Virginia v. EPA: An Attempt to Regulate Ozone Nonattainment Areas Through Regional Mandates

I. OVERVIEW

In 1995, in an effort to reduce ozone pollution in the northeast region of the United States, the Environmental Protection Agency (EPA) promulgated a rule requiring twelve northeastern states[1] and the District of Columbia to essentially adopt California's "Low Emission Vehicle" standard.[2] EPA's rule required that all of these states' implementation plans (SIPs), previously approved by EPA, be revised to include the stricter California vehicle emission standard.[3] The impetus behind the rule's promulgation was a recommendation from the Northeast Ozone Transport Commission (NOTC) that EPA require all NOTC member states to adopt the California standard.[4] The NOTC was created by Section 184 of the 1990 Clean Air Act Amendments (1990 CAAA) to develop proposals for ozone pollution control measures "'necessary to bring any area in [the northeast] region into attainment.'"[5]

The Commonwealth of Virginia and several associations representing automobile manufacturers and dealers filed a petition for review of the final rule, and opposed the rule on grounds that it "[was] unsupported by the record, contrary to the statute, and constitutionally defective."[6] The Commonwealth of Massachusetts, the States of New York, Connecticut, Rhode Island, and Vermont, the city of New York, the Natural Resources Defense Council, Inc., and the American Lung Association, Inc., intervened to defend the rule.[7] The District of Columbia Circuit Court of Appeals interpreted several sections of the

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1. These northeastern states include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, and Vermont. *See* Virginia v. EPA, 108 F.3d 1397, 1401 (D.C. Cir. 1997). Only the northern portion of Virginia near the metropolitan area of Washington, D.C., is included in the Commission. *See id.* at 1401 n.2.

2. *See id.* at 1401.

3. *See id.*

4. *See id.* at 1402.

5. *Id.* (quoting the Clean Air Act § 184, 42 U.S.C. § 7511(c)(1) (1994)). Section 176A(a) of the 1990 CAAA also allows the EPA or the states to develop regional pollution commissions in other parts of the United States. *See id.* at 1402 n.3.

6. *Id*. at 1399.

7. *See id.*

1990 CAAA and its predecessor, the Clean Air Act (CAA),[8] in order to determine whether the rule promulgated by the EPA was authorized by these legislative acts.[9] The D.C. Circuit vacated the EPA's rule in its entirety, holding that there is no authorization under either Section 110 or Section 184 of the 1990 CAAA to mandate state implementation of specific pollution control measures. *Virginia v. Environmental Protection Agency*, 108 F.3d 1397, 1415 (D.C. Cir. 1997).

II. BACKGROUND

Air pollution has been a government concern since Congress passed the Air Pollution Control—Research and Technical Assistance Act of 1955.[10] This early legislation focused primarily on air pollution research.[11] Subsequent legislative acts, such as the 1963 Clean Air Act,[12] focused on more specific issues such as automobile emissions and the health effects of air pollution.[13] The 1970 Clean Air Act Amendments (1970 CAAA)[14] authorized the EPA to set specific standards for air pollutants, known as the national ambient air quality standards, or "NAAQs."[15] The 1970 CAAA also mandated for the first time specific attainment dates for the achievement of air quality levels.[16] These amendments did not, however, mandate particular measures which the states would be required to undertake to attain these standards.[17] States retained the power to propose and implement particular air pollution control measures calculated to attain ambient air quality standards.[18] If state proposals were inadequate, however, the EPA was authorized to

8. 42 U.S.C. §§ 7401-7671q (1994).

9. *See Virginia*, 108 F.3d at 1403-04.

10. Pub. L. No. 84-159, 69 Stat. 322 (1955); *see* David Bennett, Note, *Zero Emission Vehicles: The Air Pollution Messiah? Northeastern States Mandate ZEVs Without Considering the Alternatives or Consequences*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 333, 335 (1996).

11. *See* Bennett, *supra* note 10, at 335.

12. Pub. L. No. 88-206, 77 Stat. 392 (1963).

13. *See* Bennett, *supra* note 10, at 336-37. The Clean Air Act of 1963, the Motor Vehicle Air Pollution Act of 1965, and the Air Quality Act of 1967 addressed the need to develop uniform national automobile emission standards. The Air Quality Act also provided for research into the health effects of specific air pollutants. *See id.*

14. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

15. *See* Bennett, *supra* note 10, at 338.

16. *See* Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 64-65 (1975).

17. *See id.* at 64.

18. *See id.* at 65, 79.

enact measures necessary to achieve air quality standards.[19] The 1970 CAAA required, among other things, that state plans designed to achieve federal air quality standards include:

> adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region.[20]

Amendments to the CAA were again adopted in 1977 and 1990.[21] The 1990 CAAA contained several provisions designed to combat the problem of ozone nonattainment across the United States.[22] Fifty-seven ozone nonattainment areas exist in the United States, not including California or the Northeast Ozone Transport Region.[23] This regional pollution traverses state boundaries, as the ozone-creating pollutants are carried downwind from one state to another, and has a substantial effect on state efforts to attain or maintain federally mandated air quality standards.[24]

Regional air pollution was addressed more aggressively in the 1990 CAAA which, among other things, created the NOTC.[25] The NOTC advisory panel consists of the governors of the twelve member states and the Mayor of the District of Columbia, or their delegates.[26] Section 184 of the 1990 CAAA charged the NOTC with "develop[ing], [pollution] control measures for ozone pollution in the Region [which are] 'necessary

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19. If a plan did not satisfy Section 110(a)(2) of the CAA, the EPA had a nondiscretionary duty to implement the Act through a federal implementation plan. *See* CAA § 110(c), 42 U.S.C. § 7410(c) (1994); *see also* Bennett, *supra* note 10, at 338.

20. *Train*, 421 U.S. 60, 65 n.2 (quoting CAA § 110(a)(2), 42 U.S.C. § 7410(a)(2) (1994)).

21. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399; *see also* Bennett, *supra* note 10, at 338-39.

22. *See* Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution under the Clean Air Act of 1990*, 24 B.C. ENVTL. AFF. L. REV. 1, 27 (1996).

23. *See* Bennett, *supra* note 10, at 366.

24. *See* Wilcox, *supra* note 22, at 3-5, 8. Virginia is upwind of every Northeast Ozone Transport Commission member state. The failure of Virginia to reduce emissions could limit each downwind state's ability to attain or maintain federally imposed air quality standards. *See id.* at 41. Similarly, Texas and Louisiana each contribute to the other's emission problems. *See* Virginia v. EPA, 108 F.3d 1397, 1400 (D.C. Cir. 1997).

25. *See Virginia*, 108 F.3d at 1402. The word "transport" in the Commission's title refers to the phenomenon by which air currents slowly move ozone-causing pollutants and ozone-laden air, bringing high ozone levels to areas hundreds of miles downwind from the actual pollution sources. *See id.* at 1400.

26. *See id.* at 1402.

to bring any area in [the northeast] region into attainment.'"[27] Proposals from the NOTC are then submitted to the EPA, who must publish notice in the Federal Register, provide an opportunity for a public hearing, review the recommendation, consult with NOTC members, and consider data and comments received during the notice and comment process.[28] The EPA will have nine months after the receipt of the NOTC's proposal to "'determine whether to approve, disapprove,' or approve in part and disapprove in part, the recommendation; to 'notify the [NOTC] in writing' of the [EPA's] determination; and to 'publish such determination in the Federal Register.'"[29] Should the EPA approve the NOTC's recommendation, it is obliged to declare each member state's SIP inadequate and to "order the states to include the approved control measures in their revised plans pursuant to section 110(k)(5)."[30]

The EPA is also authorized, under Section 110 of the 1990 CAAA, to require states to revise SIPs "[w]henever the [EPA] finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national [ambient] air quality standard, [or] to mitigate adequately the interstate pollution transport described in [CAA sections 176A or 184] . . . ."[31]

Prior to the promulgation of the rule invalidating all twelve NOTC member states' implementation plans, the EPA had approved all twelve of these SIPs under Section 110.[32] Nevertheless, the NOTC voted on February 1, 1994, "to recommend that EPA mandate the [implementation of the] California vehicle program," also known as the Low Emission Vehicle standard, "'throughout the' Region."[33] The EPA approved the NOTC's recommendation, declared all twelve states' SIPs inadequate pursuant to Section 184, and promulgated the rule requiring the implementation of the California vehicle emission program.[34]

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27. *Id.* (quoting CAA § 184(c)(1), 42 U.S.C. § 7511c(c)(1) (1994)).

28. *See id.* (citing CAA § 184(c)(2), (c)(3), 42 U.S.C. 7511c(c)(2), (c)(3) (1994)).

29. *Id.* (quoting CAA § 184(c)(4), 42 U.S.C. § 7511c(c)(4) (1994)).

30. *Id.* (citing CAA § 184(c)(5), 42 U.S.C. § 7511c(c)(5) (1994)).

31. *Id.* at 1409 (quoting CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5) (1994)). The EPA's declaration that a state's SIP is inadequate and must be revised is often known as a "SIP call." *See id.* at 1403.

32. *See id.* at 1401.

33. *Id.* at 1402 (quoting Notice of Availability, 59 Fed. Reg. 12,914, 12,915 (1994)). The governors of the 12 states and the Mayor of the District of Columbia, or their delegates, cast votes. Virginia, Delaware, New Jersey, and New Hampshire voted against this recommendation.

34. *See id.* at 1402-03.

III. THE COURT'S DECISION

The District of Columbia Circuit Court of Appeals interpreted several sections of the 1990 CAAA and its predecessor, the Clean Air Act, in order to determine whether the rule promulgated by the EPA was a valid exercise of the authority granted by these legislative acts. The court began by discussing a series of several questions aimed at analyzing the EPA's authority under the CAA.

The initial question the court asked was whether the EPA conditioned approval of a SIP on the state's adoption of the California car program.[35] The court concluded that the EPA's assertion that it offered the states a choice to enact emission reduction programs other than the California vehicle program was without merit because the requirements faced under alternative emission reduction programs were much more stringent than the requirements faced if a state chose to implement the California program.[36]

Whereas a state which adopted the California program would not be required to legislate anything more, a state such as Virginia which opted for an alternative program would have to reduce nitrogen oxides 3.5 times and volatile organic compounds 6.5 times more than a "California" state.[37] The court went so far as to say "only a very foolish state would see EPA's offer to accept this substitute program as a real alternative."[38] To aid the rest of its analysis, the court concluded on this question that it would treat the EPA's rule as "'requir[ing] all the northeastern states to adopt the California car program'. . . ."[39]

The next question the D.C. Circuit set out to answer was whether "section 110 give[s] EPA the authority to condition approval of a state's plan on the state's adoption of control measures EPA has chosen."[40] The EPA asserted that section 110 of the 1990 CAAA authorizes the EPA to require states to adopt specific pollution control measures.[41] The court held that Section 110 has never allowed for such an EPA mandate, stating that "'each state determines an emission reduction program for its nonattainment areas, subject to EPA approval, within deadlines imposed

35. *Id.* at 1404.
36. *Id.* at 1404-05.
37. *See id.*
38. *Id.* at 1405.
39. *Id.* (quoting Final Rule on Ozone Transport Commission; Low Emission Vehicle Program for the Northeast Transport Region, 60 Fed. Reg. 4712, 4713 (1995)) (codified at 40 C.F.R. pt. 51 (1996); 40 C.F.R. pts. 52, 85 (1997)).
40. *Id.*
41. *See id.*

by Congress.'"[42] The D.C. Circuit relied on the United States Supreme Court's holding in *Train v. Natural Resources Defense Council, Inc.*,[43] that the Clean Air Act "gave the states initial responsibility for determining the manner in which air quality standards were to be achieved."[44] Going even further, the D.C. Circuit held that the "EPA 'identifies the end to be achieved, while the states choose the particular means for realizing that end.'"[45]

The Supreme Court's holding in *Train* rested squarely on the express language of Section 107(a) of the CAA.[46] This section provides that:

> [e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan which will specify *the manner* in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.[47]

The D.C. Circuit also held that even the EPA's adoption of a federal implementation plan as a result of a state's failure to maintain ambient air quality standards does not allow the EPA to mandate a state's implementation of specific control measures.[48] According to Section 110, states have "'the power to determine which sources would be burdened by regulations and to what extent.'"[49]

The EPA argued that Section 110 of the 1990 CAAA specifically authorized it to require states to implement specific pollution control measures.[50] The D.C. Circuit, however, held that the language relied upon by the EPA does not alter the balance of power existing between the states and the EPA, previously recognized by the U.S. Supreme Court in *Train*.[51] This language only gives the EPA the authority to require state

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42. *Id.* at 1406 (quoting Natural Resources Defense Council, Inc. v. Browner, 57 F.3d 1122, 1123 (D.C. Cir. 1995)).

43. 421 U.S. 60, 64 (1975).

44. *Virginia*, 108 F.3d at 1407.

45. *Id.* at 1408 (quoting Air Pollution Control Dist. v. EPA, 739 F.2d 1071, 1075 (6th Cir. 1984)).

46. *See id.* at 1407.

47. *Id.*

48. *Id.* at 1408 (quoting EPA v. Brown, 431 U.S. 99, 103 (1977)).

49. *Id.* (quoting Union Elec. Co. v. E.P.A., 427 U.S. 246, 269 (1976)).

50. *See id.* at 1409. Section 110(k)(5) contains the following language: ". . . [if a state plan is inadequate] the Administrator [of the EPA] shall require the State to revise the plan *as necessary* to correct such inadequacies." *Id.* (quoting CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5) (1994)) (emphasis added).

51. *Id.* at 1409-10.

implementation plan revisions "as necessary" not the authority to mandate specific control measures "as necessary."[52]

The court next asked whether Section 184 gives the EPA the authority to require the implementation of specific pollution control measures.[53] The D.C. Circuit held that Section 184, when interpreted in isolation from other Clean Air Act provisions, does indeed give the EPA the authority to require the implementation of the EPA mandated control measures.[54]

The Commonwealth of Virginia, however, argued that Section 184 was not only unconstitutional, but also inconsistent with Sections 202 and 177 of the Clean Air Act.[55] The court declined to reach this constitutional question, and instead addressed the statutory issue of whether "section 177, read together with section 202, [forbade] EPA from conditioning its approval of a state's implementation plan on the state's adoption of the California program to limit motor vehicle emissions."[56]

Section 202 regulates new motor vehicle and engine emission standards and provides that "'the numerical emission standards specified . . . [in Section 202] shall not be modified . . . before the model year 2004.'"[57] The court found that the EPA's rule was inconsistent with section 202 "[t]o the extent [that the] final rule can be viewed as setting emissions standards for new motor vehicles in the northeastern states. . . ."[58]

The EPA also asserted that the northeastern states could voluntarily adopt the California emission program in accordance with Section 177 of the CAA.[59] Section 177 provides that "'any State . . . may adopt and enforce . . . standards relating to control of emissions from new motor vehicles or new motor vehicle engines' if the state standards 'are identical to the California standards' and if the standards are adopted 'at least two years before' they take effect."[60] The court noted that Section 177 thus gives each state the discretion to follow California's lead or not.[61] The court attacked the EPA's position on section 177 because it found nothing

52. *See id.* at 1410.
53. *Id.*
54. *Id.*
55. *See id.*
56. *Id.* at 1411.
57. *Id.* (quoting CAA § 202(b)(1)(C), 42 U.S.C. § 7521(b)(1)(C) (1994)).
58. *Id.* at 1411.
59. *See id.* at 1412.
60. *Id.* (quoting CAA § 177, 42 U.S.C. § 7507 (1994)).
61. *Id.*

voluntary about a Section 184 mandate to implement the California emission program.[62] Specific vehicle emission standards chosen and mandated by the EPA violated Section 177 in light of Section 202 by "'mandat[ing] state action that would otherwise be discretionary [under Section 177]. . . .'"[63] The court rejected the EPA's assertion that Section 184 enabled the EPA to require states to implement certain control measures and recognized that Section 202 specifically prohibited the type of measure included in the EPA's rule—stricter emission standards than those required by Section 202.[64]

Finally, the court analyzed the issue of whether there was substantial evidence to support the declaration that each of the SIPs failed to meet the requirements of both Section 110(a)(2)(D) and Section 184.[65] The court held that "since the particular measure recommended [by the NOTC] to EPA [was] not one the agency [could] mandate, EPA's finding of inadequacy . . . [could not] survive."[66] The D.C. Circuit found that EPA's rule could not be based on Section 110 because the applicable computer modeling necessary to support a finding of inadequacy under Section 110(a)(2)(D) did not exist.[67] The circuit court vacated the rule based on its interpretation of the relevant sections of the CAA and the 1990 CAAA, finding that the rule was not supported by either of these legislative acts.[68]

IV. ANALYSIS

The D.C. Circuit Court's opinion in *Virginia* correctly interpreted Section 110 of the CAA, Section 110's modifications under the 1990 CAAA, and Section 184 of the 1990 CAAA. The court's opinion goes astray, however, in its treatment of Section 184 in light of the particular issues present in *Virginia* and the potential issues which may arise in the future.

According to the court's analysis of Section 184, the EPA may not mandate the implementation of a control measure specifically prohibited by some other legislative provision. This prohibition applies even if the mandate is initiated by a recommendation from a Regional Pollution

62. *Id.*

63. *Id.* (quoting Final Rule on Ozone Transport Commission; Low Emission Vehicle Program for the Northeast Transport Region, 60 Fed. Reg. 4712, 4713 (1995) (codified at 40 C.F.R. pt. 51 (1996); 40 C.F.R. pts. 52, 85 (1997)).

64. *Id.* at 1413.

65. *Id.* at 1414.

66. *Id.*

67. *Id.* at 1415.

68. *Id.*

Commission created by Congress and authorized to make such recommendations to the EPA.[69] The court failed to recognize that Congress intended, through the 1990 CAAA, to address pollution from a regional perspective, rather than from an isolated state perspective.[70] This viewpoint is necessitated by the fact that air pollution travels across state lines and adversely affects a state's ability to attain or maintain air quality standards.[71]

The court seems to imply that requiring a state to implement a particular control measure infringes upon a state's sovereignty.[72] State sovereignty is, however, more greatly affected when one state, such as Virginia, is allowed to pollute eleven other states because of its failure to adopt a pollution control measure which is at least as stringent as those measures adopted by the downwind states. Section 184 was enacted by Congress to eliminate this possibility.[73] The court's decision limits the usefulness of the NOTC and greatly inhibits the regional approach to combating air pollution.

There is something curious about the court's reliance on state sovereignty claims to invalidate the EPA's rule. The court emphatically held that Section 184 does give the EPA the authority to mandate certain control measures.[74] The court's decision actually endorses any EPA rule promulgated pursuant to a Section 184 mandate requiring the implementation of control measures such as "ration[ing] gasoline; impos[ing] tougher emission standards for boilers, gas turbines, and large internal combustion engines; . . . encourag[ing] carpooling; develop[ing] a comprehensive system of fees and incentives designed to affect driving habits and vehicle usage . . . [and] enhanc[ing] vehicle inspection and maintenance programs . . . ."[75] It seems that state sovereignty concerns fall by the wayside unless there is a specific provision of the CAA or its amendments prohibiting the implementation of a particular type of control measure. This, however, is inconsistent with the court's own interpretation of Section 110 and subsequent position that "states [are not required] to insert in their [implementation] plans control measures EPA

69. *See id.* at 1414.
70. *See* Wilcox, *supra* note 22, at 34.
71. *See generally id.* at 31-32.
72. *See Virginia*, 108 F.3d at 1408-09.
73. *See* Wilcox, *supra* note 22, at 49.
74. *Virginia*, 108 F.3d at 1410.
75. *Id.* at 1413 (internal quotations omitted).

has [mandated]."[76] The question remains whether Section 184 can be upheld in light of Section 110.

As for Section 202, when read in isolation, it does not allow for more stringent vehicle emission standards. However, it is hard to imagine that recommendations addressing vehicular sources cannot be made by the NOTC.[77] It seems that this is one emission source which could be approached from a regional perspective because reducing this emission source would not have a disproportionate effect on the economy of any particular state in the region. Consider the inequitable burden a heavily industrialized state would encounter if a regional pollution commission adopted a pollution control measure that saddled industry with much of the emission reduction load. This type of control measure would definitely infringe upon a state's sovereign right to promote certain industrial activities within its own borders. However, according to the court's interpretation of Section 184, this type of control measure could be mandated by an EPA rule pursuant to a NOTC recommendation simply because a specific provision, similar to Section 202, does not exist.[78]

If sovereign rights were the true concern of the court, Section 184 should have been invalidated in light of Section 110 of the CAA rather than holding that some Section 184 recommendations are appropriate while others are not.

Another question which also surfaces amidst the analytical quagmire present in *Virginia* is: What exactly does "mandate" mean? The District of Columbia Circuit Court of Appeals believes that the EPA has mandated the implementation of the California vehicle emission program.[79] Others, however, may believe that the EPA is simply promulgating an endorsement of the NOTC in order to give the Commission's recommendation the force and effect of law.[80] When promulgating the rule requiring the adoption of the California vehicle program, the EPA addressed the rule's validity in light of Section 202.[81] CAA Section 202 precludes the modification of *national* emission standards prior to the

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76. *Id.* at 1409.

77. *See* Final Rule on Ozone Transport Commission; Low Emission Vehicle Program for the Northeast Transport Region, 60 Fed. Reg. 4712, 4718 (1995) (codified at 40 C.F.R. pt. 51 (1996); 40 C.F.R. pts. 52, 85 (1997)). The EPA believed that the language "additional control measures," included in Section 184, allowed the Administrator to impose on states "measures over and above those required under other provisions of the Act." *Id.*

78. *See Virginia*, 108 F.3d at 1410, 1413.

79. *See id.* at 1404.

80. *See* Final Rule on Ozone Transport Commission; Low Emission Vehicle Program for the Northeast Ozone Transport Region, 60 Fed. Reg. at 4718.

81. *See id.*

year 2004; it does not, however, prohibit the altering of *state* vehicle emission standards.[82] The EPA's rule does not alter national emission standards.[83] It alters state emission standards at the behest of the NOTC.[84]

It should not be forgotten that each NOTC member state had an EPA approved state implementation plan.[85] Nevertheless, the NOTC petitioned EPA to mandate the implementation of the California program in the region.[86] While it is true that the NOTC vote was not unanimous, the states, under the ambit of the NOTC, made the first move, not the EPA.[87] If something is to be attacked, it should not be the EPA's rule, but rather, the constitutionality of approaching air pollution problems from a regional perspective through the formation of regional pollution commissions. This is a question which was posed by the petitioners but left unanswered by the court.[88]

V. CONCLUSION

The Clean Air Act of 1963 recognized that air pollution in one state may affect a neighboring or nearby state's air quality.[89] The 1990 CAAA's creation of the NOTC signified a marked change in Congress's approach to regional air pollution. Section 184 of the 1990 CAAA authorized the NOTC to make pollution control measure recommendations to the EPA by a majority vote of the member states.[90] Unanimity was not required. Section 202 may preclude the EPA from promulgating a rule requiring stricter emission standards prior to the year 2004, but this section does not prohibit the NOTC from recommending to the EPA that such a requirement should be implemented.[91] When faced with the decision of creating the NOTC, Congress obviously believed that, in the air pollution battle, regional concerns should be favored at the expense of local concerns.[92] Such an approach is consistent with congressional concern that upwind pollution should not be allowed to

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82. *See id.*
83. *See id.*
84. *See id.* at 4712.
85. *See* Virginia v. EPA, 108 F.3d 1397, 1401 (D.C. Cir. 1997).
86. *See* Final Rule on Ozone Transport Commission; Low Emission Vehicle Program for the Northeast Transport Region, 60 Fed. Reg. 4712 (codified at 40 C.F.R. pt. 51 (1996); 40 C.F.R. pts. 52, 85 (1997)).
87. *See supra* note 33 and accompanying text.
88. *See Virginia*, 108 F.3d at 1410.
89. *See* Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 65-66 (1975).
90. *See supra* notes 33, 34 and accompanying text.
91. *See Virginia*, 108 F.3d at 1402, 1411.
92. *See generally* Wilcox, *supra* note 22, at 30.

impede a downwind state's ability to attain or maintain air quality standards.

While the EPA's rule infringes upon state sovereignty, this infringement is necessitated by Congress's decision to tackle air pollution from a regional perspective. This decision begs the question of what the purpose of NOTC recommendations are if the EPA is unable to implement them, and they are not binding on every member state. In regions like the northeast, where the heavy concentration of industry and prevailing wind patterns make the entire area an ozone nonattainment zone, a regional approach seems to be the only way to address the problem. If a regional air pollution control program of any kind is to succeed, the NOTC and the EPA must, by court interpretation or congressional mandate, be granted the power to propose and implement region-wide pollution control strategies.

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