The Crafting of the National Low-Emission Vehicle Program: A Private Contract Theory of Public Rulemaking

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I.
INTRODUCTION

Under the Clean Air Act Amendments of 1990 ("CAA"),[1] the United States Environmental Protection Agency ("U.S. EPA" or "EPA") is expressly prohibited from enforcing more stringent motor vehicle emissions standards until the year 2004.[2] However, Congress granted the State of California a preemption waiver permitting that state alone to adopt stricter standards.[3] Congress further granted other states the authority under the CAA to adopt any emissions standards adopted by California.[4] Thus, while states other than California cannot choose to implement their own vehicle emissions standards, they do have the power to adopt the California standards in place of the applicable federal standards.

In 1990, California adopted the Low-Emission Vehicle ("CAL LEV") program.[5] Following its adoption, a number of states in the Northeast, as well as Texas, Michigan, Illinois, and Wisconsin, began to consider adopting California's standards. The Northeast states, empowered to act together under the CAA as the Ozone Transport Commission ("OTC"), adopted a Memorandum of Understanding agreeing to adopt the CAL LEV program.[6] Of these states, only Massachusetts and New York

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1. 42 U.S.C. §§ 7401-7642 (1994).
2. 42 U.S.C. § 7521(b)(1)(C) (1994).
3. 42 U.S.C. § 7543(b) (1994).
4. 42 U.S.C. § 7507 (1994).
5. California Air Resources Bd., Res. 90-58 (September 28, 1990).
6. 59 Fed. Reg. 21720, 21722-23 (1994) (codified at 40 C.F.R. § 51.120 (1997)).

actually succeeded in implementing the program. Auto manufacturers (both U.S. and foreign industry groups) protested the OTC's actions and, in response, proposed an alternative to regional adoption of the California LEV program. The U.S. EPA reacted by supporting compromise negotiations between the states and the auto industry. These negotiations resulted in the creation of the National Low-Emission Vehicle ("NLEV") program.[7]

The NLEV program, if implemented, would apply in all 49 states other than California. Since the program incorporates requirements for more stringent auto emissions standards prior to 2004 (contrary to the CAA ban), the U.S. EPA seems to lack authority under the CAA to enforce the NLEV program. Provisions of the NLEV program purport, however, to create independent contract mechanisms, outside the realm of the CAA, that would permit the U.S. EPA to enforce the more stringent emissions standards. The U.S. EPA, in sum, has collaborated with state governments and auto manufacturers to negotiate a rule that neither was contemplated by Congress nor is suggested in the language of the CAA.

Adoption of the NLEV program raises several fundamental legal issues. First, does the U.S. EPA have the authority to implement and enforce a regulation that appears, on its face, unauthorized under federal statute? Second, does the EPA have the authority to utilize a rulemaking procedure that is inconsistent with statutory guidelines, such as those established in the Negotiated Rulemaking Act. Third, if the EPA does have the authority to use novel rulemaking procedures, do the U.S. EPA and the states have the legal authority to reach an agreement on a national regulation through informal negotiations between select states and auto manufacturers? Fourth, what is the efficacy of substituting private negotiation in place of public rulemaking?

A discussion of these legal questions begins with a survey of the path that the EPA, the states, and the auto manufacturers have traveled to arrive at the novel NLEV plan. To understand the negotiating stances of all parties involved in the NLEV rulemaking, it is important first to have a sense of the legislative, regulatory, and general political history that laid the groundwork for the NLEV negotiations. After describing the negotiating backdrop, this comment summarizes the substance of the NLEV

7. 62 Fed. Reg. 31191 (1997) (to be codified at 40 C.F.R. §§ 85, 86).

program, followed by a discussion of the unorthodox rulemaking procedure that the EPA has used in crafting the rule.

Finally, this comment considers the link between the EPA's unorthodox negotiating procedure and the unconventional NLEV rule. This comment concludes that the 1990 CAA excessively restricts the EPA's ability to react to changing air pollution control needs and technological advances. In the case of the NLEV rule, the EPA and state governments incorporated private contract theory into public rulemaking as a way to add needed flexibility to regulatory content. By resorting to a nontraditional administrative procedure, the EPA may have succeeded in circumventing the CAA's excessive statutory restrictions. But the EPA's method of creating flexibility may also come with the significant cost of constraining its ability to balance all public and private interests.

II.

FEDERAL LEGISLATIVE AND REGULATORY BACKDROP

A. *Framework of the Clean Air Act*

The Clean Air Act ("CAA"), first promulgated in its current form in 1970 and most recently amended in 1990, created an overarching scheme of "cooperative federalism."[8] Under this scheme, the U.S. EPA initially must identify criteria air pollutants[9] and establish national ambient air quality standards ("NAAQS").[10] Section 108 of the CAA instructs the Adminis-

8. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 776 (1992); Theodore L. Garret and Sonya D. Winner, A Clean Air Act Primer: Part I, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10159, 10161 (1992) (discussing Congress' vision of a federal-state partnership, in which the U.S. EPA sets national ambient air quality standards and the states individually establish plans to meet those standards).

9. 42 U.S.C. § 7408 (1994). Pursuant to this section, the EPA has identified seven criteria air pollutants: carbon monoxide ("CO"), nitrogen dioxide ("NO_x"), hydrocarbons ("HCs") (also called volatile organic compounds ("VOCs")), ozone, sulfur oxides ("SO_2"), particulate matter ("PM"), and lead. As instructed in this section of the CAA, the EPA listed these pollutants based primarily on their calculated adverse effects on public health and welfare.

10. 42 U.S.C. § 7409 (1994). Pursuant to this section, EPA has established primary national ambient air quality standards (NAAQS) for each criteria pollutant, designed to protect human health, and secondary NAAQS, intended to protect public welfare. States are only required to meet the primary standards; the secondary standards are merely a goal. In this paper, I will be focusing on states' efforts to meet the ozone NAAQS. In the upper atmosphere, ozone occurs naturally and forms a protective layer which shields Earth from the sun's ultraviolet rays. In the lower atmosphere, i.e. at "ground level," however, ozone is mostly not naturally

trator of the EPA to develop NAAQS for pollutants the Administrator determines "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[11] The CAA then vests each state with the primary responsibility for formulating a plan to attain or maintain the NAAQS for each criteria air pollutant.[12] Section 110(a) of the CAA directs the individual states to submit to the EPA for approval a State Implementation Plan ("SIP") that specifies how the state intends to control emissions of the criteria air pollutants to meet the NAAQS.[13] Areas not meeting the NAAQS are classified as "nonattainment areas" under Section 107 of the CAA.[14]

In formulating its SIP, each state must establish emissions standards or other pollution control measures to regulate the sources of criteria pollutants in the state.[15] The CAA divides sources of pollution into two primary categories: stationary sources, such as industrial stacks and vents; and mobile sources, comprised primarily of automobiles and trucks. The CAA grants the states relatively broad discretion to formulate standards and programs to regulate stationary sources. However, in order to avoid the possibility of manufacturers of mobile sources being unduly burdened by different standards and regulations in each state, Congress set standards for these sources at the federal level.[16] In deciding to establish federal motor vehicle emission standards, the Senate Committee on Public Works noted that permitting

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occurring, and causes serious health problems, such as damaged lung tissue and reduced lung function, as well as harming crops and trees. Ozone is produced as a result of a chemical reaction between VOCs and NOx mixed with sunlight. When states aim to reduce ground-level ozone, therefore, they must work to reduce emissions of VOCs and NOx, the two human-made ingredients of ozone. *See* 60 Fed. Reg. 4712 (1995) (codified at 40 C.F.R. §§ 51, 52, 85 (1997)).

11. 42 U.S.C. § 7408(a)(1)(A) (1994).

12. 42 U.S.C. § 7410(a) (1994).

13. *Id.*

14. 42 U.S.C. § 7407 (1994). Currently, the EPA classifies 66 areas as "serious" or "severe" nonattainment areas for ozone. 62 Fed. Reg. 31191, 31196 (1995) (codified at 40 C.F.R. §§ 85, 86 (1997)). The EPA is, moreover, in the process of updating and strengthening the ozone NAAQS, which will push even more areas out of attainment. *See* 62 Fed. Reg. 38856 (1997). Ground-level ozone, one of the criteria pollutants, is the most prevalent air pollutant in most urban areas. It is formed when nitrogen dioxide and hydrocarbons react with each other in sunlight. *See* 60 Fed. Reg. 4712 (1995). Ground-level ozone is the primary harmful ingredient in "smog."

15. 42 U.S.C. § 7408(a) (1994).

16. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. New York State Dept of Envtl. Conservation, 17 F.3d 521, 524 (2d Cir. 1994).

each state to set different standards "could result in chaos insofar as manufacturers, dealers, and users are concerned."[17]

Title II of the CAA governs the regulation of mobile sources. In Section 202, Congress specifies detailed, national standards and regulations for new motor vehicles sold in the U.S.[18] This legislation scheduled Tier I standards for motor vehicle tailpipe emissions of CO, NOx, HC, and PM to go into effect beginning in 1994, and required all light-duty vehicles and light-duty trucks sold in the U.S. to meet the federal Tier I emission standards by 1996.[19] Section 202 further instructs EPA to conduct a study of "the need for further reductions in emissions in order to attain or maintain the national ambient air quality standards," taking into account the availability of technology for meeting more stringent standards and alternative means of meeting the NAAQS.[20] Based on this study, the EPA must then determine by December 31, 1999, whether it needs to institute Tier II standards, whether the technology necessary for meeting more stringent standards will be available, and whether further emissions reductions would be cost-effective.[21] Section 202 emphasizes that "[i]t is the intent of Congress that the numerical emission standards specified in . . . this section shall not be modified by the Administrator after the enactment of the Clean Air Act Amendments of 1990 for any model year before the model year 2004."[22] Section 202(b)(1)(C) thus bars the EPA from altering the Tier I standards before model year 2004.[23] Legislative history of the 1990 Amendments to the CAA illustrates that this proviso was a compromise measure to resolve a debate in the Senate about whether there should be a future round of more stringent emission standards.[24]

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17. *Id.*, *quoting* S.Rep. No. 192, 89th Cong., 1st Sess. 5-6 (1965).

18. 42 U.S.C. § 7521 (1994).

19. 42 U.S.C. § 7521(g) (1994).

20. 42 U.S.C. § 7521(i)(2)(A) (1994).

21. 42 U.S.C. § 7521(i)(3)(A) (1994). The EPA has the authority to select the level of the Tier II standards. But if the EPA fails to state otherwise, the Tier II standards specified in the CAA will take effect. *id.*

22. 42 U.S.C. § 7521(b)(1)(C) (1994).

23. *See also* Commonwealth of Virginia v. Environmental Protection Agency, 108 F.3d 1397, 1403 n.4 (D.C. Cir. 1997).

24. *See, e.g.*, 136 CONG. REC. S250 (daily ed. Jan. 24, 1990); 136 CONG. REC. S2739 (daily ed. Mar. 20, 1990).

B. *The California Exemption to Federal Preemption*

Section 209(a) of the CAA prohibits any state from adopting and enforcing its own motor vehicle emission standards.[25] Section 209(b) of the CAA then exempts from federal preemption any state that began regulating motor vehicle emissions before March 30, 1966.[26] When Congress incorporated section 209(b) into the 1970 CAA Amendments, Congress clearly was targeting the proviso specifically for California, which was the only state that could qualify as a pre-1966 regulator.[27] Recognizing that California's "unique problems and pioneering efforts" warranted a waiver from preemption, Congress exempted the state from federal preemption over the adamant objection of the auto industry, which sought a uniform national standard to avoid excessive economic burden.[28]

In the 1977 Amendments to the CAA, Congress amended section 209(b) to require that EPA grant California a waiver from federal preemption only if the State's standards, in the aggregate, protected public health at least as well as the federal standards.[29] Moving slightly away from the initial purpose of preserving California's pioneering role, the 1977 Amendments further added Section 177, which permits other states to opt into the California standards once the EPA has granted California a waiver from federal preemption.[30] In granting states this new opt-in authority, Congress recognized the extreme difficulty many states with "serious" nonattainment areas face in trying to formulate SIPs that could achieve the NAAQS.

Intending to minimize the burden placed on manufacturers of motor vehicles, however, Congress carefully circumscribed the section 177 opt-in authority by requiring that a state's standards be identical to California's standards.[31] Nevertheless, section 177 granted states significant new discretion to choose between either the federal or the California standards. But, as will be dis-

25. 42 U.S.C. § 7543(a) (1994).

26. 42 U.S.C. § 7543(b) (1994).

27. S.Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (quoting Senator Murphy of California).

28. *Id.*

29. Clean Air Act Amendments of 1977, Pub.L. No. 95-95, § 207, 91 Stat. 685 (codified in the 1990 Amendments to the CAA at 42 U.S.C. § 7543(b)(1)).

30. Pub.L. No. 95-95, § 129(b), 91 Stat. 685, 750 (codified in the 1990 Amendments at 42 U.S.C. § 7507).

31. 42 U.S.C. § 7507(1) (1994).

cussed below, no state attempted to take advantage of this new opt-in authority until after the 1990 CAA Amendments.

III.
STATE LEGISLATIVE AND REGULATORY EFFORTS

A. *The California Low-Emission Vehicle Program*

California has always been at the forefront of motor vehicle emission control, primarily because of the extraordinarily high levels of air pollution in the South Coast Air Basin (which includes Los Angeles and Orange Counties). Of the 71 areas that are currently listed as nonattainment for ozone, the South Coast Air Basin is the only one that is — and ever has been — classified as "extreme." Like most other urban areas, motor vehicles have always been one of the largest single sources of most criteria air pollutants.[32]

In keeping with the State's pioneering tradition, in 1988, the California State Legislature directed the California Air Resources Board ("CARB") to adopt the most cost-effective program to regulate new motor vehicle emissions, in-use motor vehicles, and vehicle fuels, with the ultimate goal of achieving a 55 percent reduction in organic gas emissions and a 15 percent reduction in nitrogen oxide emissions by December 31, 2000.[33] To comply with the Legislature's instructions regarding new motor vehicle emissions, CARB adopted the California Low-Emission Vehicle ("CAL LEV") program in September 1990, set to go into effect in September 1991.[34] The U.S. EPA then approved the CAL LEV program for a CAA section 209(b) waiver of federal preemption in January 1993.[35]

The CAL LEV program requires that passenger cars and light- and medium-duty trucks meet a series of increasingly more stringent emission standards that are phased in over a ten year period, beginning in 1994.[36] To meet these standards, motor vehicle manufacturers must certify that all vehicles sold in the state meet

32. In the South Coast Air Basin in 1988, emissions from on-road vehicles accounted for 87 percent of the total annual CO emissions, 59 percent of the total annual NOx emissions, and 46 percent of the total annual volatile organic compound (a subset of hydrocarbon) emissions. 53 Fed. Reg. 49494, 49518 (1988).

33. *See* CAL. HEALTH & SAFETY CODE § 43018(b)- (c) (West 1995).

34. California Air Resources Bd., Res. 90-58 (September 28, 1990).

35. 58 Fed. Reg. 4166 (1993) (announcing availability of Waiver of Federal Preemption; California Low-Emission Vehicle Standards (Jan. 8, 1993)).

36. *See* CAL. CODE REGS. tit. 13 § 1960.1(g)(2) (1991).

one of four sets of increasingly more stringent emissions standards, which are classified as: transitional low-emission vehicles ("TLEVs"), low-emission vehicles ("LEVs"), ultra-low emission vehicles ("ULEVs"), and zero-emission vehicles ("ZEVs").[37] Vehicle manufacturers have the flexibility to decide what mix of vehicle classes they wish to sell each year to meet the increasingly tighter emission standards.[38] Each manufacturer, in other words, must meet emissions standards based on an average of its total fleet of vehicles sold that year in the state. Of course, as the average permissible emissions decreases, the manufacturer will need to sell increasingly more LEVs and ULEVs to meet the overall "fleet average" requirement. In addition to the fleet average requirement, the CAL LEV program also requires that manufacturers meet a sales quota for ZEVs, defined as vehicles with no tailpipe emissions of any pollutant throughout their lifetimes.[39]

In 1989-1990, when Congress was finalizing the Clean Air Act Amendments, development of the technology necessary to achieve low-emission vehicle emission standards, as required under the proposed CAL LEV program, seemed to be a distant goal. Many, in fact, contended that the technology was either unachievable for gasoline-powered cars or would be prohibitively expensive.[40] In the face of this uncertainty in price and availability of technology to meet the increasingly stringent LEV standards, California, the international laboratory for new air pollution control technologies, forged ahead. And contrary to

37. *Id.* Each standard is progressively more stringent than the federal Tier I standard.

38. *Id.* While the four sets of emissions standards cover CO, NOx, HCs, and PM, the increasingly tighter emissions standards each manufacturer must meet are based upon the total vehicle fleet's average non-methane organic gas ("NMOG," which is a subset of HC emissions) emissions. The series of increasingly tighter emissions standards is thus referred to as the "NMOG curve."

39. *Id.* Currently, only battery-powered electric vehicles are capable of meeting the ZEV standard. However, technologies such as the fuel cell may conceivably compete with the electric battery in the future. *See* CARB Memo, February 26, 1996, Mail-Out #96-06.

40. *See, e.g.*, Jay Mathews, *California Air-Quality Plan Unveiled; New Cars' Emissions Would be Cut to a Fraction of Current U.S. Standards within 10 Years*, WASH. POST, Dec. 15, 1989, at A11 (quoting Joseph C. Calhoun, assistant director of auto emission control at General Motors, saying that his company "will contend that the proposed [CAL LEV] standards are 'infeasible' under current technology . . ."); Larry Margasak, *U.S. May Get California's Tough Air Law: House Panel Oks Car Plan Starting in '94*, ARIZ. REPUBLIC, October 3, 1989, at A1 (quoting Harold A. Poling, chief operating officer for Ford Motor Co., saying that the CAL LEV standards "are not feasible").

auto industry and many others' predictions, technology has kept pace with the demands of the CAL LEV standards. Consumers in California currently are buying both TLEVs and LEVs, as well as a Honda ULEV.[41]

B. *Northeast and Other States' Efforts to Opt Into the CAL LEV Program*

Although the South Coast Air Basin has the worst air pollution in the country, sixty-six other metropolitan areas throughout the country which are classified as "severe" or "serious" nonattainment for ozone also face significant challenges in meeting the NAAQS.[42] States delinquent in submitting to the U.S. EPA adequate SIPs demonstrating attainment of the NAAQS face the threat of serious sanctions. In sections 110(m) and 179(a) and (b), Congress requires the EPA to impose mandatory sanctions on states failing to timely submit approvable SIPs.[43] Sanctions can include a 2 to 1 emissions offset for stationary sources of pollution in the state,[44] or the withholding of federal highway funds.[45] Either sanction can cause significant economic harm in any state.

As the Second Circuit recently articulated, "[i]t was in an effort to assist those states struggling to meet federal pollution standards that Congress . . . directed in 1977 that other states could promulgate regulations requiring vehicles sold in their state to be in compliance with California's emission standards or to 'piggyback' onto California's preemption exemption."[46] As discussed, section 177 grants states the authority to opt into any emission standards for which California has received a waiver of federal preemption.[47] Until California adopted the CAL LEV program, however, no state chose to exercise its opt-in authority. Following California's passage of the CAL LEV program, most

41. *See* the CARB web page for a list of auto manufacturers which are selling TLEVs and LEVs, http://www.arb.ca.gov (visited on Nov. 20, 1997).

42. 62 Fed. Reg. 31191, 31196 (1997).

43. 42 U.S.C. §§ 7410(m), 7509(a), (b) (1994).

44. A 2 to 1 emissions offset for stationary sources would mean that, as a prerequisite to introducing any new sources of pollution from a stationary source, the state would need to ensure that twice as much comparable air pollution from existing sources is first eliminated.

45. 42 U.S.C. § 7509(b)(1), (2) (1994).

46. Motor Vehicle Mfrs. Ass'n of the U.S. v. New York State Dep't of Envtl. Conservation, 17 F.3d 521, 524 (2d Cir. 1994).

47. *See* 42 U.S.C. § 7507 (1994).

states with "severe" nonattainment areas have at least considered opting into the program.[48]

The states that have taken the most steps toward opting into the CAL LEV program, however, are the twelve states (plus the District of Columbia) in the Northeast that constitute the Ozone Transport Region ("OTR"). Congress established the OTR under section 184 of the CAA,[49] based on the recognition that, due to the population density and geographic proximity of metropolitan areas in the Northeast states, ozone pollution drifts across state lines throughout the region (usually being blown from south to north along the coast).[50] The Northeast states are, therefore, largely interdependent on one another for pollution reduction actions.[51] Moreover, because the chemical reactions that create ground-level ozone take place while the pollutants (VOCs and NOx) are being blown through the air, smog can be more severe miles away from the source of pollutants.[52]

Pursuant to section 184, the EPA convened the Ozone Transport Commission ("OTC") for the OTR on May 7, 1991.[53] The OTC is comprised of the Governor of each OTR state (or their designees), the U.S. EPA Administrator (or her designee), the affected Regional EPA Administrators (or designees), and a Governor-appointed air pollution control official representing each state.[54] Section 184(c) grants the OTC the authority to recommend additional pollution control measures to the U.S. EPA for enforcement in the OTR.[55] Specifically, the OTC can recommend additional measures for all or part of the OTR if the OTC determines that such measures are necessary to bring any area of the OTR into attainment of the NAAQS for ozone.[56]

Between 1991, when the OTC was convened, and 1994, the OTC worked toward a regional ozone reduction strategy primar-

48. For example, in 1993, Wisconsin and Texas considered opting into the CAL LEV program.

49. 42 U.S.C. § 7511c(a) (1994). The OTR consists of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, the portion of northern Virginia that is within the Consolidated Metropolitan Statistical Area of the District of Columbia, and the District of Columbia.

50. *See* 59 Fed. Reg. 21720, 21722 (1994).

51. *Id.*

52. *See* 60 Fed. Reg. 4712, 4712 (1995).

53. *See* 42 U.S.C. § 7511c(a) (1994); 59 Fed. Reg. 21720, 21722 (1994).

54. *See* 59 Fed. Reg. 21720, 21722 (1994).

55. 42 U.S.C. § 7511c(c)(1) (1994).

56. *Id.*

ily through signing consensus agreements ("Memoranda of Understanding") to adopt identified pollution control measures. At its third meeting on October 29, 1991, the OTC states agreed to a Memorandum of Understanding ("MOU") which provided that each state would take steps to implement the CAL LEV program as soon as possible.[57] New York and Massachusetts are the only states that have fully adopted and implemented the CAL LEV program.[58]

In authorizing implementation of the CAL LEV standards, these two states have had to withstand heavy legal battering from the automobile manufacturing industry groups.[59] Since New York and Massachusetts finalized regulations adopting the CAL LEV standards in 1992,[60] the domestic and foreign automobile industry groups have attacked the legality of their actions through at least seven lawsuits and appeals.[61] Although the courts held in the states' favor on virtually all significant issues, the successive lawsuits cost New York and Massachusetts significant amounts of money and public good will, as well as discour-

57. *See* 59 Fed. Reg. 21720, 21723 (1994).

58. *Id.*; 6 N.Y.C.R.R. part 218 (1992); MASS. REGS. CODE Tit. 310, § 7.40 (1992).

59. The two industry groups that have taken the primary role in litigation are the American Automobile Manufacturers Association ("AAMA", formerly the Motor Vehicle Manufacturers Association of the United States), and the Association of International Automobile Manufacturers ("AIAM"). The AAMA represents the "Big Three" automobile manufacturers: General Motors Corp., Ford Motor Corp., and Chrysler Corp.; the AIAM represents all the major foreign automobile manufacturers.

60. New York adopted amended final regulations on May 28, 1992 (6 N.Y.C.R.R. part 218 (1992)); Massachusetts adopted final rules on January 31, 1992 (MASS. REGS. CODE tit. 310, § 7.40 (1992)). In addition to the CAL LEV tailpipe standards, both states also adopted the ZEV mandate component of the CAL LEV program.

61. *See* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conservation, 810 F. Supp. 1331 (N.D.N.Y. 1993); Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conservation, 831 F. Supp. 57 (N.D.N.Y 1993); Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conservation, 869 F. Supp. 1012 (N.D.N.Y. 1994); Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conservation, 17 F.3d 521 (2d Cir. 1994); Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conservation, 79 F.3d 1298 (2d Cir. 1996); American Auto. Mfrs. Ass'n v. Greenbaum, No. CIV.A.93-10799-MA, 1993 WL 443946 (D. Mass. Oct. 27, 1993); American Auto. Mfrs. Ass'n v. Commissioner, Massachusetts Dep't of Envtl. Protection, 31 F.3d 18 (1st Cir. 1994). In the lawsuits, the plaintiffs challenged the states' adoption of the CAL LEV program based on arguments including that the states did not permit the manufacturers adequate lead time, and that the different motor vehicle fuel requirements and colder climate in the Northeast states would result in violations of the "identicality" requirement of section 177 of the CAA.

aged most other states from quickly following the lead of the two front-runners.[62]

Once it became clear that the vast majority of the OTR states did not have the political momentum and/or resources to opt into the CAL LEV program individually on a voluntary basis,[63] Maine, Maryland, and Massachusetts decided to petition the OTC to adopt a recommendation that the U.S. EPA require all the OTR states to adopt the CAL LEV program.[64] On February 1, 1994, the OTC voted by a 9 to 4 majority to submit the recommendation.[65]

IV.

RESPONSES TO THE OTC RECOMMENDATION FOR AN OTC LEV RULE; BIRTH OF THE "NATIONAL LEV" IDEA

Section 184(c) of the CAA specifies procedures that the EPA must follow once it receives a recommendation from the OTC for additional control measures.[66] This section requires the EPA to decide within nine months of receipt of the OTC's recommendation whether to "approve, disapprove, or partially disapprove and partially approve" the recommendation.[67] In making this decision, section 184(c) directs the EPA to consider two general criteria: 1) whether the additional recommended control measure is "necessary" to bring any area in the OTR into attainment; and 2) whether the additional control measure is "consistent" with

62. As the mass litigation that New York and Massachusetts faced helps to illustrate, the "power to exercise discretion," given to the states by section 177 of the CAA, in practice seems to have turned out to be, in truth, a heavy burden. In an attempt to relieve this burden, the Northeast states petitioned the EPA to require the OTC-LEV program. In this way, the EPA, rather than the individual states, would be placed at the forefront of any legal attacks against implementation and enforcement of the California standards. As discussed below, however, this tactic was recently foiled by a D.C. Circuit Court ruling. *See* Virginia, et al. v. EPA, Connecticut, et al., 108 F.3d 1397 (D.C. Cir. 1997).

63. Many states adopted "wait-and-see" policies based on their neighbors' actions, as well as based on the outcomes of multiple lawsuits being waged in both the First and Second Circuits. Other states passed legislation which hinged implementation of the CAL LEV program on whether a certain number of other OTR states would implement the program first. This practice created a sort of chicken-and-the-egg dilemma, in which each state was waiting for another to act first.

64. 59 Fed. Reg. 21720, 21723 (1994).

65. *Id.*

66. *See* 42 U.S.C. § 7511c(c) (1994).

67. 42 U.S.C. § 7511c(c)(4) (1994).

the CAA.[68] Considering these criteria, EPA proposed approval of the OTC's recommendation in April 1994.[69]

Once it became clear that EPA was intent on supporting the OTR's adoption of the California standards, the automobile manufacturers responded by proposing an alternative to implementing the CAL LEV program in the OTR. The manufacturers proposed a "49-state" low-emission vehicle program — now called the "National Low-Emission Vehicle" ("NLEV" or "National LEV") program.[70] The NLEV program would, as its name suggests, provide for motor vehicle emissions standards more stringent than the current federal standards in the 49 states other than California. In exchange for expanded geographic coverage, the program would ultimately require emissions levels to be only as stringent as the "low-emission vehicle" level, but not bring emissions limits down toward the "ultra low-emission vehicle" level, as in the CAL LEV program.[71]

On January 24, 1995, the EPA published a final rule that, on its face, approved the OTC's recommendation.[72] As requested by the OTC, the EPA's final rule detailed the provisions of the "OTC LEV" program, which mirrors the CAL LEV program standards (minus the ZEV mandate, which would remain optional for each state), and which the EPA would enforce in all the states in the OTR.[73] The EPA projected that, without the OTC LEV ("or an equivalent") program, highway vehicles would account for approximately 38 percent of NOx and 22 percent of VOC emissions in the OTR in 2005.[74]

Although the EPA's final rule stated approval for the OTC LEV program, the EPA conditioned the effectiveness of the final rule on the OTC states' acceptance of an alternate, "49-state"

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68. *Id.*; *see also* 59 Fed. Reg. 21720, 21725 (1994).

69. 59 Fed. Reg. 21720, 21725 (1994).

70. *See* 59 Fed. Reg. 53396 (1994) (codified at 40 C.F.R. § 85 (1997)).

71. The NLEV program would provide certification standards for ULEVs, based on the California standards. However, the vehicle fleet emission average requirement would only require levels equivalent to LEV standards (whereas the CAL LEV program ultimately requires a fleet average that is somewhat below the LEV level). Auto manufacturers would therefore have the option of selling ULEVs, but doing so would not be necessary to meet the fleet average requirements. The OTC states and the auto manufacturers may enter into a separate agreement to promote the sale of ULEVs and other "Advanced Technology Vehicles." 62 Fed. Reg. 31191, 31199 (1997).

72. 60 Fed. Reg. 4712 (1995); *see also* 59 Fed. Reg. 21720 (1994); 59 Fed. Reg. 48664 (1994).

73. *See* 60 Fed. Reg. 4712 (1995).

74. *Id.*

program, as proposed by the automobile manufacturers. In the announcement of the rule in the Federal Register, the Agency reported that "[s]tates would be relieved of their obligations under this [OTC LEV] requirement if EPA were to find that all automakers had opted into an acceptable LEV-equivalent new motor vehicle program. EPA believes that such a program, which would be far better than OTC LEV, could be agreed upon and adopted in the near future."[75] Following this comment, the EPA encouraged negotiations between the OTR states and the major automakers to formulate a "national," "49-state" LEV program. To this end, the EPA hired the Keystone Center, a professional mediation firm, to facilitate negotiations between the automakers, select states, and other key interest groups.[76] Hoping that these negotiations would prove fruitful, the EPA delayed enforcing the OTC LEV program, which became merely a backstop and bargaining tool.

Instead of enforcing the OTC LEV program, the EPA embarked on a policy of fostering discussions between the Northeast states, the auto manufacturers, and other interested parties to design a "National LEV" (or "NLEV") program. The fundamental structure of the NLEV program is based on the auto manufacturers' initial proposal made during the OTC LEV rule comment period. As stated above, the program would require the auto manufacturers to sell vehicles that meet an increasingly stringent emissions level down to the "low-emission vehicle" level, as defined under the CAL LEV program.[77] The auto manufacturers would benefit from implementation of the NLEV program, instead of the OTC LEV program or individual state implementation of the CAL LEV program, because they would be relieved of the burdens of meeting the more stringent fleet average emissions standard outside of California, as well as coping with the administrative hassles of selling different kinds of

75. *Id.*

76. *Air Pollution: Federal Vehicle Fleet Purchases Central to More ULEVs, ZEVs, Draft Says*, Cal. Env't Daily (BNA), at D-2 (Dec. 9, 1994). A fairly broad selection of interest groups were invited to participate in a handful of the negotiation sessions. Such groups included public interest organizations and industry associations representing service stations, vehicle dealerships, gas companies, emission control equipment manufacturers, electric utilities, and alternative fuel vehicle manufacturers. Most of the substantive negotiating sessions, however, were restricted to the participation of OTC state, U.S. EPA, and auto manufacturer representatives. Moreover, as discussed again below, sometimes the EPA also was left out of high-level negotiating sessions.

77. *See* 62 Fed. Reg. 31191, 31194 (1997).

cars in different states throughout the country.[78] The Northeast states, in turn, would theoretically benefit from having lower emission vehicles sold on a national, rather than just a regional, level. Without NLEV, the Northeast states would have to contend with dirtier cars and dirtier air traveling across their borders from their non-LEV neighboring states. According to EPA measurements, due to the effects of cross-border vehicle travel and cross-border air pollution transport from outside the OTR, "the National LEV program will result in emissions reductions in the OTR that are equivalent to or greater than the emissions reductions that would be achieved through OTC state-by-state adoption of the CAL LEV program."[79] The EPA further asserts that, "[n]ot only will National LEV provide emissions reductions benefits to the OTC States, it will reduce states' costs of providing their citizens with healthy air by avoiding the costs of state programs that duplicate each others' and EPA's efforts."[80]

The EPA published final rules for a National LEV program in the Federal Register on June 6, 1997.[81] Once a few lingering issues are resolved in a supplemental rulemaking,[82] the OTC states will have 45 days to "opt in" to the program, and the auto manufacturers will have 60 days to "opt in."[83]

V.
THE NLEV REGULATION

A. *Key Provisions, and Concerns about Legal Authority*

The key substantive provision of the NLEV rule provides that auto manufacturers would sell TLEVs, LEVs, and ULEVs, as certified under the California LEV program, to meet an increasingly more stringent fleet average emissions requirement throughout the 49 states (i.e., all states other than California,

78. *Id.*; *see also* 60 Fed. Reg. 52734, 52736 (1995) (codified at C.F.R. §§ 51, 85, 86 (1997)).

79. 62 Fed. Reg. 31191, 31194 (1997).

80. *Id.*

81. 62 Fed. Reg. 31191 (1997).

82. The EPA issued a Supplemental Notice of Proposed Rulemaking ("SNPRM") on August 8, 1997. Provisions of the proposed rule include: 1) requiring OTC states to commit to the NLEV program through 2005, unless the EPA implements emissions standards at least as stringent as Tier II; and 2) permitting OTC states that have adopted ZEV mandates (i.e., New York, Massachusetts, and Vermont) to retain them. The EPA plans to issue the final Supplemental Rule in December 1997.

83. For a discussion of the meaning of "opting in," see *infra* part V.C..

which would retain its own CAL LEV program).[84] The NLEV standards are more stringent than the current standards. The EPA hopes to implement the NLEV program beginning in 1999 in the OTR and in 2001 nationwide (except in California).[85] These provisions seem to run directly in the face of CAA section 202(b)(1)(C), which proscribes the EPA until 2004 from enforcing automobile emissions standards that are more stringent than the current federal standards. Therefore, not only is the NLEV rule not explicitly authorized by the CAA, but the CAA seems explicitly to prohibit the rule's enactment.

A March 1997 D.C. Circuit Court ruling underscores the EPA's apparent lack of authority to enforce the NLEV rule in all 49 states. In *Virginia v. EPA*, the State of Virginia (one of the four states that declined to vote in favor of the OTC recommendation), joined by three industry trade associations representing automobile manufacturers and dealers, challenged the EPA's enforcement of the OTC LEV program.[86] The court found that sections 177 and 202 of the CAA, read together, prohibit the EPA from requiring states to adopt the CAL LEV program.[87] As discussed above, section 177 gives states the discretion to opt into the California motor vehicle emissions program, and section 202(b)(1)(C) prevents EPA from enforcing more stringent motor vehicle emissions standards before the model year 2004. The court found that, although the states have full power to exercise their independent authority under section 177, the EPA has no authority to require any state, against its will, to adopt the California standards.[88] Therefore, the OTC petition to the EPA requesting that EPA enforce the CAL LEV program in the OTR is ineffective in giving EPA the authority to enforce the more stringent standards. The EPA's OTC LEV rule is invalid.

B. *The EPA's Theory About the Source of the Agency's Legal Authority*

In its final NLEV regulation, adopted after and notwithstanding the court's decision in *Virginia v. EPA*, the EPA offers a legal theory explaining the source of its legal authority under the CAA to promulgate the NLEV rule. The EPA asserts that it has statu-

84. 62 Fed. Reg. 31191, 31195 (1997).
85. *Id.* at 31200.
86. Virginia v. Environmental Protection Agency, 108 F.3d 1397 (D.C. Cir. 1997).
87. *Id.* at 1411.
88. *Id.* at 1411-13.

tory authority to adopt the "voluntary" NLEV standards under CAA sections 202(a) and 301(a).[89] Section 202(a)(1) grants the EPA general authority to prescribe standards for motor vehicle emissions;[90] section 301(a) states, in part, that "[t]he Administrator [of the EPA] is authorized to prescribe such regulations as are necessary to carry out his [or her] functions under this chapter."[91] The EPA claims that section 301(a) validates the Agency's proposed actions because "[t]he primary purpose of the CAA is to protect and enhance the quality of the Nation's air resources by reducing air pollution. Controlling emissions from mobile sources is a key means for achieving the Act's purpose."[92] The EPA further contends that section 202(b)(1)(C), which proscribes EPA enforcement of more stringent motor vehicle emissions standards, does not preclude EPA from establishing voluntary standards.[93]

Crucial to EPA's theory is the Agency's insistence that the NLEV standards would be "voluntary." That is, the EPA would not actually *require* the auto manufacturers to comply with the NLEV standards. Rather, the Agency would continue to require compliance only with the Federal Tier I standards, in accordance with section 202 of the CAA. However, under the NLEV program, each individual auto manufacturer would have the option of *voluntarily* agreeing to comply with the more stringent NLEV standards. Once a manufacturer "voluntarily opts into" the NLEV program, the EPA says that the manufacturer will then be bound by the provisions of the program.[94] National LEV standards "would be enforced in the same manner as any other federal motor vehicle standard."[95] By making the NLEV standards "voluntary" rather than mandatory, the EPA believes that it can circumvent the CAA prohibition on tighter standards. Stressing the hybrid voluntary/mandatory nature of the NLEV program, EPA further states that, "[o]nce manufacturers opt into National

89. 62 Fed. Reg. 31191, 31221-22 (1997); 60 Fed. Reg. 52734, 52757-58 (1995).
90. 42 U.S.C. § 7521(a) (1994).
91. 42 U.S.C. § 7601(a) (1994).
92. 60 Fed. Reg. 52734, 52758 (1995).
93. 60 Fed. Reg. 52734, 52757 (1995).
94. In the final NLEV regulation, the EPA states that "[a] motor vehicle manufacturer would opt into the program by submitting a written notification that unambiguously and unconditionally states that the manufacturer is opting into the program." 62 Fed. Reg. 31191, 31201 (1997). Once a manufacturer "opts into" the NLEV program, the manufacturer would have a very limited ability to "opt out." *See id.* at 31202 (detailing conditions allowing opt-out).
95. *Id.* at 31192.

LEV, they will find administration and enforcement of its requirements indistinguishable from administration and enforcement of the rest of the federal motor vehicle emissions program."[96]

The legal validity of the NLEV program ultimately seems to hinge on the legitimacy of both the EPA's voluntary/mandatory distinction, and the EPA's assumption of an extremely broad grant of authority under the CAA to promulgate a regulation neither contemplated by Congress nor suggested by the legislation. Based on the reasoning in *Virginia v. EPA*, the EPA's reliance on the CAA's broad grant of authority to protect the Nation's air would not, standing alone, uphold the EPA's legal authority. In its decision invalidating the EPA's efforts to enforce the OTC LEV program, the court emphasized that "'when a conflict arises between specific and general provisions of the same legislation, the courts should give voice to Congress's specific articulation of its policies and preferences.'"[97]

C. *Opt-In and Opt-Out Conditions in the NLEV Regulation*

The NLEV rule establishes only one primary condition for any party choosing to opt into the NLEV program: a promise not to challenge the EPA's legal authority to enforce the program. In the NLEV regulation, the EPA specifies that:

> [t]he opt-in notification must state that the . . . [party] will not challenge EPA's authority to establish the National LEV program and to enforce it once a . . . [party] has unconditionally opted into the program. Parties that choose to opt into a program that they have volunteered to establish should agree that they will not challenge the program later, particularly in the context of an enforcement action brought by EPA due to a party's failure to comply with the program requirements.[98]

Of course, if EPA does in fact lack legal authority to establish and enforce the NLEV program, then it seems likely that the auto manufacturers' commitment not to challenge such authority also would be unenforceable. Furthermore, while the EPA identifies enforcement mechanisms it may utilize in the event that

96. *Id.* at 31200.

97. 108 F.3d at 1413, 15 *quoting* Ohio Power Co. v. FERC, 654 F.2d 779, 784 (D.C. Cir. 1992). The Supreme Court first established this standard of judicial review of agency interpretation of statutes in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

98. 62 Fed. Reg. 31191, 31201 (1997).

auto manufacturers violate the NLEV emissions standards (or other substantive terms of the NLEV program), the EPA does not identify any enforcement mechanism that would apply if a party — either an OTC state or an auto manufacturer — violates the commitment not to sue.

Conditions to opt *out* of the NLEV program, on the other hand, are significantly more restrictive. Once an OTC state opts into the NLEV program, it can only opt out by exercising its CAA section 177 authority to adopt the CAL LEV program.[99] A state could not, therefore, simply opt out of the program in favor of the currently applicable, more lenient federal Tier I standards. Similarly restrictive, once an auto manufacturer opts into the NLEV program, it can only opt out under two circumstances: 1) if an OTC state opts out of the NLEV program in favor of the CAL LEV program; or 2) if the EPA modifies specified "stable standards," such as emissions standards, without the manufacturers' consent.[100] These opt-out conditions seem to ensure that the OTC states and the auto manufacturers get only what they bargained for in the NLEV negotiations; neither side, in this way, can secure an unbargained-for windfall, nor is either side bound to abide by anything more than intended.

VI.

NEGOTIATING THE NLEV REGULATION

The EPA managed to arrive at the creative NLEV regulation — which was not contemplated, nor even vaguely suggested, by Congress when it drafted the 1990 Amendments to the CAA — through its revolutionary, negotiation-style rulemaking procedure.[101] In the preamble to its final rule, the EPA writes that, "[i]f National LEV is implemented, it will demonstrate how cooperative, partnership efforts can produce a smarter, cheaper program that reduces regulatory burden while increasing protection of the environment and public health."[102] By EPA's own

99. 62 Fed. Reg. 31191, 31207 (1997).

100. *Id.* at 31201-07.

101. An EPA representative suggested that a possible precedent for the NLEV rulemaking procedure is "Project XL," which is an EPA pilot program that permits regulatees the opportunity to propose alternative pollution management strategies in place of existing pollution control regulatory requirements. Telephone conversation with anonymous EPA official, March 14, 1997. For a full description of Project XL, see 62 Fed. Reg. 19872 (1997).

102. *Id.* at 31192.

admission, the procedure the Agency has followed in negotiating the NLEV program is "unprecedented."[103]

The NLEV negotiating process began when the American Automobile Manufacturers Association ("AAMA"), representing the "Big Three" auto manufacturers — General Motors, Ford, and Chrysler — proposed a 49-state alternative program in response to the OTC's petition for the EPA to enforce CAL LEV in the Northeast. With this alternative proposal in hand, the EPA established the "Subcommittee on Mobile Source Emissions and Air Quality in the Northeast States of the Clean Air Act Advisory Committee," pursuant to the Federal Advisory Committee Act.[104] Members of the Subcommittee include representatives of state and local governments located within and outside the OTR, automobile manufacturers and dealers, fuel providers, utilities, alternative fuel vehicle proponents, public health and environmental groups, and labor groups.[105] The EPA charged the Subcommittee with "evaluating the issues related to the [OTC] petition and providing a public forum to discuss alternative motor vehicle standards that could apply in all states, except California."[106]

Once the broad outline of a 49-state LEV program was established, EPA further encouraged the auto manufacturers (including both domestic and foreign manufacturers) and OTC states to meet with each other to delineate the details of such a program. Similar to a negotiated rulemaking, or "reg-neg," the EPA charged these two parties with coming to consensus on a 49-state National LEV program. However, unlike a reg-neg, and in violation of the Negotiated Rulemaking Act of 1990,[107] only the two parties — the OTC states and the auto manufacturers — were included in the substantive negotiations. Moreover, the negotiations were often held behind closed doors with no public notice. Although an EPA representative usually attended and facilitated these meetings, some meetings took place in the absence of any federal agency representation.[108]

The nature of the negotiations between the OTC states and the auto manufacturers renews and heightens a number of concerns

103. *Id.* at 31194.

104. *Id.* at 31195; 5 U.S.C. app. 2 §§ 1-15 (1982) (limiting advisory committees strictly to an advisory role, and requiring public notice of all proceedings).

105. 60 Fed. Reg. 52734, 52740 (1995).

106. *Id.*

107. 5 U.S.C. §§ 561-570 (1992).

108. Telephone conversation with anonymous EPA official, March 14, 1997.

that were expressed regarding the legitimacy and efficacy of the reg-neg procedure before the Negotiated Rulemaking Act established firm procedural guidelines.[109] Such concerns include: inadequate representation of significantly affected parties; unequal power between the negotiating parties; and lack of agency accountability. Moreover, as Professor William Funk cautioned under analogous circumstances, the NLEV negotiating procedure, by giving effect to a consensus achieved by the two negotiating parties, seems to foster the development of an extra-legal regulation.[110]

VII.

BEYOND A "NEGOTIATED RULEMAKING"

The administrative procedure that EPA has loosely followed resembles, but significantly departs from, a regulatory negotiation. Philip Harter provided the first comprehensive description of a reg-neg in 1982, and was a primary advocate for the adoption of the Negotiated Rulemaking Act of 1990.[111] According to Harter, traditional rulemaking — in which the relevant agency publishes a proposed regulation for a public review and comment process — had become overly complex and formalized.[112] These adversarial proceedings, Harter suggested, had become burdened with delay, expense, and dissatisfaction.[113] The increasing frequency with which regulations were challenged in court further threatened the legitimacy of the process and outcome of traditional rulemaking in the eyes of many regulatees. The solution to these problems, said Harter, is to foster a negotiation process between the interested parties, including the agency issuing the regulation.[114] Supplementing the traditional review and comment process with initial face-to-face negotiations could theoretically restore the legitimacy of proposed rules and help avoid expensive, time-consuming court challenges. Other early advocates of negotiated rulemaking found evidence to suggest that "in a cooperative setting the pooling of views, experience, and knowledge

109. *See* William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest — EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987).

110. *Id.*

111. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

112. *Id.* at 2-7.

113. *Id.*

114. *Id.* at 7-8. See also Lawrence Susskind and Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985).

can produce a rule that is considered by those directly involved to be more legitimate than what the Agency might otherwise have drafted on its own."[115] Congress ultimately embraced this theory by approving the Negotiated Rulemaking Act of 1990.[116]

In passing the Negotiated Rulemaking Act ("the Act"), Congress formalized procedures for government agencies to use throughout the regulatory negotiation process. Generally, the Act provides for a forum in which representatives of a government agency and various interest groups can negotiate the text of a proposed rule. In theory, the representatives, who all have a significant stake in the outcome of the regulation, will be able to compromise and achieve consensus on the central issues. By achieving consensus and taking into consideration the key concerns of all the central parties in interest, the final rule will, theoretically, be more acceptable to all sides and thereby attract less future litigation.

In formalizing the reg-neg procedure, the Act also seeks to preserve agency accountability, secure balanced participation of a broad range of interest groups, and ensure adequate representation of the public interest. William Funk's analysis of an early EPA reg-neg, conducted before passage of the Act, illustrates many concerns regarding the process.[117] As Funk discusses, through reliance on a reg-neg process to formulate woodstove standards, the EPA seemed to exceed its authority under the CAA.[118] While the CAA required the EPA to regulate woodstove emissions under certain circumstances, the EPA, in its final regulation, added provisions such as grandfather clauses and phase-in schedules that the CAA did not authorize.[119] Funk suggests that the EPA arrived at these creative, but unauthorized, provisions as a result of delegating excessive authority to private interest groups and deferring to the particular desires of these groups for the sake of achieving consensus. In the end, says Funk, the EPA formulated "an after-the-fact rationale attempting to justify decisions made by the negotiating committee for reasons we can never know."[120]

115. Susskind and McMahon at 163-164.
116. 5 U.S.C. §§ 561-570 (1992).
117. *See* Funk, *supra* note 109.
118. *Id.* at 57.
119. *Id.* at 78-89.
120. *Id.* at 79.

Even though the final woodstove emissions rule enjoyed questionable legal authority under the CAA, however, it may ultimately be more resistant to legal challenge because the primary parties who would otherwise stage such a challenge were willing parties to the agreement. To clinch these parties' allegiance to the final rule, the EPA closed the deal by requiring all participants in the reg-neg to sign a formal written agreement promising not to challenge it. The agreement further obligated the parties to file memoranda in court supporting the rule in the event that someone else challenges the rule.[121] Funk concludes that, "under these circumstances, the 'authority' of the regulation derives more from the agreement between the parties than it does from the statutory sources in the Clean Air Act."[122]

The Negotiated Rulemaking Act seeks to avoid the pitfalls described by Funk through a variety of mechanisms. For example, provisions of the Act, consistent with the Administrative Procedure Act,[123] require any regulation formulated through a reg-neg process to then proceed through the traditional notice and comment process before final agency approval. Other provisions require adequate representation of parties in interest at all negotiation sessions,[124] and a high degree of public disclosure regarding all reg-neg proceedings.[125] Through extensive public disclosure, along with ultimate reliance on the traditional notice and comment rulemaking process, the Act seeks to prevent regulatory outcomes shaped by, for instance, domination by a particular interest group or an agency's relinquishment of power delegated to it by Congress.

In addition, a recent appellate court decision reinforces the limits on agency ability to relinquish excessive power over the rulemaking process and outcome.[126] In *USA Group Loan Serv-*

121. *Id.* at 84.

122. *Id.*

123. 5 U.S.C. § 553 (1992).

124. 5 U.S.C. § 564(b) (1992). Under the Negotiated Rulemaking Act, to establish a reg-neg committee, the agency must determine that the "committee can adequately represent the interests that will be significantly affected by a proposed rule..." *Id.* § 565(a). The Act further provides: "Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice...may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule." *Id.* § 564(b).

125. For example, the Act requires the agency to give notice in the Federal Register of the decision to use a reg-neg procedure. *Id.* § 564(a).

126. USA Group Loan Services, Inc. v. Riley, 82 F.3d 708 (7th Cir. 1996).

ices Inc. v. Riley, an official of the Department of Education promised parties to a regulatory negotiation that the Department would abide by any consensus the negotiating parties reach unless there were compelling reasons to depart.[127] The court wrote in response, "[w]e have doubts about the propriety of the official's promise to abide by a consensus of the regulated industry but we have no doubt that the Negotiated Rulemaking Act did not make the promise enforceable."[128] In its decision, the court emphasized that a reg-neg can only legally serve the purpose of crafting a proposed regulation. Consequently, regardless of any consensus reached on a proposed rule, the relevant federal agency must ultimately rely on its own judgment, submit a proposed rule to notice and comment rulemaking, and retain the final say over the regulation.

The regulatory process through which the EPA has crafted the NLEV program differs from that prescribed by the Negotiated Rulemaking Act in key ways. Most significantly, the NLEV negotiations were largely held behind closed doors, between select parties, and, due to the character of the NLEV rule, the EPA is virtually bound by the parties' agreements. Most key provisions of the NLEV rule were ironed out strictly between representatives of Northeast states and large auto manufacturers. Excluded from the high-level negotiations were environmental, health, and consumer advocacy groups, as well as representatives from other states, and other relevant business and industry groups. Even EPA officials were absent from some of the negotiating sessions.[129] Moreover, since the ultimate NLEV rule must be "voluntary," the EPA had little, if any, real power to alter the provisions in the negotiated rule. Any significant changes the EPA made would likely defeat the goal of enticing the states and auto manufacturers to voluntarily adhere to the NLEV rule. The EPA was, in this sense, completely bound by the consensus reached by the two parties in the voluntary NLEV agreement.

By engaging in a relatively free-wheeling regulatory negotiation process, the EPA has virtually stripped away the safeguards that the Act imposed to shield the reg-neg process from the potential problems discussed above: inadequate representation of significantly affected parties; unequal power between the negotiating parties; and violation of the delegation doctrine. In fact, all

127. *Id.* at 714.
128. *Id.*
129. *See supra* note 111.

three of these problems seem to have been central characteristics of the NLEV negotiation.

First, as indicated above, many parties with significant interest in the NLEV program were excluded from much of the negotiations. Although the EPA made an effort to be all-inclusive in convening advisory group meetings, most of the substantive negotiations on the actual NLEV provisions were restricted to OTC state and auto manufacturer representatives. Even the EPA often had only marginal, if any, representation at substantive meetings, thereby undermining the Agency's role as representative of the public interest.

Second, in addition to the public interest, as well as other private interests being excluded from much consideration, further fallout from the closed-door negotiations was a precarious balance — arguably a significant imbalance — between the opposing negotiating positions. Here, each side was left to fend almost entirely for itself at the negotiating table. Shaping the balance of powers were numerous circumstances unrelated to the substantive considerations underlying the desire for the NLEV rule. The OTC states' main bargaining chip in the negotiations was their ability to implement the CAL LEV program in the absence of a satisfactory resolution to the NLEV negotiations. Early in the negotiations, however, EPA's strong support for an NLEV compromise program shifted much power from the states to the auto manufacturers. The EPA's open support for NLEV demonstrated the Agency's resolve to encourage a compromise, as well as its less than full support for the individual states' efforts to implement and enforce the CAL LEV program.

The states lost even more leverage when the D.C. Circuit Court, in *Virginia v. EPA*, ruled against the legality of the OTC LEV program.[130] The OTC LEV rule would have required all the OTC states to implement the equivalent of the CAL LEV program in the absence of a resolution of the NLEV negotiations. The court's ruling — that the EPA has no legal authority to enforce OTC LEV — removed the threat of mass implementation of a CAL LEV-equivalent program, and left the individual states within the OTC to fend for themselves. The threat of a few individual states implementing a CAL LEV program was a much weaker bargaining chip than the threat of the entire Northeast region adopting the stricter standards. Further weakening

130. 108 F.3d 1397 (D.C. Cir. 1997).

the OTC states' position was that, since they each are relatively small and interdependent on each other for air pollution control actions (unlike California), each individual state has much less incentive to implement a CAL LEV program when its neighbors may stick with the federal standards.

Because the balance of power shifted between only two parties, with relatively minor input from outside influences, the substance of the final NLEV rule seems to have been more a product of tactical jockeying than of legal and scientific reasoning. Further compounding the effect of negotiating tactics dictating regulatory substance was the fact that the final NLEV rule was not confined to fulfill any particular legislative mandates. The parties here had virtually free reign to devise any provisions that might remedy their respective concerns. Without any legal guidelines to confine the terms of the negotiated rule, the parties had unlimited negotiating room in which to swing from one side's position to the other.

The NLEV reg-neg process further ignored the Negotiated Rulemaking Act's safeguards in a third way. Once the parties negotiated a proposed rule, the EPA could not alter any key provisions without risking the rule's destruction. The EPA's inability to change key provisions rendered meaningless the opportunities for formal public comment on the proposed rule. That is, if the EPA were to promulgate a rule not to the liking of either the states or the auto manufacturers, one side could easily choose not to opt in to the final version, thereby making the regulation moot. By tying its hands in this way, the EPA violated the premise underlying the delegation doctrine. The EPA may not delegate legal authority granted by Congress, and must always maintain final decision-making power.[131] As the court wrote in *Scenic Hudson Preservation Conference v. FPC*, an agency may not "act as an umpire blandly calling balls and strikes for adversaries appearing before it."[132] Similarly, in *USA Group Loan Services, Inc. v. Riley*, Judge Posner emphasized that a government agency may not abdicate regulatory authority to the regulated and that regulatory negotiations may not end in a binding contract.[133]

131. *See e.g.*, USA Group Loan Services, Inc. v. Riley, 82 F.3d 708 (7th Cir. 1996).

132. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

133. 82 F.3d 708 at 714.

VIII.
CONCLUSION: TOWARD A CONTRACT THEORY OF RULEMAKING

The NLEV Rule neither could nor would have been drafted without the EPA's use of a nontraditional administrative procedure. Not only did Congress not suggest the NLEV Rule in the CAA, but Congress went so far as to prohibit the key provision of the NLEV Rule (i.e., early implementation of more stringent national auto emissions standards). By encouraging interested parties to engage in negotiations without regard to the safeguards prescribed by the Negotiated Rulemaking Act, the EPA expanded the boundaries of its administrative authority. Once the EPA brought the most powerful parties in interest inside the substantive rulemaking process, the EPA was able to effectively expand its rulemaking powers beyond the authority delegated to it by Congress. The EPA could, in this way, craft a creative regulation based on the desires of the negotiators, rather than the intentions of Congress. As long as the parties in interest promised not to challenge the final rule, any provisions on which they could achieve consensus could theoretically become law. By passing the NLEV Rule, the EPA, assisted by the other parties in interest, made an end run around the requirements of the CAA. If the NLEV program is actually enacted, then, in effect, private parties — with the blessing of a federal agency and participation of certain states — have contracted around federal statutory requirements. The law would, in this way, be relegated to a mere starting point for negotiations.

Although concerns about the ramifications of the manner in which the NLEV Rule was crafted certainly seem justified, pursuing this type of expanded regulatory negotiations process may also have some important, legitimate benefits. In this case, the NLEV Rule became a viable option because the realities of emission control technology exceeded the expectations of Congress at the time the CAA Amendments of 1990 were drafted. Contrary to the predictions of auto industry representatives, technology necessary to achieve the TLEV, LEV, and ULEV standards has dramatically decreased in price and become widely available.[134] Technological developments have out-paced even the regulators' expectations.

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134. *See supra* text accompanying note 40.

Although section 177 of the CAA ostensibly grants other states the authority to adopt the California program, and thereby benefit from the CAL LEV experiment, most states do not appear to have the clout to independently do so. By prohibiting the EPA from enforcing stricter auto emission standards, the CAA virtually denies most states the ability to capitalize on the technological developments being demonstrated in California until 2004. By giving the EPA and the states a way to take advantage of the new technology, the NLEV negotiations were a positive reaction to the shortsightedness of Congress in 1990. The negotiations provided the EPA and all other parties in interest with the flexibility to react to changes in technological capabilities since passage of the 1990 CAA Amendments, without having to reopen and amend the legislation.

Ultimately, however, the public interest is not best served when the EPA exercises free reign to orchestrate private, contract-style rulemaking. This type of rulemaking ignores the important safeguards that Congress established in passing the Negotiated Rulemaking Act, largely rewarding might over right. But while the EPA should not have unconstrained authority to regulate, the Agency should have the flexibility to react to changed circumstances. The 1990 CAA contains excessive restrictions on the EPA's ability to react to new air quality concerns and developing technologies. The EPA's creative path around these restrictions may be effective, but is far from ideal.