provides for the implementation and enforcement of such standards of performance.⁶

The reference in Section 111 to section 7410 (i.e., Section 110 of the Clean Air Act⁷) reflects the Congressional intent that the process for submission of plans under Section 111 be “similar” to the process under Section 110 of the Act. Under Section 110, states adopt “state implementation plans” to attain “National Ambient Air Quality Standards,” which EPA also establishes.⁸ Thus,

⁵ *Id.* EPA has defined “emission guideline” as:

(e) *Emission guideline* means a guideline set forth in subpart C of this part, or in a final guideline document published under [§ 60.22\(a\)](#), which reflects the degree of emission reduction achievable through the application of the best system of emission reduction which (taking into account the cost of such reduction) the Administrator has determined has been adequately demonstrated for designated facilities.

40 C.F.R. § 60.21(e).

⁶ 42 U.S.C. § 7411(d).

⁷ 42 U.S.C. § 7410.

⁸ 42 U.S.C. § 7410(a)(1) (“(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under [section 7409](#) of this title for any air

under Section 110, states submit plans to EPA that must attain the air quality standards, while under Section 111, states submit plans to EPA containing standards of performance that must meet the goals for existing sources established by EPA.

The question then becomes: what happens if a state fails to submit a plan under Section 111 or submits a plan that does not fully comply with EPA's regulations? Section 111(d)(2) addresses this issue by, once again, referring to Section 110:

- (2) The Administrator shall have the same authority--
 - (A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) [Section 110(c)] of this title in the case of failure to submit an implementation plan....⁹

In turn, Section 110 states that "The [EPA] Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator": (1) finds that a state has failed to make a required submission or that the state plan submitted "does not satisfy" the minimum criteria in Section 110(k)(1)(A), or (2) "disapproves a State implementation plan submission in whole or in part," unless the State corrects the deficiency and the Administrator approves the correction before the Administrator promulgates the plan.¹⁰

Thus, by analogy to Section 110, the Administrator's obligation to promulgate a FIP under Section 111 is triggered by: (1) a state failure to submit any plan; (2) a state failure to submit a plan that satisfies the minimum criteria for the plan as established by EPA; or (3) an EPA disapproval of a state plan. In the past, EPA has taken the position that, if a state fails to submit an approvable plan, EPA may immediately act to implement a FIP even if it has not yet actually disapproved the state submittal.¹¹

pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State..."

⁹ 42 U.S.C. § 7411(d)(2).

¹⁰ 42 U.S.C. § 7410(c)(1)(A),(B).

¹¹ See, e.g., Approval and Promulgation of Air Quality Implementation Plans; States of Michigan and Minnesota; Regional Haze, 78 Fed. Reg. 8478, 8484 (Feb. 6, 2013) ("EPA notes that the agency's mandate to promulgate such a FIP applies without regard to whether EPA has disapproved a state submittal. While EPA has proposed to disapprove Michigan and Minnesota's regional haze SIPs in this instance, publication of final disapproval of the states' submittals is not a prerequisite for promulgating a FIP, and EPA must promulgate a FIP in these circumstances irrespective of whether it has disapproved the state submittals.") For example, if a state plan plainly omitted key components that were required, then EPA could conclude immediately that the plan was insufficient.

1.2 If a state refuses to submit a legally sufficient plan to EPA, must EPA automatically adopt a FIP for that state?

The Administrator has the “same authority” to prescribe plan under Section 111 as she “would have under Section 7410(c) [i.e. Section 110].”¹² The language of Section 110 is mandatory: “The Administrator shall promulgate a Federal implementation plan” under the circumstances specified.¹³ Courts have found that, under Section 110, the Administrator possesses a non-discretionary duty to promulgate a plan in these instances.¹⁴ Given that the Administrator has the “same authority” under Section 111 as she would have under Section 110, the logical conclusion is that Section 111 likewise mandates the Administrator to promulgate a FIP.

This conclusion is consistent with Congress’s intent in enacting the FIP provisions of Section 110. Congress established a regulatory structure that favors state plans but requires FIPs as a backup in case of state defaults.¹⁵ The legislative history of the 1990 Amendments to the Clean Air Act describes this mandatory duty: “When a State fails to develop a plan that meets the requirements of the law, the EPA is required to promulgate a Federal Implementation Plan.”¹⁶

1.3 Does a lawsuit to compel state adoption of a plan constitute an alternative to EPA's promulgation of a FIP?

Both Section 111 and Section 110 on their face require states to submit compliance plans. Section 111 says “each State shall submit to the Administrator a plan,” while Section 110 declares that “each State shall...adopt and submit to the Administrator...a plan...”

The courts, however, have held that this facially mandatory language in Section 110 is actually directory, and states may choose not to submit a plan. While the issue has not been widely litigated, the Courts' rationale is that the Clean Air Act establishes a specific remedy for a

¹² 42 U.S.C. § 7411(d)(2)(A).

¹³ 42 U.S.C. § 7410(c)(1).

¹⁴ See, e.g., *Coalition for Clean Air v. Southern California Edison Co.*, 971 F.2d 219, 224 (9th Cir. 1992)

¹⁵ At a minimum, if Section 111 does not mandate a FIP in the case of a state default, it unquestionably authorizes one. This interpretation, however, would find that the Administrator has discretion under Section 111, but not under Section 110. Thus, under that interpretation, if the Administrator did not promulgate a FIP, a state default would leave the source under Section 111 unregulated.

¹⁶ 1990 U.S. Code Cong. & Admin. News 3867, 3868.

failure to submit a plan: EPA must step in and promulgate a FIP.¹⁷ The same result -- a finding that a state plan is not mandatory -- should obtain under Section 111. Additionally, the case law under the Tenth Amendment precludes the federal government from "commandeering" states to enforce a federal program.¹⁸ The courts would likely treat a state failure to submit a plan under Section 111 in light of that case law. The remedy would be a FIP under Section 111, not a court order compelling a plan.

1.4 What if a State refused to submit a plan and EPA failed to adopt a FIP?

As discussed above, the Clean Air Act mandates EPA to adopt a FIP for a state under specified circumstances. If EPA refuses to do so, a citizen could bring a "citizen suit" under Section 304 of the Act to compel EPA's adoption of the FIP.¹⁹ Section 304 confers jurisdiction in the United States District Courts over actions "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator..."²⁰ Here, the statute does not confer discretion upon EPA; it "shall promulgate" the FIP under the circumstances that the statute outlines.

¹⁷ District of Columbia v. Train, 521 F.2d 971, 983-84 (D.C. Cir. 1975), *vacated sub nom*, EPA v. Brown, 431 U.S. 99 (1977), (citing Plan for Arcadia v. Anita Associates, 379 F. Supp. 311 (C.D. Cal. 1973) *aff'd* 501 F.2d 390 (9th Cir. 1974).)

¹⁸ See, e.g., New York v. United States, 505 U.S. 144, 176 (1992) (Low-Level Radioactive Waste Policy Act "commandeers the legislative processes of the states," an outcome not allowed by the Tenth Amendment).

¹⁹ 42 U.S.C. § 7604. See, e.g., Assessment of Visibility Impairment at the Grand Canyon National Park: Advance Notice of Proposed Rulemaking, 64 Fed. Reg. 32458, 32460 ("Most states did not meet the September 2, 1981 deadline for submitting a SIP revision to address visibility protection. A number of environmental groups filed a citizen suit seeking to compel EPA to promulgate its own visibility implementation plans for the states that had failed to submit SIPs to EPA, pursuant to section 110(c) of the Act.")

²⁰ *Id.* § 7604(a)(2). See, e.g., Environmental Defense Fund v. Thomas, 870 F.2d 892, 896 (2d Cir. 1989), *cert. den.* Alabama Power Co. v. Environmental Defense Fund, 493 U.S. 991 (1989) ("Because the duty to make *some* decision is non-discretionary, it is enforceable under Section 304 in the district courts.") (emphasis in original); Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987) ("Congress provided for district court enforcement under section 304 in order to permit citizen enforcement of 'clear-cut violations by polluters or defaults by the Administrator' where the only required judicial role would be to make a clear-cut factual determination of whether a violation did or did not occur...") Compare: Friends of the Earth v. U.S. E.P.A., 934 F. Supp. 2d 40, 51-52 (D.D.C. 2013) ("Since the language of the statute does not clearly create a mandatory duty to undertake the endangerment analysis, the Court concludes that it cannot compel the agency to begin under section 304. . . .")

2. THE EFFECT AND CONTENT OF A FEDERAL IMPLEMENTATION PLAN

2.1 When must a FIP be promulgated and take effect?

Section 111 does not establish time limits for the promulgation of a FIP. However, as discussed above, the statute declares that the Administrator of EPA shall have “the same authority ... to prescribe a plan for a State ... as he would have under section 7410(c) [i.e. Section 110(c)]...”²¹

Section 110(c)(1) states:

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.²²

The “authority...to prescribe a plan” under Section 110 includes time limits for promulgating the FIP. EPA must act “within 2 years” after the Administrator (1) makes certain findings regarding the state failure to submit a plan or the inadequacy of that submission, or (2) disapproves the state submission.²³ The two-year time period prescribed in Section 110 for promulgating a FIP presumably applies under Section 111 as well.

An alternative reading of Section 111(d) might be that the “same authority” phrase refers only to the power to adopt a FIP and not to its timing. But under this alternate interpretation, the FIP authority under Section 111 would no longer parallel the FIP authority under Section 110, while Congress generally intended to link the two. Moreover, EPA’s announcement that it is currently preparing a FIP under Section 111 may indicate the agency’s belief that it is subject to, or intends to abide by, the time limits established in Section 110.

²¹ 42 U.S.C. § 7411(d)(2)(A).

²² 42 U.S.C. § 7410(c)(1).

²³ *Id.*

The two year period is a maximum. Nothing would prevent the Administrator, as she has done in the past, from making the required findings concerning a state plan and then simultaneously implementing the FIP.

Finally, the precise date when a FIP becomes effective will depend on when EPA completes the rulemaking process to implement it.

2.2 How long does a FIP bind a state?

Section 111 does not address this question, but other provisions of the Clean Air Act do so. First, in mandating the Administrator to impose a FIP after she disapproves a state implementation plan, Section 110 includes an exception: “unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.”²⁴ A state correction of its plan deficiency that EPA has approved thus can occur up to the time when the Administrator actually puts the FIP in place. The Act’s intent to prefer a state plan over a federal one is apparent. As the Supreme Court stated in Train v. Natural Resources Defense Council:

The Act gives the Agency no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c)...²⁵

Second, the statutory definition of the term “federal implementation plan” indicates that the FIP plays a secondary role as a “gap-filler” where States have not met the required standard. Section 302 of the Act defines “federal implementation plan” as a “plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan...”²⁶

²⁴ 42 U.S.C. § 7410(c)(1).

²⁵ 421 U.S. 60, 79 (1975)

²⁶ 42 U.S.C. § 7602(y).

Finally, EPA's past practice under Section 110 has been to rescind FIPs whenever a state produces a compliant plan. Its proposed regulations for existing power plants indicate that the agency will automatically withdraw any federal plan when EPA approves a state plan.²⁷

In sum, a FIP will bind a state until the state produces a compliant plan, and EPA then formally approves that plan and rescinds the FIP.

2.3 Can a state delay any response until after EPA promulgates a Federal Implementation Plan and then decide to submit a plan that complies?

Nothing in Section 111 or the related provision of Section 110 prevents a state from submitting a plan after EPA has implemented a FIP. Further, as indicated in the response to last question, Congress intended the State plan to act as the primary vehicle for complying with federal standards. In the vast majority of situations where EPA has imposed FIPs in the past, states have eventually submitted plan revisions that were legally sufficient, and in approving them EPA has automatically revoked the FIP that it previously put in place.²⁸

2.4 What procedure does EPA use to adopt a FIP?

As with other rules, EPA adopts a federal implementation plan through a notice and comment rulemaking process. Accordingly, the upcoming FIP that EPA has promised will be a draft regulation that EPA will send out for public comment before finalizing. So the FIP that EPA will release in summer 2015 will be subject to change after comment by members of the public.

²⁷ Proposed Rule 4 C.F.R. 60.5720 ("The Federal plan is an interim action and will be automatically withdrawn when your state plan is approved.")

²⁸ See, e.g., 77 Fed. Reg. 73320 (Dec. 10, 2012) Approval of Air Quality Plans ("EPA is taking final action under section 110 of the Clean Air Act (CAA) to approve a State Implementation Plan (SIP) revision for the South Coast Air Quality Management District (SCAQMD or District) portion of the California State Implementation Plan (SIP)...In addition, upon the effective date of this action, the District is no longer subject to the Federal Implementation Plan (FIP) at 40 CFR 52.21 as it pertains to GHGs."); 77 Fed. Reg. 64414 (Oct. 22, 2012) Approval and Promulgation of Air Quality Implementation ("If the Virgin Islands at any time decide to submit a SIP revision to incorporate provisions that would be approvable as a SIP revision for a regional haze plan, EPA would welcome that submittal. If EPA were to approve such a SIP revision, after public notice and comment, the SIP provisions would replace EPA's FIP.")

2.5 What must a Section 111 FIP accomplish?

A FIP under Section 111 replaces all or part of a plan that a state either did not submit or submitted in an inadequate form. Under the proposed regulations here, the purpose of a state plan is to meet the emission reduction goal that EPA has set for a state. This goal—a number—acts as an emissions cap for the state’s emissions of carbon dioxide.²⁹ So all FIPs must meet this goal.

2.6 What generally determines the measures that EPA will include in a FIP?

As discussed above, the purpose of a FIP is to fill in what is missing from the state plan. Thus, the nature of the deficiency in the state plan dictates the scope of EPA’s discretion. If what is missing from or deficient in the state plan is minor, then EPA’s discretion would be limited to fixing that minor problem. In contrast, if a state refuses to submit any plan to EPA, then EPA would be required to adopt a FIP that achieved the goal of the non-existent or inadequate state submission: attainment of the emission reduction goal established by EPA.

2.7 Which sources can EPA regulate in a FIP?

Section 111 requires state plans to establish “standards of performance for any existing source” that, in the case of EPA’s power plant rules, emits carbon pollution.³⁰ Section 111 defines the term “existing source” to mean “any stationary source other than a new source.”³¹ In turn, Section 111 then defines “stationary source” to mean “any building, structure, facility, or installation which emits or may emit any air pollutant.”³²

Under these definitions, EPA can regulate any existing sources that are emitting or may emit carbon dioxide, the pollutant in question. This universe of sources would include electricity generating units within the state. EPA might well limit the regulatory scope of its FIP to this category of sources.

²⁹ Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830, 34895 (June 8, 2014).

³⁰ 42 U.S.C. § 7411(d)(1).

³¹ *Id.* § 7411(a)(6).

³² *Id.* § 7411(a)(3).

However, in proposing emission guidelines for the states, EPA has taken the position that Section 111 allows it to consider reductions beyond these individual sources (i.e. reductions that can be made "beyond the fence line" of these sources). Its interpretation rests on the phrase "standard of performance," which Section 111 defines to mean:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.³³

The Act does not define the term "best system of emission reduction." In its proposed rulemaking, EPA reads the term to extend beyond literal emitters of carbon dioxide to include other means of reducing emissions through use of alternative sources of energy and energy conservation. In setting the emission goal for each state, EPA's draft regulations take these factors (or "building blocks," in EPA terminology) into account.³⁴

Could a FIP adopted by EPA regulate all parts of this "best system" that the agency has identified for a particular state? For example, could a FIP include measures that require existing distributors of electricity to take actions that reduce the demand for electricity? One view is that EPA's regulatory authority extends only to "existing sources." Under this view, unless an entity actually emits carbon dioxide, EPA cannot exercise regulatory authority over it in a FIP.

The definition of the term "stationary source" in Section 111 supports such an interpretation. Under that definition, a "stationary source" is "any building, structure, facility, or installation which emits or may emit any air pollutant."³⁵ This definition would require that the source actually "emit" or "may emit" carbon dioxide before EPA could regulate it in a FIP. Under this interpretation, EPA's FIP authority would be limited to the electricity generating units that actually emit carbon dioxide.

A contrary position rests principally on the language in Section 111 that a state plan creating a "standard of performance" must reflect emission reductions "achievable through the application of the best system of emission reduction." If a state fails to adopt a plan, then EPA's

³³ *Id.* § 7411(a)(1).

³⁴ *Carbon Pollution Emission Guidelines*, *supra* n. 29, at 34834-35.

³⁵ 42 U.S.C. § 7411(a)(3).

authority in a FIP would be co-extensive with the state authority that it replaces.³⁶ As EPA has stated in the past, its FIP authority encompasses the exercise of all authority that a state may exercise under the Act.³⁷ Thus, if the "best system" in a state includes emission reductions achieved by entities other than power plants, then under this interpretation EPA's regulatory authority in a FIP would encompass those entities.³⁸ Additionally, some early judicial authority has found that EPA has broad power in promulgating a FIP.³⁹

Three factors cast doubt on whether EPA would adopt this latter interpretation. First, the interpretation could entail a large increase in the number of entities actually subject to EPA regulatory control. It may well be that EPA simply does not have the administrative resources available to administer such an extension. Second, Tenth Amendment limitations would prevent it from relying on the state to carry out any of the regulations; it would have to implement all regulation on its own. Third, fashioning a regulatory system over this broader array of entities would present significant challenges.

So it is questionable whether EPA would attempt to regulate entities who lay "beyond the fence line" in a FIP. Most likely, a FIP will only regulate those emission sources – electricity generating units – that actually emit carbon dioxide.

³⁶ Central Arizona Water Conservation District v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1973) ("Acting in place of the state of Arizona pursuant to a FIP under 42 U.S.C. § 7419(c), EPA 'stands in the shoes of the defaulting State, and all of the rights and duties that would otherwise fall to the State accrue instead to EPA.'...")

³⁷ See, e.g., 63 Fed. Reg. 15920, 15923 (Apr. 1, 1998) Promulgation of Federal Implementation Plan for Arizona ("EPA has wide-ranging authority under section 110(c) to fill in gaps left by a State failure. EPA's authority to prescribe FIP measures is of three types. First, EPA may promulgate any measure which it has authority to issue in a non-FIP context. Second, EPA may invoke section 110(c)'s general FIP authority and act to cure a planning inadequacy in any way not clearly prohibited by statute. Third, under section 110(c) the courts have held that EPA may exercise all authority that the State may exercise under the Act.")

³⁸ The Clean Air Act defines a "federal implementation plan" to include "means or techniques (including economic incentives, such as marketable permits...)" 42 U.S.C. § 7602(Y). This definition also may indicate that EPA could include non-sources in that plan. Such a system might extend beyond power plants to other entities from which marketable emission reductions could originate.

³⁹ See South Terminal Corp. v. EPA, 504 F.2d 646, 669 (1st Cir. 1974) ("We are inclined to construe Congress' broad grant of power to the EPA as including all enforcement devices reasonably necessary to the achievement and maintenance of the goals established by the legislation...")

2.8 How stringently can EPA regulate electrical generating units in a FIP?

If EPA only regulates actual emitters of carbon dioxide -- the electrical generating units -- in a FIP, then the logical next issue is the extent to which may EPA regulate them. In other words, how stringent may the “standards of performance” be for existing power plants?

To begin with, these standards of performance must attain the emission reduction goal that EPA promulgates (i.e. the numerical limit on carbon dioxide emissions in each state). As noted above, EPA proposes to set that emission goal by defining the “best system of emission reduction” to include ways of reducing carbon emissions “outside the fence line” of the electrical generating unit, i.e. to include reductions possible from all four of EPA’s “building blocks.” These encompass measures outside of the power plant itself, including substituting alternative sources of electricity and reducing demand.⁴⁰

Accordingly, EPA may take the position that, in setting the standards of performance for electricity generating units in a FIP, the limits on those units can reflect reductions from all four building blocks. The limits would comprise the “best system of emission reduction” that is part of the definition of “standard of performance” in Section 111. EPA’s logic would be that, because it can consider “behind the fence line” actions in establishing the emission guideline for a state to meet, the “standards of performance” imposed on power plants in a FIP can reflect those same actions.

Such an approach to determining these “standards of performance” undoubtedly would be challenged. Its validity will largely depend on whether the courts uphold EPA’s interpretation of “best system of emission reduction” to include reductions from “building blocks” that are “beyond the fence line” of the power plants.

Finally, in establishing standards of performance for a FIP, Section 111 requires EPA to (1) take into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements; and (2) find that the “best system” is “adequately

⁴⁰ See *Carbon Pollution Emission Guidelines*, *supra* n. 29, at 34835.

demonstrated.”⁴¹ It must also consider the “remaining useful life of the existing source to which such standard applies.”⁴² So EPA must consider these factors in adopting the FIP.

2.9 What can EPA require a state to do in a FIP?

Two constraints principally limit what EPA can require of a state in a FIP: (1) the scope of EPA’s statutory authority in the Clean Air Act to adopt FIPs, and (2) limits imposed by the Tenth Amendment. Both sets of limitations generally prevent EPA from requiring a state to implement a FIP promulgated by EPA.

A key case on statutory limits is District of Columbia v. Train,⁴³ a 1975 decision of the Court of Appeals for the District of Columbia Circuit. Petitioners challenged transportation control regulations promulgated by EPA as federal implementation plans for the National Capital Region. The plans commanded states to carry out a variety of measures, including committing to purchase buses, adopting an inspection and maintenance program for vehicles, and retrofitting certain classes of vehicles with pollution control devices. The petitioners argued that the Clean Air Act “does not authorize the EPA to require the states to enact laws or administer and enforce implementation plans. . . .”⁴⁴ The court agreed:

[A]n analysis of the language of the Act, and particularly of its enforcement provisions, does not appear to support the Administrator's claim that Congress intended to authorize him to regulate sources of pollution caused by the general public by requiring the states to enact statutes and to administer and enforce the programs contained in the EPA plan.⁴⁵

The court reached this holding primarily by concluding that the Clean Air Act “contains no enforcement mechanisms which would be used to force a reluctant state to adopt and submit an adequate plan under section 110(a).”⁴⁶ It explained:

Had Congress intended to adopt the novel approach of empowering a federal agency to order unconsenting states to enact state statutes and regulations, thereby converting state

⁴¹ 42 U.S.C. § 7411(a)(1).

⁴² 42 U.S.C. § 7411(d)(2).

⁴³ District of Columbia, 521 F.2d 971.

⁴⁴ *Id.* at 981.

⁴⁵ *Id.* at 983.

⁴⁶ *Id.*

legislatures into arms of the EPA, it most likely would have made that intent clear in the statute. It chose instead to adopt the quite unremarkable procedure of authorizing the promulgation of federal regulations to govern an area it believed to be subject to its commerce power, in those instances where state enactments did not meet federal standards.⁴⁷

While Congress has amended the Clean Air Act twice since the District of Columbia opinion, none of those amendments change this conclusion.⁴⁸

Moreover, since the District of Columbia decision, the Supreme Court has issued a series of opinions holding that the Tenth Amendment sharply constrains Congress's ability to enlist states in implementing federal programs.⁴⁹ For example, in New York v. United States,⁵⁰ a 1992 opinion, the Court considered the constitutionality of the so-called "take title" provisions of the Low-Level Radioactive Waste Policy Act Amendments of 1985. The Court emphasized that Congress "may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' . . ." ⁵¹ The "take title" provision offered states the alternatives of regulating pursuant to Congress's direction or taking title to low level radioactive waste and becoming liable for damages for failing to do so. The court held that both types of actions would unconstitutionally "commandeer" state governments.

A later case, Printz v. United States,⁵² concerned a federal law requiring local officials to conduct background checks on prospective handgun purchasers. The Court reiterated that "the Federal government may not compel the States to implement, by legislation or executive action,

⁴⁷ *Id.* at 984-85. See also Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated on other grounds*, 431 U.S. 99 (1977) (Section 113 of the Clean Air Act did not authorize EPA to bring an enforcement action against the state for failing to implement a motor vehicle inspection and maintenance program). Other cases during that period were slightly more favorable to EPA's authority. See City of Santa Rosa v. EPA, 534 F.2d 150 (9th Cir. 1976), *vacated on other grounds* Pacific Legal Foundation v. Brown, 429 U.S. 990 (1976) (EPA had authority to order gas rationing); and Commonwealth of Pennsylvania v. EPA, 500 F.2d 246 (3^d Cir. 1974) (largely upholding transportation control plan from Commerce Clause challenge).

⁴⁸ The District of Columbia court did note that if the state was the actual source of pollution, then Congress could require action by the state to regulate that source. *Id.* at 983 ("We agree with the Administrator that by including the states and their subdivisions within the definition of "person," Congress clearly intended that state-operated activities which are direct sources of air pollution would be subject to federal regulation the same as private pollution sources. . . .")

⁴⁹ The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

⁵⁰ 505 U.S. 144 (1992).

⁵¹ *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)).

⁵² 521 U.S. 898 (1997).

federal regulatory programs...”⁵³ The Court held that the federal law violated the Tenth Amendment by requiring local officials to carry out background checks and to accept the form completed by the applicant purchaser. The Court concluded: “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”⁵⁴ Justice O’Connor, concurring, noted that the Court was not deciding whether “purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause power are similarly invalid.”⁵⁵

Thus, some judicial authority has construed the Clean Air Act as not authorizing EPA to require that states adopt legislation or regulations. Additionally, later Supreme Court cases have curtailed the ability of the federal government to require that states implement federal legislation, with the possible exception of ministerial reporting requirements and perhaps other administrative duties.⁵⁶ These cases suggest that, in enacting a FIP, EPA’s discretion is limited to directly regulating individual sources of pollution, rather than ordering the states to undertake that regulation.

2.10 Could a FIP include an emissions trading program?

The Clean Air Act’s definition of “federal implementation plan” explicitly includes “economic incentives” like trading systems:

The term “Federal implementation plan” means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standards.⁵⁷

⁵³ Id. at 925.

⁵⁴ 521 U.S. at 935.

⁵⁵ Id. at 936 (O’Connor, J., concurring).

⁵⁶ For example, EPA has taken the position in the past that title V of the Clean Air Act requires states to include all applicable requirements, including requirements of a FIP, in the title V permit. Federal Implementation Plans To Reduce the Regional Transport of Ozone, 63 Fed. Reg. 56394, 56400 (Oct. 21, 1998).

⁵⁷ 42 U.S.C. 7602(y) (emphasis added).

Presumably, that definition would also apply to implementation plans under Section 111.

2.11 Could EPA punish a state for not submitting a plan or impose harsher mandates than if a state adopted its own plan?

EPA cannot punish a state for failing to submit a plan. In that situation, EPA's statutory authority is limited to promulgating a FIP that fills the gap left by state inaction and meets the state's emission reduction goal. Of course, EPA possesses discretion in adopting the mix of controls in the FIP that will attain the goal. A FIP could be designated to incentivize states to comply, such as by making it easy for states to take over part of the FIP's regulatory apparatus. But evidence that EPA acted punitively in exercising that discretion would almost certainly render the FIP arbitrary and capricious.

The FIP's function is to meet the emission reduction goal promulgated in EPA's Existing Source Performance Standard regulations and also to fulfill other requirements for state plans set out in those regulations (i.e. identification of affected entities, description of plan approach and its geographic scope, average emissions performance the plan will achieve for the relevant periods, etc.).⁵⁸ EPA cannot adopt requirements in a FIP that exceed what is needed to meet those requirements, and thus are "harsher" than a state plan would be.

2.12 Will a FIP be "more restrictive" and "less flexible" than a state plan?

Both a FIP and a state plan must achieve the same objective: attainment of the state's emission goal established by EPA. To do so, both must achieve the same reduction in current emissions of carbon dioxide. Thus, in terms of the ultimate reductions in carbon emissions, a FIP will not be "more restrictive" than a state plan.

As to flexibility, the state implementation plan serves as the principal mechanism by which states choose the list of emissions reductions that will apply in each state. Congress employed this method of "cooperative federalism" to maximize state discretion in choosing the "mix" of controls that would attain the national ambient air quality standards.⁵⁹ The Clean Air Act does limit that

⁵⁸ *Carbon Pollution Emission Guidelines*, *supra* n. 29, Proposed Rule 40 C.F.R. 60.5740 ("What must I include in my state plan?").

⁵⁹ See, e.g. *Train v. NRDC*, *supra* n. 25.

discretion in some ways by imposing specific “floors” of emission reduction on some sources – e.g., the “lowest achievable emission rate” for new sources in nonattainment areas, “best available control technology” for new sources in prevention of significant deterioration areas, etc. Still, within those limits, states can choose to allocate the needed emission reductions as they see fit.

However, if EPA chooses to impose the FIP solely on power plants, the FIP would be far less flexible than state plans which choose to achieve the reductions by imposing legal constraints through a wider variety of measures not just limited to power plants. Furthermore, EPA certainly has less knowledge than states about the particular circumstances in which existing sources operate. Its lack of knowledge would result in a FIP that was less-informed, and probably more expensive, than a state plan would be.

3. ENFORCEMENT OF A FEDERAL IMPLEMENTATION PLAN

3.1 Can EPA adopt a FIP but not implement it?

EPA’s rules require state plans under section 110 – and thus presumptively under Section 111 – to be legally enforceable.⁶⁰ Like a state’s implementation plan, the FIP has to contain measures ensuring that the emission reduction goal will be met and that allow for enforcement against entities that do not comply.⁶¹

3.2 Is a FIP subject to judicial review?

As adopted by EPA after notice and comment, a FIP is a final agency action. Under the Clean Air Act, that action is subject to judicial review in the U.S. Court of Appeals if a petition for review is filed with 60 days after EPA finalizes the FIP.⁶² However, unlike EPA’s final rules for existing power plants, which are nationwide in effect and thus challengeable only in the U.S. Court of Appeals for the District of Columbia Circuit, a FIP is effective only in the particular state for

⁶⁰ 40 C.F.R. 51.230 (“Each plan must show that the State has legal authority to carry out the plan...”)

⁶¹ *Carbon Pollution Emission Guidelines, supra* n. 29, at 34914 (“In its plan, a state must adequately demonstrate that it has the legal authority for each implementation and enforcement component that it has included in its plan as part of a federally enforceable emission standard...”)

⁶² 42 U.S.C. § 7607(b)(1) (“Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register...”)

which EPA adopts it. Accordingly, a challenge to the FIP does not have to be filed in the District of Columbia Circuit, but can be filed in the Circuit in which the state resides.⁶³

3.3 Can EPA enforce a FIP?

Section 111 specifically authorizes EPA to enforce the provisions of a FIP. Section 111(d) states:

(2) The Administrator shall have the same authority--

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under [sections 7413](#) [i.e. §113] and [7414](#) [i.e. §114] of this title with respect to an implementation plan.

Section 113 of the Act authorizes the Administrator to take certain enforcement actions “[w]henever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit. . . .”⁶⁴ The term “an applicable implementation plan” would include a federal implementation plan that applies until a state plan is approved. The Administrator must send a notice of violation to the state and to the source. After giving notice and waiting 30 days, the Administrator may (1) issue an order requiring the source to comply; (2) issue an administrative penalty; or (3) bring a civil action pursuant to Section 113(b) for injunctive relief or civil penalties.⁶⁵

⁶³ *Id.* (“A petition for review of the Administrator's action in approving or promulgating any implementation plan under... [section 7411\(d\)](#) of this title...may be filed only in the United States Court of Appeals for the appropriate circuit....” Section 307 does, however, go on to state: “Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination...”

⁶⁴ 42 U.S.C. § 7413(a)(1). Section 7414 deals with issues such as recordkeeping, monitoring, inspections, and entry onto property in aid of enforcement.

⁶⁵ 41 U.S.C. § 7413(a)(1).

3.4 Can a private citizen enforce a FIP?

Section 111 contains no provisions referring to private enforcement of federal implementation plans. However, under section 304 of the Act, “any person” (including private individuals) may bring a so-called “citizen suit” against:

any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.⁶⁶

The statute sets out notice requirements that must be met before the suit can be brought.

For Section 304 to apply, a violation of the FIP must be a violation of an “emission standard or limitation under this chapter.” Section 111 defines the term “standard of performance” to mean “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable...”⁶⁷ So a “standard of performance” in a FIP is almost certainly a type of “emission limitation.” Furthermore, the “chapter” referred to in the phrase “under this chapter” includes Section 111.⁶⁸ Accordingly, the citizen suit provision in Section 304 seemingly applies to FIPs promulgated under Section 111.

3.5 Can a FIP be enforced against a state?

As can be seen from the answer to the last question, an enforcement action is brought against the “person” alleged to “have violated” or be “in violation” of an “emission standard or limitation under this chapter.” The violator will be the individual source subject to the emission standards included in the FIP. So the action will not be brought against the state unless the state owns or operates a facility subject to an emission standard or limitation in the FIP.

⁶⁶ 42 U.S.C. § 7604(a)(1).

⁶⁷ 42 U.S.C. § 7411(a).

⁶⁸ Both fall under Chapter 85 of Title 42, United States Code.

3.6 Can EPA impose sanctions against a state for its failure to submit a plan to comply with EPA's regulations under Section 111?

The most likely answer is that sanctions do not apply in this situation. Section 179 of the Clean Air Act⁶⁹ establishes sanctions that EPA may impose upon states in some instances. In particular, Section 179(a)(3) sets out two circumstances when sanctions may apply: (1) when the Administrator “determines that a State has failed to make any submission as may be required under this chapter,⁷⁰ and (2) when the Administrator disapproves a submission required under this chapter.

Initially, the question is whether the state plan under section 111 is a “submission required under this Chapter.” Section 111(d)(1) states that each State “shall submit to the Administrator a plan” which establishes standards of performance. Thus, under the plain meaning of Section 179, a failure to submit a plan, or a disapproval of a submitted plan, would seem to be a “failure to make a[] submission” that would trigger the sanctions mechanism. Additionally, Section the “chapter” referred to in Section 179(a)(3) includes Section 111.⁷¹

However, the sanctions established by Section 179 are two-fold, and the statutory provisions cast considerable doubt on whether sanctions apply to state failures to submit plans under Section 111. First, the initial sentence of Section 179 states that it applies to implementation plans “under this Part,” and the relevant part of the Code deals only with nonattainment plans.⁷² Second, Section 179 calls for “highway sanctions,” which are monies which the Federal Government offers to states for highway and transportation purposes. But this statutory provision is “applicable to a nonattainment area,” which is an area that has not attained a national ambient air quality standard. Section 111 does not concern such areas.

The second sanction specified is a required increase in the “offset requirements of Section 7503 to new or modified sources...” Again, however, Section 7503 applies to permits for

⁶⁹ 42 U.S.C. § 7509.

⁷⁰ *Id.* § 7509(a)(3). This language then excludes certain other failures to submit or disapprovals under subsections (a)(1) and (a)(2). Both concern failures to submit “for an area designated nonattainment under Section 7407” of the Act. Those are submittals required because the area has not attained the national ambient air quality standards. Presumably, these provisions are intended to apply only for submittals that pertain to pollutants that cause the nonattainment status. Greenhouse gases do not fall within that category.

⁷¹ See *supra* n. 68.

⁷² “Part D. Plan Requirements for Nonattainment Areas.”

nonattainment areas. It seems illogical that Congress would apply sanctions tailored to nonattainment areas in the Section 111 context, which has nothing to do with such areas.

Furthermore, if the sanctions provisions apply, they would take effect only in areas which are in nonattainment. This feature of the sanctions gives rise to the possibility that sanctions for failing to comply with Section 111 would apply only in parts of some states (i.e., in nonattainment areas of a state), but not in other parts. Indeed, the sanctions might not apply at all if a state had somehow attained all the air quality standards. Again, this limitation makes little sense in terms of Section 111.

Overall, the statutory language in the sanctions provisions of Section 179(b) indicates that Congress intended the sanctions only to apply in nonattainment areas.