

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CITIZENS FOR PENNSYLVANIA’S FUTURE	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
BRADLEY L. MALLORY, SECRETARY OF	:	
THE PENNSYLVANIA DEPARTMENT OF	:	
TRANSPORTATION, AND DAVID E. HESS,	:	NO. 02-798
SECRETARY OF THE PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	
	:	
Defendants.	:	

MEMORANDUM

Baylson, J.

December 18, 2002

In its Complaint, Citizens for Pennsylvania’s Future (“Plaintiff”) seeks declaratory and injunctive relief arising out of the failure of Bradley L. Mallory, in his capacity as the Secretary of the Pennsylvania Department of Transportation, and David E. Hess, in his capacity as the Secretary of the Pennsylvania Department of Environmental Protection (“Defendants”), to fully implement Pennsylvania’s state enhanced vehicle and maintenance inspection program (“I/M Program”) as required by Pennsylvania’s state implementation plan (“SIP”) allegedly in violation of the Clean Air Act, 42 U.S.C. §§ 7401 -7671q (“CAA”). Plaintiff seeks recovery for in Count I for violations of “emission standards or limitations” within the meaning of 42 U.S.C. § 7604(a)(1) and (f).

Presently before the Court are Plaintiff’s Motion for Partial Summary Judgment and Defendants’ Motion for Summary Judgment. Oral argument was held on December 9, 2002. For

the reasons set forth below, the Court will deny Defendants' Motion for Summary Judgment and will grant Plaintiff's Motion for Partial Summary Judgment.

I. Background

A. Factual Background

The purpose of the CAA is:

- (1) to promote and enhance the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
- (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
- (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and programs; and
- (4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

42 U.S.C. § 7401(b).

Under the CAA, the United States Environmental Protection Agency ("EPA") must establish national ambient air quality standards ("NAAQS") for certain air pollutants. Primary NAAQS must be set at a level that will "protect the public health" with "an adequate margin of safety" and secondary NAAQS must be set at a level that will "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. § 7409(b).

The CAA designated Pennsylvania as part of an ozone transport region and required Pennsylvania to submit a SIP establishing enhanced I/M programs for certain areas. 42 U.S.C. § 7511c(b)(1)(A). The Pennsylvania Department of Environmental Protection ("DEP") submitted Pennsylvania's enhanced I/M regulations to the EPA, which approved them and incorporated them into the Pennsylvania SIP codified at 40 C.F.R. § 52.2020. Under the Pennsylvania SIP,

the Pennsylvania I/M Program was required to begin in five counties in and around Philadelphia (“Philadelphia Counties”) and four counties in and around Pittsburgh by October 1, 1997, and in sixteen remaining Pennsylvania counties (“Sixteen Counties”)¹ subject to the program by November 1999. This case concerns the Sixteen Counties.

B. Procedural Background

Plaintiff filed the Complaint in the instant action on February 15, 2002 alleging that the I/M Program has never been implemented in the Sixteen Counties, and Defendants, therefore, are in violation of the Pennsylvania SIP’s implementation requirements. (Compl. ¶¶ 23, 28.)

Plaintiff maintains that the failure of Defendants to implement the I/M Program in the Sixteen Counties violates “emission standards or limitations” under the CAA. *Id.* ¶ 30. To remedy this violation, Plaintiff requests that this Court: (1) declare that Defendants have violated and are in violation of “emission standards or limitations” within the meaning of 42 U.S.C. § 7604(a)(1) and (f); (2) order Defendants to fully and expeditiously implement, administer, maintain, and enforce the I/M Program as required by Pennsylvania SIP’s in the Sixteen Counties; (3) award Plaintiff its costs and reasonable attorney and expert witness fees; (4) retain jurisdiction over the action to ensure compliance with the Court’s decree; and (5) grant such other relief as the Court deems just and proper. *Id.* at 8. Plaintiff filed its Motion for Partial Summary Judgment on September 9, 2002 seeking summary judgment on all liability issues, and Defendants filed their Motion for Summary Judgment on October 4, 2002.

¹ The Sixteen Counties are Lehigh, Northampton, Berks, Cumberland, Dauphin, Lancaster, Lebanon, York, Blair, Cambria, Centre, Erie, Lackawanna, Luzerne, Lycoming and Mercer.

II. Legal Standard

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party’s initial burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

III. Discussion

A. Ex parte Young Exception

At the legal heart of this case is an exception to Eleventh Amendment immunity created by Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Under the Ex parte Young exception, “individual state officers can be sued in their individual capacities for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law.” MCI Telecomm. Corp., 271 F.3d at 506. Such a suit is not considered a suit against the state, and, therefore, is not barred by the Eleventh Amendment. Id. The theory of the Ex parte Young exception is that, because a state cannot authorize unconstitutional or illegal conduct, the state officer’s action is ultra vires and such a state officer is “stripped of his official or representative character.” Ex parte Young, 209 U.S. at 160. The Ex parte Young exception, which applies to violations of the United States Constitution and federal statutes, is “accepted as necessary to permit federal courts to vindicate federal rights and hold state officials responsible to the ‘supreme authority if the United States.’” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (quoting Ex parte Young, 209 U.S. at 160).

B. Plaintiff’s Contentions

Plaintiff alleges in its Complaint that Defendants, in their capacities as Commonwealth officials, violated and continue to violate the CAA by failing to fully implement the I/M Program in the Sixteen Counties. Thus, it argues that the Ex parte Young exception is applicable and its CAA claim is not barred by the Eleventh Amendment.

C. Defendants’ Contention

Defendants do not deny their failure to implement the I/M Program but argue that the

criteria for Ex parte Young exception are not satisfied and, as a result, Plaintiff's suit is barred by the Eleventh Amendment, for the following reasons:

1. The source of the alleged violation lies in state law, not federal law;
2. The EPA's approval of Pennsylvania's SIP does not transform the I/M Program into federal law for any purpose other than enforcement by the EPA;
3. Because the CAA provides a detailed remedial scheme for its enforcement, the Ex parte Young exception is inapplicable; and
4. Section 304 of the CAA, 42 U.S.C. § 7604(f), does not abrogate Eleventh Amendment immunity. (Mem. Supp. Defendants' Mot. Summ. J. at 8-21.)

D. Clean Air Council v. Mallory

On October 18, 2002, Judge DuBois of this Court issued a decision in Clean Air Council v. Mallory, CIV.A.01-179, 2002 U.S. Dist. LEXIS 19986 (E.D. Pa. Oct. 18, 2002)², which involved similar facts and almost identical defendants and issues. In Clean Air Council, the plaintiff filed a Complaint against defendant Bradley L. Mallory, in his capacity as Secretary of the Pennsylvania Department of Transportation, and defendant James M. Seif, in his capacity as the Secretary of the Pennsylvania Department of Environmental Protection, alleging that the defendants were in violation of "emission standards or limitations" within the meaning of the CAA because the defendants failed to fully implement the I/M Program required by Pennsylvania's SIP in the Philadelphia Counties. Clean Air Council, 2002 U.S. District LEXIS

² On December 3, 2002, after giving the parties an opportunity to discuss the appropriate remedy, Judge DuBois entered a final order (Docket No. 26) that the defendant, on or before September 1, 2003, must either fully implement the final cutpoints, or fully implement the alternative cutpoints, if fully approved by that date.

19986, at *1-2. Although the defendants complied with the first phase of the I/M Program and fully implemented the initial start-up pass/fail emission standards in the Philadelphia Counties, the defendants admitted that they failed to fully implement the final pass/fail emission standards for the second phase of the I/M Program, which the approved Pennsylvania SIP required compliance with by December 1, 1998. Id. at *7.

In their cross-motion for summary judgment, the defendants asked the Court to grant summary judgment in their favor on the ground that the suit was barred by the Eleventh Amendment. Id. at *13. The defendants advanced three grounds in support of its argument that the Ex parte Young exception to the Eleventh Amendment was not available to enforce violations of the CAA against state officials:

1. The detailed remedial scheme of the CAA evidences Congress' intention to restrict the availability of Ex parte Young actions to enforce violations of the statute against state officials;
2. The Commonwealth of Pennsylvania has a special state sovereignty interest in enforcement of its approved SIP; and
3. The plaintiff seeks only to enforce state law, not federal law. Id. at *17.

The Court in Clean Air Council: (1) rejected all of the defendants' arguments; (2) determined that defendants violated the CAA by their failure to fully implement the I/M Program within the December 1, 1998 compliance deadline; (3) concluded that the plaintiff was entitled to judgment as a matter of law on the issue of the defendants' liability; and (4) concluded that the appropriate remedy for the defendants' violation of the Act was injunctive relief. Id. at *52, 56.

Plaintiff urges this Court to follow Judge DuBois reasoning in Clean Air Council because

Clean Air Council reaches many of the same Eleventh Amendment questions as presented in the instant action. (Mem. Opp'n Defendants' Mot. Summ. J. at 4-5.) Defendants state that they continue to advance their argument that Pennsylvania's SIP and the state regulations that are incorporated into the SIP have not been transformed into federal law in a manner sufficient to permit the instant action under the Ex parte Young exception to Eleventh Amendment immunity despite Judge DuBois' opinion to this effect in Clean Air Council. (Defendants' Reply Br. at 1.) Defendants, however, do not attempt to distinguish the instant action from Clean Air Council, but merely state their reasons for disagreeing with the reasoning in Clean Air Council. Because Clean Air Council involved similar facts and almost identical defendants and issues, this Court adopts Judge DuBois' sound reasoning. There is no need to repeat Judge DuBois' exhaustive analysis of the issues, which are almost identical to the issues in the present action. Thus, this Court will only discuss governing law and highlight parts of Judge DuBois' opinion.

E. Defendant's Arguments

1. Eleventh Amendment Immunity

In its Motion for Partial Summary Judgment, Plaintiff moves for summary judgment on liability based on the failure to implement the I/M Program in the Sixteen Counties in violation of the Pennsylvania SIP's implementation requirements. (Mem. Supp. Plaintiff's Mot. Summ. J. at 12.) In their Motion for Summary Judgment, Defendants argue that judgment should be granted in their favor because Plaintiff's claims are barred by the Eleventh Amendment. (Mem. Supp. Defendants' Mot. Summ. J. at 7.)

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any

suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. This “amendment has been interpreted to make states generally immune from suit by private parties in federal court.” MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 503 (3d Cir. 2001), cert. denied, sub. nom Pa. PUC v. MCI Telecomms. Corp., ___ U.S. ___, 123 S. Ct. 340, 154 L. Ed. 2d 247 (2002) (citations omitted).

There are three exceptions to Eleventh Amendment immunity: “1) congressional abrogation, 2) state waiver, and 3) suits against individual state officers for prospective relief to end an ongoing violation of federal law.” Id.

Plaintiff alleges in its Complaint that Defendants, in their capacities as Commonwealth officials, violated and continue to violate the CAA by failing to fully implement the I/M Program in the Sixteen Counties. Thus, it argues that the Ex parte Young exception is applicable.³ (Mem. Supp. Plaintiff’s Mot. Summ. J. at 13-19.) Although Defendants admit that the I/M Program has not been implemented in the Sixteen Counties (Mem. Supp. Defendants’ Mot. Summ. J. at 6), Defendants argue that the criteria for Ex parte Young exception are not satisfied and, as a result, Plaintiff’s suit is barred by the Eleventh Amendment (Mem. Supp. Defendants’ Mot. Summ. J. at 8-21.)

2. Detailed Remedial Scheme for Enforcement of the CAA

In Seminole Tribe of Florida v. Florida, the Supreme Court ruled that the Ex parte Young exception to the Eleventh Amendment is not available where “Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right.” 517 U.S. 44,

³ For a discussion of the Ex parte Young exception, see supra Part III. A.

74, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). The Supreme Court in Seminole Tribe examined the remedial scheme of the Indian Gaming and Regulatory Act (“IGRA”), which provides a statutory basis for the operation and regulation of gaming by Indian tribes, and concluded that Congress’ decision to include an elaborate remedial scheme in the Act demonstrated that it did not intend to subject states and state officials to liability under the statute. Id. at 75 (“By contrast with this quite modest set of sanctions, an action brought against a state official under Ex parte Young would expose that official to the full remedial powers of the federal court, including, presumably, contempt sanctions.”). The Supreme Court reasoned that “if § 2710(d)(3) [of the IGRA] could be enforced in a suit under Ex parte Young, [the detailed remedial scheme] would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme [of IGRA] when more complete and more immediate relief would be available under Ex parte Young.” Id. On this basis, the Supreme Court held that the petitioner in Seminole Tribe could not enforce the IGRA against a state official, the Governor of Florida, by utilizing the doctrine of Ex parte Young. Id. at 75-76.

Defendants, relying on Seminole Tribe, argue that Plaintiff may not bring the instant action under the Ex parte Young exception because, similar to the remedial scheme of the IGRA, Congress has created a detailed remedial scheme in the CAA for the enforcement of a federal statutory right against a state. (Mem. Supp. Defendants’ Mot. Summ J. at 14.) In advancing this argument, Defendants point out that the CAA provides two specific remedies for a state's failure to implement the requirements of an EPA-approved SIP: (1) imposition of sanctions under 42 U.S.C. § § 7509(a)(4) and (b); and (2) enforcement of the EPA-approved SIP directly by the EPA pursuant to 42 U.S.C. § 7413(a)(2). Id. at 15-16. These provisions, according to

Defendants, demonstrate that Congress contemplated the EPA as a necessary part of the CAA's remedial scheme and that permitting this action to go forward under Ex parte Young, without involvement of the EPA, would constitute a judicial enlargement of the remedies chosen by Congress to enforce the CAA and make the statute's remedial scheme superfluous. Id. at 16. Defendants further assert that the CAA's remedial scheme allows private parties to compel the EPA to fulfill its nondiscretionary duties required by the statute by filing a citizen suit against the Administrator of the EPA pursuant to 42 U.S.C. § 7604(a)(2). Id. at 18.

The defendants in Clean Air Council advanced the same arguments. Although Judge DuBois agreed that Seminole Tribe narrowed the applicability of the Ex parte Young exception in certain instances, Judge DuBois distinguished Clean Air Council from Seminole Tribe and held that the plaintiff's CAA claim against the defendants was not barred by Seminole Tribe's exception to the Ex parte Young doctrine. Clean Air Council, 2002 U.S. Dist. LEXIS 19986, at *20. This Court agrees with Judge DuBois that the CAA contains a limited remedial scheme, and that Seminole Tribe does not preclude the plaintiff from maintaining the instant action under Ex parte Young. Id. As Judge DuBois found, it is significant that Congress, in enacting the CAA, included a citizen suit provision pursuant to 42 U.S.C. § 7604⁴ in the statute's remedial

⁴ In permitting private citizens to utilize civil suits to enforce the statute, the CAA provides:

Any person may commence a civil action on his own behalf . . . against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

42 U.S.C. § 7604(a)(1). For a discussion on this citizen suit provision, see infra Part III. F.

scheme. Id. Judge DuBois noted, however, that the IGRA contains no such provision. Id.

Judge DuBois also cited to footnote 17 of Seminole Tribe in which the Supreme Court addressed the relative complexity of remedial schemes when it distinguished the IGRA's remedial scheme from remedial schemes set forth in statutes such as the Clean Water Act (the "CWA")⁵:

We do not hold that Congress cannot authorize federal jurisdiction under Ex parte Young over a cause of action with a limited remedial scheme . . . In this regard, [the IGRA] stands in contrast to the statutes [such as the CWA] cited by the dissent as examples where lower courts have found that Congress implicitly authorized suit under Ex parte Young. Compare 28 U.S.C. § 2254(e) (sic) (federal court authorized to issue an "order directed to an appropriate State official") [with] 33 U.S.C. § 1365(a) (authorizing a suit against "any person" who is alleged to be in violation of relevant water pollution laws).

Seminole Tribe, 517 U.S. at 75 n.17. Because the language of the citizen suit provision in the CAA is identical to language of the CWA's citizen suit provision, Judge DuBois' interpretation of the CAA's remedial scheme in a manner that is consistent with the Supreme Court's interpretation of the CWA's remedial scheme in Seminole Tribe is sound, as is his ruling that, by including the citizen suit provision in the CAA, Congress implicitly authorized enforcement of the CAA against state officials under the Ex parte Young exception. Clean Air Council, 2002 U.S. Dist. LEXIS 19986, *22-24.

Judge DuBois also cited to Sweat v. Hull, 200 F. Supp. 2d 1162 (D. Ariz. 2001), which

⁵ The CWA authorizes citizen suits "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1).

relied on footnote 17 of Seminole Tribe and the identical nature of language of the CWA's and CAA's citizen suit provisions. This Court agrees that “Seminole Tribe does not support the position that Congress did not intend to authorize federal jurisdiction over an action brought pursuant to the CAA.” Clean Air Council, 2002 U.S. Dist. LEXIS 19986, *24 (citing Sweat, 200 F. Supp. 2d at 1168 n. 8).

In so ruling, Judge DuBois also found persuasive the decisions in a number of other post-Seminole Tribe cases that the citizen suit provisions of other environmental statutes - the CWA, the Endangered Species Act (“ESA”), and the Resource Conservation and Recovery Act (“RCRA”) - are implicit legislative authorization for suit under Ex parte Young. See, e.g., Natural Res. Def. Council v. California Dept. of Transp., 96 F.3d 420 (9th Cir. 1996); Strahan v. Coxe, 127 F.3d 155, 166 (1st Cir. 1997), cert. denied, 525 U.S. 978, 119 S. Ct. 437, 142 L. Ed. 2d 356 (1998); Cox v. Dallas, 256 F.3d 281, 309 (5th Cir. 2001).

Judge DuBois concluded that, unlike the petitioner in Seminole Tribe, the plaintiff only sought to obtain injunctive relief under the statute's limited remedial scheme. Id. Accordingly, the Court held that the plaintiff's CAA claim against the defendants was not barred by Seminole Tribe's exception to the Ex parte Young doctrine. Id.

Similarly, in the instant action, Plaintiff is only seeking obtain injunctive relief under the CAA's limited remedial scheme. This Court, therefore, accepts the sound reasoning of Judge DuBois in Clean Air Council and finds that Seminole Tribe is distinguishable from the instant action. Therefore, Plaintiff's CAA claim against Defendants is not barred and can be brought under the Ex parte Young exception to Eleventh Amendment immunity.

3. Section 304 of the CAA, 42 U.S.C. § 7604(f)

Defendants contend that, although § 304 of the CAA recognizes that actions against “any governmental instrumentality or agency” may only be brought “to the extent permitted by the Eleventh Amendment,” the fact that it provides for civil penalties and relief for past violations, as well as injunctive relief, mandates the conclusion that Congress intended some abrogation of the states’ sovereign immunity beyond that which could be accomplished through an action under the Ex parte Young exception. (Mem. Supp. Defendants’ Mot. Summ. J. at 18.) Defendants argue, however, that because Seminole Tribe held that congressional abrogations of Eleventh Amendment immunity are valid only if undertaken pursuant to section 5 of the Fourteenth Amendment, and because the CAA, including § 304, were enacted pursuant to the Commerce Clause, Congress did not have the authority to abrogate a state’s sovereign immunity when it enacted § 304 of the CAA. Id. at 19. Plaintiff argues that Defendants’ argument on abrogation under the Eleventh Amendment is inapposite because, although abrogation offers one possible exception to the application of the Eleventh Amendment, Plaintiff has claimed that the exception under the Ex parte Young, not abrogation, applies. (Mem. Opp’n Defendants’ Mot. Summ. J. at 10.)

In reviewing the same argument by the defendants in Clean Air Council, Judge DuBois held that the question of whether Congress has the power to abrogate the Commonwealth of Pennsylvania’s sovereign immunity from suit was not relevant because the Commonwealth or its agencies were not defendants. Clean Air Council, 2002 U.S. Dist. LEXIS 19986, at *16 n.3. The Court, therefore, found that the proper inquiry was whether the plaintiff could maintain the Ex parte Young action against defendants Mallory and Seif to enforce their alleged violations of

the CAA. Id.

The Court adopts Judge DuBois' sound reasoning with respect to this argument. Because the Court has already found that Plaintiff can maintain the instant Ex parte Young action against Defendants to enforce their alleged violations of the CAA, the Court will deny Defendants' Motion for Summary Judgment and will grant Plaintiff's Motion for Partial Summary Judgment on the issue of Eleventh Amendment immunity.

4. Source of the Alleged Violation

Plaintiff, like the plaintiff in Clean Air Council, relied on Concerned Citizens of Bridesburg v. Philadelphia Water Dept., 843 F.2d 679 (3d Cir. 1988) for the proposition that, once approved into a SIP by the EPA under the CAA, state regulations such as the Pennsylvania vehicle testing program are federal laws. (Mem. Supp. Plaintiff's Mot. Summ J. at 15.) In Concerned Citizens of Bridesburg, the Third Circuit held that "the Pennsylvania SIP is a federal regulation promulgated pursuant to the Clean Air Act" and affirmed the district court's pretrial determination that the plaintiff's complaint, alleging a violation of city and state odor regulations that were part of the EPA-approved Pennsylvania SIP, is "a cognizable federal claim under the Pennsylvania SIP." 843 F.2d at 680-81.

Defendants argue the EPA's approval of Pennsylvania's SIP did not transform the I/M Program into federal law for any purpose other than enforcement by the EPA because the I/M Program was not explicitly incorporated into federal law. (Mem. Supp. Defendants' Mot. Summ J. at 10.) Defendants, like the defendants in Clean Air Council, also argue that Concerned Citizens of Bridesburg is inapposite to the instant action because it predates Seminole Tribe of

Florida v. Florida, 517 U.S. 44, 74, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)⁶, and cites to 42 U.S.C. § 7610, but not 42 U.S.C. § 7604, for its holding that Pennsylvania’s SIP is a federal regulation promulgated under the CAA. Id. at 13. Defendants assert that § 7610 is very limited and deals only with the impact of the CAA on other laws enforced by the EPA Administrator and “nonduplication of appropriations,” and does not address the incorporation of state law or the SIP into federal law. Id.

Judge DuBois considered the same arguments in Clean Air Council, and, ultimately, rejected the defendants’ arguments. Judge DuBois rejected the defendants’ argument that Concerned Citizens of Bridesburg was inapposite because it predates Seminole Tribe because he found that Seminole Tribe did not curtail Congress’ power to authorize suits under Ex parte Young, including the citizen suit provision under the CAA. Clean Air Council, 2002 U.S. Dist. LEXIS 19986, at *46. Judge DuBois then concluded that the plaintiff was seeking to enforce federal law, not state law, after analyzing 42 U.S.C. §§ 7410 and 7413. Id. at *32-35. After reviewing the statutory requirements to obtain EPA approval of a SIP, Judge DuBois held that, once approved by the EPA, a SIP has the force and effect of federal law, thereby permitting the Administrator of the EPA to enforce it in federal court. Id. at *36 (citing to 42 U.S.C. § 7413(a) and (b); Delaware Valley Citizens' Council for Clean Air v. Davis, 932 F.2d 256, 264 (3d Cir. 1991) (“Section 7604 permits citizens to commence civil suits in the district courts against persons who violate either emission standards or limitations promulgated under various sections of the Act or orders issued by the EPA or a state concerning those standards or limitations.”)); Am. Lung Ass'n of N.J. v. Kean, 871 F.2d 319, 325 (3d Cir. 1989) (stating that “the explicit

⁶ For a discussion of Seminole Tribe, see supra Part III. D. 3.

language of the Clean Air Act permits this suit, since the regulations at issue are requirements" that are specifically identified as "emission standards or limitations" under the citizen suit provision)).

In ruling that the EPA-approved SIP is federal law, Judge DuBois also relied on Arkansas v. Oklahoma, 503 U.S. 91, 110, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992), where the Supreme Court held that an EPA regulation requiring water pollution discharge permits to comply ““with the applicable water quality requirements of all affected States’ . . . effectively incorporates into federal law those state-law standards the Agency reasonably determines to be ‘applicable.’” Clean Air Council, U.S. Dist. LEXIS 19986, at *46-47. Moreover, Judge DuBois observed that a number of other courts have ruled that a specific provision of an EPA-approved state SIP is federal law and, thus, enforceable under the citizen suit provision of the CAA. Id. (citing Trustees for Alaska v. Fink, 17 F.3d 1209, 1210 n.3 (9th Cir. 1994) (“Having ‘the force and effect of federal law,’ the EPA-approved and promulgated Alaska SIP is enforceable in federal courts.”) (quoting Union Electric Co. v. E.P.A., 515 F.2d 206, 211 & n.17 (8th Cir. 1975), aff’d, 427 U.S. 246, 96 S. Ct. 2518, 49 L. Ed. 2d 474 (1976)); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989) (“If a state implementation plan . . . is approved by the EPA, its requirements become federal law and are fully enforceable in federal court.”) (citing 42 U.S.C. § 7604(a); 1 W. Rodgers, ENVIRONMENTAL LAW: AIR AND WATER §§ 3.9-3.11 (1986)); Communities for a Better Environment v. Cenco Refining Co., 180 F. Supp. 2d 1062, 1068 (C.D. Cal. 2001) (“Once approved by the EPA, the requirements and commitments of a SIP become binding as a matter of federal law upon the state.”) (citing 42 U.S.C. § 7413(a)(2)); Save Our Health Organization v.

Recomp of Minnesota, Inc., 829 F. Supp. 288, 291 (D. Minn. 1993) (ruling that plaintiff has a basis under the citizen suit provision of the CAA to challenge defendant's compliance with odor regulations incorporated into an EPA-approved state SIP).

To support their argument that Pennsylvania's SIP is not federal law, Defendants cite to Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310 (3d Cir. July 24, 2002), which held that the Eleventh Amendment bars suit in federal court against a state official pursuant to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"); at issue is that official's alleged failure to implement, administer, enforce, and maintain a federally approved state coal mining program. Pennsylvania Fed'n of Sportsmen's Clubs, 297 F.3d at 313. The SMCRA was enacted to control surface coal mining in response to Congress' concern over the environmental and societal costs of surface coal mining operations. Id. at 315. The SMCRA enables states to "assume exclusive jurisdiction over regulation of surface coal mining and reclamation operations" by submitting to the Secretary of the Interior a proposed program containing state laws that provide for the regulation of surface coal mining and reclamation operations in accordance with the SMCRA's requirements. Id. at 315-16.

The plaintiffs filed suit under the citizen suit provision of the SMCRA to address alleged violations of Pennsylvania's program, which was approved by the Secretary of the Interior. Id. at 319, 322. The plaintiff's primary argument to support its position that the action could be brought under the Ex parte Young exception was that issues under the Pennsylvania program were issues of federal law because the Pennsylvania program had been incorporated into the SMCRA, in that it had been codified in the C.F.R. Id. at 321. Following the holding of the Fourth Circuit in Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001), that once a

state's proposed program is approved by the Secretary of the Interior, the state's program and regulations are state law, not federal law, the Third Circuit rejected the plaintiffs' argument that the Pennsylvania program had been incorporated in federal law. Pennsylvania Fed'n of Sportsmen's Clubs, 297 F.3d at 326. The Third Circuit, therefore, held that the suit could not fall within the Ex parte Young exception and that the defendant was "entitled to Eleventh Amendment immunity from suit in federal court as to allegations of continuing violations of duties under the [approved] Pennsylvania program" Id. at 330.

Although the CAA and the SMCRA are similar statutes in terms of their implementation by state programs, the Third Circuit's decision in Pennsylvania Fed'n of Sportsmen's Clubs is not applicable to bar this suit because that case involved alleged violations of the Pennsylvania program and the SMCRA, not Pennsylvania's SIP and the CAA. In any event, this Court concludes that it is bound by the Third Circuit's decision in Concerned Citizens of Bridesburg, supra, which was not cited by the Third Circuit in Pennsylvania Fed'n of Sportsmen's Clubs and which held, as noted above, in interpreting the CAA and Pennsylvania's SIP, that the Pennsylvania vehicle testing program becomes a federal law once approved into a SIP by the EPA. The Third Circuit's omission of a citation to Concerned Citizens of Bridesburg in its recent Pennsylvania Fed'n of Sportsmen's Clubs decision implies strongly that the Court believes the SMCRA is different from the CAA. This Court, therefore, follows Concerned Citizens of Bridesburg and adopts the holding of Judge DuBois in Clean Air Council that Pennsylvania's SIP has the force and effect of federal law and, as a result, the source of the alleged violation of Pennsylvania SIP's implementation requirements is federal law, not state law.

F. Citizen Suit under the CAA

The citizen suit provision of the CAA provides, in relevant part:

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf -

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation

42 U.S.C. § 7604(a). The CAA defines “emission standard or limitation under this chapter” to include, inter alia, “(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard . . . (3) any condition or requirement under an applicable implementation plan relating to . . . vehicle inspection and maintenance programs . . . or . . . (4) any other standard, limitation, or schedule established under . . . any applicable State implementation plan approved by the Administrator [of EPA]” 42 U.S.C. § 7604(f). An “applicable State implementation plan” is defined as “the portion (or portions) of the implementation plan, or the most recent revision thereof, which has been approved under section 7410 of this title.” 42 U.S.C. § 7602(q).

The Court finds that the Pennsylvania SIP’s November 15, 1999 compliance deadline for the Sixteen Counties fits within the definition of “any condition or requirement under an applicable implementation plan relating to . . . vehicle inspection and maintenance programs,” and, therefore, are “emission standards or limitations.” See Clean Air Council, 2002 U.S. Dist. LEXIS 19986, *39-40 (citing 42 U.S.C. § 7604(f)(3)). Further, the Court finds that Pennsylvania SIP’s November 15, 1999 compliance deadline also fits within the definitions of “a schedule or

timetable of compliance” and a “schedule established . . . under any applicable State implementation plan.” See id. at *40 (citing 42 U.S.C. § 7604(f)(1), (4)). In order to qualify as an enforceable “emission standard or limitation under this chapter,” a given requirement must be “in effect under this chapter . . . or under an applicable implementation plan.” See id. at *44 (citing 42 U.S.C. § 7604(f)). This Court concludes that the “vehicle inspection and maintenance programs” at issue are in effect under an applicable implementation plan because they are included in the Pennsylvania SIP. See id. As a result, the Court finds that Plaintiff has properly brought a claim under the CAA’s citizen suit provision to enforce the Pennsylvania SIP’s November 15, 1999 deadline.

Liability turns solely on whether a state “complies with its own federally mandated plan.” Id. at *50. Because Defendants admit that the I/M Program has not been implemented in the Sixteen Counties (Mem. Supp. Defendants’ Mot. Summ. J. at 6), the Court finds that Defendants have violated “emission standards or limitations” under 42 U.S.C. § 7604(f) that are in effect under the Act. Therefore, there is no genuine issue of material fact on the issue of liability and the Court will grant Plaintiff’s Motion for Partial Summary Judgment on the issue of liability.

Because the Court finds that Defendants violated the CAA, the Court is obligated to issue an appropriate order for its enforcement. See Clean Air Council, 2002 U.S. Dist. LEXIS 19986, at *51 (citations omitted). The Court finds that the appropriate remedy for Defendants’ violation is injunctive relief and orders Defendants to implement the I/M Program in the Sixteen Counties. However, because the Court has no information on how the implementation can be achieved or how soon implementation can be achieved, the Court will hold a hearing to discuss implementation of the I/M Program in the Sixteen Counties.

IV. Conclusion

For the reasons discussed above, the Court will deny Defendants' Motion for Summary Judgment and will grant Plaintiff's Motion for Partial Summary Judgment.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CITIZENS FOR PENNSYLVANIA’S FUTURE	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
BRADLEY L. MALLORY, SECRETARY OF	:	
THE PENNSYLVANIA DEPARTMENT OF	:	
TRANSPORTATION, AND DAVID E. HESS,	:	NO. 02-798
SECRETARY OF THE PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of December, 2002, upon consideration of Plaintiff’s Motion for Partial Summary Judgment (Docket No. 10) and Defendants’ Motion for Summary Judgment (Docket No. 12), it is hereby ORDERED that Plaintiff’s Motion for Partial Summary Judgment is GRANTED and that Defendants’ Motion for Summary Judgment is DENIED.

The parties are directed to conclude any fact discovery relevant on the remedy by February 15, 2003, to confer on an appropriate remedy, and to file a joint proposed Order, or separate memoranda, no later than February 28, 2003.⁷ The Court will schedule a hearing at that time.

BY THE COURT:

MICHAEL M. BAYLSON, U.S.D.J.

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⁷ Defense counsel has wisely suggested that the new administration in Harrisburg will require some time to determine its position on these issues.