

# CRS Report for Congress

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## Highway Fund Sanctions for Clean Air Act Violations

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### Summary

Under the Clean Air Act, the Administrator of the Environmental Protection Agency is required to impose highway fund and other sanctions on areas that she determines not to have submitted or not to have implemented adequate plans to attain air quality standards. The threat of sanctions is a powerful tool that Congress gave EPA to encourage state compliance with the Act's objectives. EPA has formally notified the states of its intent to use this tool 855 times since 1990. Actual imposition of sanctions, which cannot occur until 18 months after formal notification, is a relatively rare event, however. The Agency has imposed sanctions 14 times since 1990; they are currently in effect for only one small area in Montana.

This report provides information concerning the authority to impose sanctions, lists the 14 areas that have been subject to sanctions since 1990, describes their status as of October 1997, and discusses the role of sanctions and alternatives under the Act.

### Introduction

As Congress considers reauthorization of ISTEA, the Intermodal Surface Transportation Efficiency Act, numerous congressional requesters have expressed interest in the connection between ISTEA and the authority of the Environmental Protection Agency (EPA) to impose sanctions withholding federal highway funds. This report provides information on EPA's authority (which is found in Sections 179 and 110(m) of the Clean Air Act), the limitations and exceptions to that authority, the recent history of the authority's use, and a discussion of the role played by highway fund and other sanctions under the Clean Air Act.

## EPA's Sanction Authority

Under the Clean Air Act, EPA sets what are called National Ambient Air Quality Standards (NAAQS), defining what are considered acceptable levels of pollution from a public health perspective. NAAQS have been set for six pollutants: ozone, carbon monoxide, particulate matter, sulfur dioxide, nitrogen oxides, and lead. States are required to monitor for each of these pollutants and submit monitoring data annually to EPA. The data are used to determine whether areas are in attainment or nonattainment for each of the standards.

If an area is in nonattainment, the Act (in general) leaves to the states the determination of such measures (to be imposed on industry, transportation, services, individuals, etc.) as may be necessary to achieve compliance with air quality standards. These measures vary from state to state. Within certain limits, states are free to choose their own approach, provided that their plan demonstrates sufficient reductions in emissions to demonstrate compliance, using approved EPA air quality models.<sup>1</sup>

If the EPA Administrator determines that a state has failed to submit an acceptable implementation plan for achieving or maintaining air quality standards, or has failed to implement the requirements of an approved plan, sanctions can be imposed. Sanctions cannot be imposed until 18 months after the Administrator makes such a determination, and they may not be imposed if a deficiency has been corrected within the 18-month period. It is not failure to attain the standards that leads to sanctions, but failure to submit an acceptable plan or to implement the measures identified in the plan.

In such cases, Section 179 of the Clean Air Act authorizes EPA to use two types of sanctions: 1) withholding of certain federal highway funds; and 2) imposing what are called "2:1 offsets" on new or modified sources of emissions.<sup>2</sup> Under Section 179, the Administrator first imposes one of these two sanctions. If the deficiency has not been corrected within 6 months, both sanctions are applied.

Under Section 110(m) of the Act, the Administrator is required to apply sanctions to any *portion* of a state, rather than the entire state, "where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency."

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<sup>1</sup> The federal government does have some additional authority that affects the State Implementation Planning process. Under Sections 182-189, the Act sets specific requirements for measures to be included in state plans, depending on the severity and type of pollution in a nonattainment area. The Act also imposes federal emission standards on automobiles and a limited number of other products sold in interstate commerce, which affect the ability of local areas to plan for emission reductions. Under the 1990 amendments to the Act, EPA is also implementing federal programs for acid rain (imposing federal standards on electric utilities) and toxic air emissions (imposing federal standards on a number of sources in industrial and service sectors).

<sup>2</sup> The 2:1 offset sanction permits the Administrator to require that new or modified sources of emissions for which a permit is required offset increased emissions from the permitted facility by emission reductions elsewhere in a ratio of at least 2:1.

## Limitations and Exceptions to the Authority

With some notable exceptions, under the circumstances described above, EPA can prohibit the Secretary of Transportation from awarding any grants under Title 23 of the United States Code. Projects that would improve safety may be exempt from the sanctions, if the Secretary determines, based on accident or other appropriate data, that the principal purpose of a project is an improvement in safety. In addition, despite the imposition of sanctions, the Secretary may approve the following projects geared toward the improvement of air quality:

- capital programs for public transit;
- construction of roads or lanes for the use of buses or high occupancy vehicles;
- planning for requirements for employers to reduce employee work-trip-related vehicle emissions;
- highway ramp metering, traffic signalization, and related programs to improve traffic flow and achieve a net emission reduction;
- fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit operations;
- programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use, through road use charges, tolls, parking surcharges, or other pricing mechanisms, vehicle restriction zones or periods, or vehicle registration programs;
- programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems, to reduce congestion and emissions; and
- such other transportation-related programs as the Administrator, in consultation with the Secretary of Transportation, finds would improve air quality and would not encourage single occupancy vehicle capacity.<sup>3</sup>

Thus, the highway fund sanctions are not absolute; there are numerous statutory exemptions.

## Recent History Regarding the Use of Sanctions

Imposition of sanctions is a relatively rare event, but their invocation to prompt state action is not. Since passage of the 1990 Clean Air Act Amendments, EPA has made formal findings of non-submittal or incompleteness of State Implementation Plans through letters to state Governors, or disapproval of SIPs through Federal Register notices, 855 times. Such letters or notices start what EPA refers to as the "sanctions clock," giving a state 18 months to submit or resubmit a plan and obtain approval. In

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<sup>3</sup> These exceptions are listed in Section 179(b) of the Clean Air Act.

general, the states do submit acceptable plans within the 18 months and no sanctions are imposed. The Agency has had to impose sanctions in only 14 cases since 1990.

A list of the 14 cases is attached to this report.<sup>4</sup> In each of the 14 cases, the Administrator has imposed the offset sanction. In 2 of the 14 cases, involving small portions of Montana and Missouri, the Administrator has imposed highway fund sanctions in addition to the offset requirement, 6 months after the imposition of offsets. The highway sanctions were subsequently lifted in the case of Iron County, Missouri. As of October 1997, they remained in effect in East Helena, Montana. East Helena was the only area of the country subject to sanctions of any kind as this report was written.

## **The Role of Sanctions**

The purpose of sanctions is to provide an incentive for states to develop and implement “adequate” air quality implementation plans (as judged by EPA), by penalizing those states that do not. Without some tool to force state action, some states might lag in the adoption of air pollution control measures and there might be competition to ease standards as a means of attracting or retaining pollution-intensive industries. Thus, sanctions are viewed by many as a useful tool to focus a state’s attention on its responsibilities under the Act.<sup>5</sup>

This tool can be useful to EPA whether or not it is actually used. The threat of imposing sanctions is often sufficient to prompt state action. As noted, such “threats” are common. They may be used even by state officials. For example, state officials anxious to have their state legislature enact laws implementing a State Implementation Plan, may argue that failure to act will lead EPA to cut off the state’s highway funds.

While potentially significant in impact, the withholding of funds generally does not lead to their ultimate loss. Highway funds are made available for a 4-year period under ISTEA. If a state submits an acceptable air quality plan or corrects the deficiencies in its state plan during the 4-year period, it will ultimately receive the funds that were withheld.

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<sup>4</sup> Before the 1990 Amendments, the Secretary of Transportation was required to impose highway fund sanctions and the EPA Administrator was not allowed to approve any award or grant under the Clean Air Act to areas that failed to submit adequate State Implementation Plans. There was no 18-month grace period, as there is under current law, and there was no provision for invoking 2:1 offsets for a 6-month period before use of highway fund sanctions. The requirement to withhold Clean Air Act grants was made discretionary in the 1990 amendments, in addition to the other changes.

In addition, since 1977, the Administrator has had discretionary authority under Section 316 of the Clean Air Act to withhold sewage treatment grants from areas that are not implementing approved State Implementation Plans. This authority has not been used since the 1980s.

<sup>5</sup> The Clean Air Act contains no provision for directly coercing states to enact components of the federal clean air program. Such direct coercion would exceed the federal government’s constitutional power. Rather, the federal government must achieve its ends through other, non-coercive means, such as preconditions on the disbursement of federal grants (e.g., the highway funds sanction) or the threat of federal assumption of currently state-run programs (e.g., the use of Federal Implementation Plans, described below). See *New York v. United States*, 505 U.S. 144 (1992).

While some may view these sanctions as being too coercive and may wish to remove EPA's sanction authority, without the sanctions EPA would be left to rely on one other tool to encourage state action: its authority under Section 110(c) to impose Federal Implementation Plans (FIPs) in states that have not submitted adequate state plans. Under this section, Congress required EPA to promulgate a federal plan to achieve or maintain air quality in states that have failed to submit adequate state plans, within 24 months of a determination of the state's failure to act.

Development of a FIP is generally considered a greater burden than imposition of highway sanctions, both by EPA and by the states, and has rarely been used. In the most recent FIP case, EPA developed a FIP for six counties in California in 1994, only after being ordered to do so by a federal court. It contained measures that were considered draconian by many regulated industries in the state. The FIP was imposed February 14, 1995, but was rescinded by P.L. 104-6, enacted April 10, 1995.

## **Conclusion**

Imposition of sanctions is a rare event. In most cases, it has involved imposition of additional offset requirements for new or modified sources of emissions. Highway fund sanctions, in contrast, have been imposed only twice since enactment of the Clean Air Act Amendments of 1990. Nevertheless, the Agency has threatened to use sanctions on numerous occasions, when it has found state actions inadequate to achieve the requirements of the Clean Air Act.

If EPA did not have authority to impose such sanctions, the Agency would have no recourse but to directly impose air pollution control measures in any recalcitrant state, in the form of a Federal Implementation Plan.

**Areas of the United States Where EPA Has Implemented  
Sanctions Under the Clean Air Act Amendments of 1990**

(as of October 16, 1997)

Area	SIP Element	Sanction	Date Imposed	Date Lifted
East Helena Area, MT	SO <sub>2</sub> SIP Secondary Standard	Emission Offset	7/19/95	In effect
		Highway Funds	1/19/96	In effect
Washington Area, DC	Ozone, NSR Rules	Emission Offset	11/23/96	5/21/97
Burlington MSA, VT	Enhanced I&M	Emission Offset	9/6/94	7/24/96
Lewis and Clark County, City of East Helena, MT	Lead SIP	Emission Offset	2/2/95	8/2/95
Iron County within Boundaries of Liberty and Arcadia Township, MO	Lead SIP	Emission Offset	2/2/95	9/18/96
		Highway Funds	8/2/95	9/18/96
St. Louis Area, MO	NO <sub>x</sub> RACT	Emission Offset	1/6/96	7/3/96
Huntington, WV	Basic I&M	Emission Offset	9/6/94	12/21/94
Douglas County, Portion of City of Omaha, NE	Lead SIP	Emission Offset	2/2/95	7/12/95
Chicago-Gary-County Area, IL	NO <sub>x</sub> RACT	Emission Offset	1/8/96*	1/26/96
Chicago-Gary-County Area, IN	NO <sub>x</sub> RACT	Emission Offset	1/8/96*	1/26/96
Baton Rouge Area, LA	NO <sub>x</sub> RACT	Emission Offset	1/1/96*	1/26/96
Grand Rapids Area, MI	NO <sub>x</sub> RACT	Emission Offset	1/8/96*	1/26/96
Muskegon Area, MI	NO <sub>x</sub> RACT	Emission Offset	1/8/96*	1/26/96
Cuyahoga County, OH	PM-10 SIP	Emission Offset	12/27/95*	1/23/96

\*Sanctions occurred while EPA was not operational due to the federal government shutdown during FY1996. In each of these cases, sanctions were lifted when the government reopened.

I&M = Vehicle Inspection and Maintenance Program

MSA = Metropolitan Statistical Area

NO<sub>x</sub> = Nitrogen Oxides

NSR = New Source Review

PM-10 = Particulate Matter of 10 micrometers or less in diameter

RACT = Reasonably Available Control Technology

SIP = State Implementation Plan

SO<sub>2</sub> = Sulfur Dioxide

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