

## **Footnotes: The Dormant Noise Control Act and Options To Abate Noise Pollution**

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1. Interview with Charles Elkins, Assistant to the General Counsel. EPA, in Washington, DC (Nov. 19, 1990).
2. See C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONSTRUCTING THE REGULATORY STATE* 27 (1990) (listing the statute).
3. Noise Pollution and Abatement Act of 1972, Pub. L. No. 92-574. 86 Stat. 1234 (1972) (codified as amended at 42 U.S.C. §§4901-4918 (1988)).
4. In a 1973 national survey of housing and neighborhood conditions by the Department of Housing and Urban Development, street noise was cited by 34 percent of the 60,000 respondents as a "condition" in the neighborhood, while 60 percent of those reporting the condition felt it was "disturbing, harmful, or dangerous," and 18 percent felt that it was so "objectionable" that they would "like to move." Address By Kenneth Eldred. *Noise At The Year 2000. Fifth International Congress On Noise As An International Problem, Sweden* (1988), at 9.
5. See R. PAEHLKE. *ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS* (1989) (describing origins of the environmental movement); C. BOSSO. *PESTICIDES & POLITICS: THE LIVE CYCLE OF A PUBLIC ISSUE* (1987) (same).
6. Hilderbrand, *Noise Pollution: An Introduction To The Problem and An Outline For Future Legal Research*. 70 *COL. L. REV.* 652,655 (1970).
7. See Wilson, "The Politics of Regulation," in *THE POLITICS OF REGULATION* 370 (J. Wilson ed. 1980) (environmental movement succeeded by capitalizing on a crisis, putting opponents on defensive by accusing them of bad acts, and by associating legislation with widely held values like clean air).
8. Letter from Noral Stewart, Stewart Acoustical Consultants, to David Pritzker, Administrative Conference of the United States (ACUS) (Mar. 12, 1991), at 3. Thus, large metropolitan areas are more likely to have noise abatement programs because noise impacts a majority of the population. In other areas where the impact is on a minority of the residents, they find it difficult to get help from local governments which are afraid of being disadvantaged in the competition for industry by creating regulations that other jurisdictions do not have. *Id.*
9. Findley & Plager, *State Regulation of Nontransportation Noise: Law & Technology*. 48 *S. CAL. L. REV.* 209, 254 (1974).
10. Telephone Interview with Frank Gomez, President. National Association of Noise Control Officials (NANCO) (Dec. 5, 1990).

11. Findley & Plager, *supra* note 9, at 253. Noise legislation was passed in Illinois and New York in 1970, in Florida, New Jersey, and North Dakota in 1971, in Hawaii in 1972, and in California in 1973. *Id.*
12. Pub. L. No. 90-411, 82 Stat. 395 (1968) (codified at 49 U.S.C. §§1431 (1988)).
13. Pub. L. No. 91-190, 83 Stat. 832 (1970) (codified at 42 U.S.C. §§4321-4370 (1988)).
14. Noise Pollution and Abatement Act of 1970, Pub. L. No. 91-604, 84 Stat. 2709 (1970) (codified as amended at 42 U.S.C. §§7641-7692 (1988)).
15. EPA, REPORT TO THE PRESIDENT AND CONGRESS ON NOISE (1971).
16. Interview with Kenneth Feith, Senior Scientist/Advisor, Office of Air and Radiation EPA, in Washington, DC (Nov. 19, 1990) (former ONAC official); Interview with Marshall Miller, in Washington, DC (Nov. 20, 1990) (former EPA General Counsel); Telephone interview with Ralph Hillquist (Jan. 7, 1991) (former General Motors employee).
17. SENATE COMM. ON PUBLIC WORKS, ENVIRONMENTAL NOISE CONTROL ACT OF 1972, S. REP. NO. 1160, 92nd Congress, 2d Sess. 2 (1972); reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4655-4698 [hereinafter "Senate Report"]; HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, ENVIRONMENTAL NOISE CONTROL ACT OF 1972, H. REP. NO. 842, 92nd Congress, 2d Sess. 6 (1972) [hereinafter "House Report"].
18. 42 U.S.C. §4901(b) (1988).
19. *Id.* §4905.
20. *Id.* §4903(c).
21. *Id.* §4907.
22. *Id.* §4901(3).
23. *Id.* §4905(e)(1). States and local governments, however, have the option of enforcing the EPA regulations by adopting "identical" limitations as their own laws or ordinances. *Id.*
24. *Id.* §4905(2). State and localities, however, were completely preempted from regulating the same railroad or motor carrier noise emissions regulated by EPA unless it granted a "special local circumstances" exemption. *Id.* §§4916(c) (railroads), 4917(c) (motor carriers).
25. Under the Clean Air Act, EPA sets national ambient standards which the states must meet by controlling sources of air pollution (other than mobile sources). 42 U.S.C. §7409-10 (1988). Congress rejected a similar scheme for noise because it "would, in effect, put the federal

government in the position of establishing land use zoning requirements on the basis of noise . . . [which] is a function . . . more properly that of the States and their political subdivisions . . . .” House Report, supra note 17, at 9. This reason, however, fails to distinguish air pollution from noise pollution if both are considered to be health measures. The harms caused by noise pollution, like those caused by air pollution, do not change by geographical area. In this circumstance, there is no justification for permitting one geographical area to permit more harm to its citizens than another area. The previous reason, however, is more defensible to the extent that noise abatement is a response to aesthetic or nonhealth concerns, because it permits local aesthetic tastes to dictate the amount of regulation. At the time it passed the Act, however, Congress considered noise to be at least, in part, a health problem. See supra notes 16 & 17 and accompanying text.

The politics of the Noise Act may offer a more persuasive explanation of why Congress did not model the Noise Act on the Clean Air Act. The strongest support for the Act were industries that desired federal preemption. supra note 16 & accompanying text, and they had no reason to support legislation that would have forced the states and local governments to regulate nonmobile sources of noise as well. Moreover, some environmentalists, such as Senator Muskie, were afraid that EPA would use preemption to enact weaker abatement requirements than states and local governments. Senate Report, supra note 17, 21-22. This worry may have split support for a more comprehensive effort.

26. EPA had asked Congress to establish a categorical grants program similar to that established under the Federal Water Pollution Act, which provides grants to localities for equipment purchases and personnel. House Report, supra 17, at 24; see H.R. 6002, 92nd Cong., 2d Sess. §102 (1972).

27. House Report, supra note 17, at 24.

28. See J. WILSON, BUREAUCRACY: WHAT AGENCIES DO AND WHY THEY DO IT (1990).

29. See Shapiro & McGarity, Reorienting OSHA: Regulatory Alternatives & Legislative Reform, 6 YALE J. REG. 1, 3 (1989) (health and safety agencies have had limited productivity).

30. 42 U.S.C. §4903.

31. Id. §4916.

32. Id. §4917.

33. 42 U.S.C. §§4904(a)-(b).

34. U.S. ENVIRONMENTAL PROTECTION AGENCY, PUBLIC HEALTH AND WELFARE CRITERIA FOR NOISE (1973).

35. EPA, INFORMATION ON LEVELS OF ENVIRONMENTAL NOISE REQUISITE TO PROTECT PUBLIC HEALTH AND WELFARE WITH AN ADEQUATE MARGIN OF SAFETY (1974) [hereinafter cited as "Levels Document"].

36. EPA, Identification of Products as Major Sources of Noise, 39 Fed. Reg. 22297 (1974).

37. Suter, Noise Wars, TECHNOLOGY REVIEW, Nov./Dec., 1989, at 47.

38. Levels Document, *supra* note 35 at 4. EPA indicated that for the most sensitive part of the population the 75 dB level would produce no more than 5 dB noise-induced permanent threshold shift at 4000 Hz which is the frequency at which the ear is most easily damaged. *Id.* at 20. EPA also found that an average ambient noise level of 55 dB or more caused interference with communication and annoyance out of doors, *id.* at 3, and on average level of 45 dB had the same effects indoors. *Id.*

39. 42 U.S.C. §4903(a). The deadlines, however, only applied if the major noise sources were in the categories of construction or transportation equipment, motors or engines, or electrical or electronic equipment. *Id.* §§4903(a)-(b). In promulgating emission standards. EPA had to consider the harm a source posed, the level of reduction in that harm achievable through the application of best available technology, and the cost of compliance. *Id.* §4903(c)(I).

40. Appendix I *infra*.

41. *Id.*

42. *Id.*

43. 42 U.S.C. §§4916(a)(1)-(2) (railroads). 4917(a)(1)(2) (motor carriers). In both cases, EPA was to choose limits that reflected application of the best available technology, taking into account the cost of compliance. *Id.* §§4916(a)(1), 4917(a)(1).

44. Appendix II *infra*. EPA also proposed, but did not promulgate a standard that would have permitted local regulation of truck yards. *Id.*

45. Standards were promulgated for locomotives and railcars, switcher locomotives, murders, locomotive load cell test stands, and car coupling. Appendix II *infra*. Standards were proposed, but not promulgated, for permitting local regulation of rail yards and for railroad property emissions restrictions. *Id.*

46. Appendix II *infra*.

47. *Association of American Railroads v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977).

48. Appendix II *infra*.

49. See Shapiro & Glicksman, Congress, the Supreme Court, and The Quiet Revolution In Administrative Law, 1988 DUKE L.J. 819, 833 (discussing why agencies have difficulty meeting short deadlines).

50. GENERAL ACCOUNTING OFFICE, NOISE POLLUTION-FEDERAL PROGRAM TO CONTROL HAS BEEN SLOW AND INEFFECTIVE 43 (1977) [cited hereinafter as "NOISE POLLUTION"]. Regulation of railroad emissions was hampered, for example, by the complexity of the rail industry and by the fact that no comprehensive studies of railroad noise existed. Wood, Traffic Noise Regulation: A Comparative Case Study, 1979 B.Y.U.L. REV.461, 495 n.8 (1979). Other significant problems for railroad and other regulations included identification of best available technology and cost of compliance, defining the scope of each standard, and establishing rules for testing the level of noise emissions. See *id.* at 510-561. ONAC was forced to rely on contractors to obtain the technical information required for regulation and this was another source of delay. The contracting process at EPA was slow and it sometimes took up to 1 year to hire a contractor. Interview with Kenneth Feith, in Washington DC (June 20, 1991).

51. Letter from Alvin Meyer, Jr. (initial ONAC director), to David Pritzker, ACUS (Mar. 26, 1991), at 2 ; Feith interview, *supra* note 50. In EPA's 1975 budget request, the agency's administrator indicated that "we are holding the Noise Program to a low level of growth and consciously stretching out the full implementation of the 1972 Act." Letter from Russell E. Turin, Administrator, EPA, to Roy Ash, Director, OMB, reprinted in Noise Control Act Extension, Hearings on H.R. 5272 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 43 (1975) [cited hereinafter as "Extension Hearings"]. Funding for standard setting improved during the middle of the 1970s, but at the end of the decade funding was decreased to support technical problems for state and local governments. Feith interview, *supra*.

52. Feith interview, *supra* note 50.

53. Interview with Ken Feith, EPA, in Washington, DC (Febr. 28, 1991). The standard was subsequently withdrawn after ONAC lost its funding. Appendix I *infra*.

54. Feith interview, ; Telephone interview with Fred Mintz, Office of Federal Activities, EPA (Jan. 14, 1991).

55. Interview with Jeff Cerrar, in Washington, DC (Nov. 19, 1990).

56. 42 U.S.C. §§4907(a)-(b). States and local governments can establish their own labeling requirements only to the extent they do not conflict with EPA's regulations. *Id.* §4907(c).

57. 40 C.F.R. §211 (1990). ONAC invited comments on what criteria should be used to select noise emitting products for labeling requirement in 1974, 39 Fed. Reg. 42,380 (1974), proposed criteria in June, 1977, 42 Fed. Reg. 31,722 (1977), and promulgated criteria in 1979. 44 Fed. Reg. 56210 (1979). At that time it was disbanded, however, ONAC had not yet chosen any products to be labeled although it said it expected to require labels for vacuum cleaners, air

conditioners shop tools, dishwashers, and lawn mowers. WASHINGTON POST, June 24, 1977, at E-10, cot. 3.

58. See *supra* note 39 & accompanying text.

59. Telephone interview with Ken Eldred, Standards Director, Acoustical Society of America (Dec. 5, 1990).

60. 42 U.S.C. §§4914(3), 4915(c). An agency must give preference to any LNEP that the General Services Administration has established does not cost more than twenty-five percent more than the least cost substitute for it, *id.* §4915(c), that does not involve extensive maintenance to retain its low-noise qualities, *id.* §4915(d), and that does not involve operating costs significantly in excess of substitute products. *Id.*

61. The act created a two-step certification process. Within ninety days of receiving an application for certification, EPA must determine whether a product qualifies as a LNEP, and, within one hundred and eighty days later, it must decide whether the product is a suitable substitute for products currently being used by the federal government. *Id.* §4914(5)m. Although ONAC promulgated procedures for administering the LNEP program in February 1974, 39 Fed. Reg. 6670, 6670 (1971) (codified at 40 C.F.R. §203.4(a)(1)(1978)), it did not quantify what level of reduction in noise would qualify a product as a LNEP or what criteria it would use to determine whether a product was a “suitable substitute.” *Id.* at 6670. In May 1977, EPA proposed to define a LNEP as any product that emitted 5dB(A) less than the emissions limit EPA had set for that product. 42 Fed. Reg. 27,442 (1977). EPA’s plan was to establish a LNEP level for each product at the time it promulgated an emissions standard for that product. *Id.* at 27,443. Since, however, it had already promulgated a standard for medium and heavy trucks, EPA proposed a LNEP level for these products at this time. *Id.* ONAC did establish an LNEP definition as part of its garbage truck and motorcycle standards. 40 C.F.R. §§205.152(c)(3), Feith Interview, *supra* note 50.

62. Appendix I *infra*.

63. See *infra* note 96 & accompanying text (discussing the “buy-quiet” program).

64. 42 U.S.C. §4904(c). Congress gave EPA three duties. First, EPA was to “coordinate” all federal government programs relating to noise control and research. *Id.* §4904(c)(I). Agencies were required to furnish to EPA “such information as [it] may reasonably require” to carry out this function. *Id.* Second, Congress required federal agencies to “consult” with EPA concerning proposed noise regulations, and, if EPA requested, to specify reasons why a proposed regulation should not be revised. *Id.* §4903(c)(2). Finally, EPA was required to publish periodically a report on the status and progress of federal activities relating to noise. *Id.* §4904(c)(3).

65. ENV. REP. (BNA) 1884 (March 28, 1975).

66. EPA, NOISE CONTROL PROGRAM: PROGRESS TO DATE-1980, at 10 (1980) [cited hereinafter as PROGRESS TO DATE]. Initiatives included soundproofing and weatherization of

hospitals and schools, developing noise specifications and reduction incentives in government procurement as part of the “Buy-Quiet” program, writing guidelines for landplanning to induce noise, retrofitting buses to reduce noise, and supporting neighborhood self-help programs. Id. Other federal units involved included the Department of Commerce, Department of Defense, Department of Energy, Department of Housing and Urban Development, Department of Transportation, General Services Administration, National Bureau of Standards, and the Veterans Administration. Id.

67. PROGRESS TO DATE, *supra* 66, at 28.

68. Federal Interagency Committee on Urban Noise, Guidelines For Considering Noise In Land Use Planning and Control (1980).

69. NOISE POLLUTION, *supra* note 50, at 31.

70. For example, EPA sponsored a workshop at Florida Atlantic University, in Deerfield Beach, Florida, in December, 1977, to identify standards needs and a plan for meeting them. Acoustical Society of America, Plan For The Development of Voluntary Standards On Environmental Sound In Response To Federal Agencies' Needs 1 (1978). Those attending included representatives from the Acoustical Society of America (ASA), the American National Standards Institute (ANSI), American Society for Testing and Materials, the Society of Automotive Engineers and several federal agencies, including in addition to EPA, the National Bureau of Standards, General Services Administration, Departments of Labor, Transportation, Health Education and Welfare, and Housing and Urban Development, and the Air Force and Navy. Id. at 2.

"Congress authorized EPA to propose noise regulations to the Federal Aviation Administration (FAA), which is responsible for regulating aircraft and airport noise, and required the FAA, offer holding a public hearing, to adopt EPA's recommendation in whole or in part, or explain its reasons for not doing so. 49 U.S.C. §1431 (c)(1) (1976). If EPA believed that the FAA's. action does not protect the public, it tray request the FAA to reconsider its conclusions and to response to EPA concerning why its original recommendations were not adopted. Id.

71. PROGRESS TO DATE, *supra* note 66, at 30-31.

72. *E.g.*, EPA, A Comparison of Sound Power Levels from Portable Air Compressors Based Upon Test Methodologies Adopted By U.S. EPA and the CEC (1980).

73. Feith interview, *supra* note 50.

74. Telephone interview with Henning Von Gierke, Retired Director, Biodynamics and Biomechanics Division, Aerospace Medical Research Laboratory, United States Air Force (Apr. 19, 1991).

75. Interview with James DuBois, Chairperson, Noise Task force, Edison Electric Institute, in Chapel Hill, N.C. (Apr. 18,1991).

76. The allegations are that the EPA official who headed the United States delegation to an OECD meeting reportedly made a "fool" of the entire delegation, Von Gierke interview, supra note 74, by the persons arrogant conduct. Eldred interview, supra note 59. According to these allegations, the United States not only lost the opportunity to influence the automobile noise emissions standards being discussed at the meeting, Von Gierke interview, supra note 74, but the atmosphere with European agencies was poisoned for a long time afterward. Eldred interview, supra note 59. A member of that delegation regards this results as "very, very deplorable" because the Europeans had adopted the American technical work on noise, and the EPA therefore missed an opportunity to cement close relations with the EEC regulators. Von Gierke interview, supra note 74.

77. Feith interview, supra note 50.

78. Congress authorized EPA to propose noise regulations to the Federal Aviation Administration (FAA), which is responsible for regulating aircraft and airport noise, and required the FAA, after holding a public hearing, to adopt EPA's recommendations in whole or in part, or explain its reasons for not doing so. 49 U.S.C. §1431 (c)(I) (1976). If EPA believes that the FAA's action does not protect the public, it may request the FAA to reconsider its conclusions and to report to EPA concerning why its original recommendations were not adopted. *Id.*

79. TRANSPORTATION NOISE, infra note 130, at 27.

80. *Id.* at 27 (FAA accepted one of EPA's 11 proposals and parts of two others).

81. See infra note 363 & accompanying text.

82. NOISE POLLUTION, supra note 50, 19. .

83. EPA was authorized to advise state and local government how to train personnel and elect enforcement equipment and to prepare model state or local legislation. 42 U.S.C. §4913(2) (1976).

84. Noise Control Act Oversight: Hearings before the Subcom. on Resource Protection of the Senate Com. on Environments and Public Works. 95th Cong., 2d Sess. (1978) [cited hereinafter as Oversight Hearings]; see Senate Comm. on Environment and Public Works, Quiet Communities Act of 1978, S. Rep. No 95.875, 95th Congress, 2d Seas. (1978).

85. Pub. L. No. 95.609, 92 Stat. 3079 (1978) (codified at 42 U.S.C. §4913).

86. 42 U.S.C. §4913. EPA was authorized to give grants for surveying the extent of local noise problems, planning and developing noise control capacity, developing abatement plans around major transportation facilities, and evaluating techniques for controlling noise. *Id.* §4913(c)(1). EPA was also required to develop a program to assess the extent of noise pollution and abatement, to establish regional technical assistance centers, and to provide direct technical assistance. *Id.* §§4913(d).(f).

87. During 1979, for example, grants were made to fifteen states, PROGRESS TO DATE, supra note 66, at 1, of between \$31,000 and \$65,000. Interview with Casey Caccavari, EPA, in Washington, DC (Feb. 28, 1991). Twelve communities received grants for demonstration projects designed to test methods of noise abatement that could be used by other communities. PROGRESS TO DATE, supra, at 1; see generally Center for Public Management, Final Report: Quiet Communities Program Demonstration (March, 1982).

88. PROGRESS TO DATE, supra note 66, at 1.

89. The ECHO program consisted of sending local noise abatement personnel to other cities to share their experience and insights. Id. At 1, 3.4,

90. ONAC held over one hundred training sessions for approximately four thousand state and local officials, served as a clearinghouse for noise control information, and engaged in other activities to support state and local training. Id. at 2; Suter, supra note 37, at 47.

Other activities included developing training materials, including materials concerning noise measurement, and loaning state and local officials sound level meters and other equipment. PROGRESS TO DATE, supra note 66, at 2.

91. PROGRESS TO DATE, supra note 66, at 2.

92. Interview with Casey Caccavari, EPA, in Washington, DC (Nov, 19, 1990). '

93. E.g., Letter from Paul Schomer, Team Leader, Environmental Acoustics Team, Construction Engineering Research Laboratory, Corps of Engineers, Department of the Army, to David ACUS (Mar. 13, 1991), at 2 (among "most useful products"); Letter from David Lipscomb, Correct Service, Inc., to David Pritzker, ACUS (Mar. 19, 1991, at 2 ("has been used repeatedly").

94. E.g., Letter from Edwin Toothman, Director, Occupational Health, Health and Safety Services, Bethlehem Steel Corp., to David Pritzker. ACUS (Apr. 1, 1990) ("too detailed and somewhat impractical"); Letter from Fredrick Kessler, FMK Technology, Inc., to David Pritzker, ACUS (Mar. 19, 1991) ("technically flawed" but "did provide . . . starting point"); Letter from Edward DiPolvere, Chief, office of Noise Control, New Jersey, to David Pritzker. ACUS (undated) (After "legal aide of EPA . . . made final version so noncommittal that its value was diminished"); Stewart Letter, supra note ("much more comprehensive than most communities ever wanted").

95. Interview with Casey Caccavari, EPA, in Washington, DC (June 20, 1991).

96. PROGRESS TO DATE, supra note 66, at 10.

97. 42 U.S.C. (a).(b).

98. PROGRESS TO DATE, supra note 66, at 7.8.

99. Suter, supra note 37, at 47: see ENVIRONMENTAL PROTECTION AGENCY, BIBLIOGRAPHY OF NOISE PUBLICATIONS

1972.1982 (undated) [cited hereinafter as BIBLIOGRAPHYJ.

100. E.g., Comments On The EPA's Office of Noise Abatement and Control. Prepared By George Luz, Bio.Acoustics Division, Environmental Hygiene Agency, U.S. Army (Mar. 22, 1991) ("we continue to consult some of these reports even though they arc 15 years old"), in Letter from Nelson Lewis. Acoustical Engineer, Bio.Acoustics Division, Environmental Hygiene Agency, U.S. Army, to Mice Suter (Mar. 22, 1991) (cited hereinafter as "Luz Comments"): Letter from Patrick Carney. President, American Speech.Language Association, to David Pritzker, ACUS (Apr. 4, 1991), at 5 (EPA publications "still valuable in providing technical assistance on subject"): Letter from Rena Glaser. Past President, National Health Conservation Association (NHCA), to David Pritzker. ACUS (Mar. 29, 1991), at 1 ("did find publications to be extremely valuable"); Letter from Andrew Stewart, President, NHCA (Apr. 3, 1991) at 1 (several publications of ONAC were extremely helpful and influential"); Kessler Letter, supra note 94, at 1 ("publications proved to be very valuable"): Lipscomb Letter, supra note 93, at 1 ("value and keep close at hand" some ONAC documents).

101. E.g., Schomer Letter, supra note 93, at I ("technical content was mixed and never of the highest level").

102. PROGRESS TO DATE, supra note 66. at 11.13.

103. Oversight Hearing, supra note 84, at 59.

104. See J. LASH, A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT 28 (1984).

105. Feith interview, supra note 16.

106. Oversight Hearings, supra note 84, at 2 (Testimony of William H. Dempsey, President, American Association of Railroads) (taking no position whether ONAC should be continued, but favoring federal preemption of state and local noise regulation); id. at 124 (Statement of Motor Vehicle Manufacturers Association of the U.S., Inc.) (same); Letter to Senator Slade Gorton from bennett C. Whitlock, Jr., American Trucking Association, reprinted in id. at 128 is (Same). The railroads and motor carriers gained credibility for this position from the fact that EPA emission standards for them industries ore enforced by the Department of Transportation (DOT), which was not put out of business. 42 U.S.C. §§4916(b), 4917(b). These industries, however, did receive some regulatory relief. See infra note Section IB3 & accompanying text (discussing weaknesses of railroad and motor carrier regulation).

107. supra note 5 & accompanying text.

108. Ruben, On Deaf Ears, ENVIRONMENTAL ACTION, Mar./Apr. 1991, at 17 ("Public apathy about noise made it all the easier for EPA's office to quickly toll under Reagan's budget axe, says [David] Hawkins of the Natural Resources Defense Council.").

109. 44 Fed. Reg. 56524 (1979).

110. Id. at 56526.56527. The agency estimated that the standard would produce a 74 percent decrease in the magnitude of refuse vehicle noise by 1991 and that about 19.7 million persons in cities and densely populated suburbs would benefit. id. at 56532. An EPA official admits, however, that the agency's original plan for testing garbage trucks would have been expensive for the industry, but he maintains that ONAC was working with the industry to solve that problem. Feith interview, supra note 16.

111. See e.g., Oversight Hearings, supra note 84, at 4.6 Testimony of Richard L. Hanneman, Director, Government and Public Affairs, National Solid Waste Management Association). The industry objected to the standard because not all noise generated by refuse collection is made by the compactor mechanism (the standard did not regulate other parts of the vehicle such as brakes tires), locally imposed curfews have effectively limited citizen complaints about garbage truck noise, the standard had the effect of preventing trucks from compacting when moving which reduced their productivity, and EPA had only weak evidence of adverse health effects. Id. At 4.5.

A former ONAC official denies that the standard would have prevented garbage trucks from compacting when moving. Telephone interview with Fred Mintz, EPA (June 19, 1991).

112. Jesse Borthwick, the Executive Director of the National association of Noise Control Office told Congress:

The problem with refuse collection noise can best be dealt with through local in-use and administrative controls. Reducing compactor noise emission levels 5 or 6 dB will virtually have no effect on reducing the impact of refuse collection in noise sensitive areas during morning hours when background noise levels are low. Reauthorization of the Noise Control Act of 1971 before the subcom. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 97th Cong., 1st. 27 (1981) [cited hereinafter "Reauthorization Hearing"].

113. The Regulatory Analysis Review Group, located in the Center White House, received more letters from Congress concerning the standard than concerning any other issue in its first 3 years. Clark. Regulating Garbage Truck noise. A quiet Debate is Getting Louder, NATIONAL JOURNAL, November 1, 1980, at 38. A Regulatory analysis Review Group study initiated in response to these complaints concluded a national standard was inappropriate for noise generated by garbage pickups. Id. At 39. The study reasoned that garbage collection noise was primarily local problem because the desired level of product noise regulation depends on the ability to regulate a truck's pattern of use which varies tremendously among communities. Id.

114. Id.

115. Kilpatrick continued, "Cost and benefits to one side, this petty, stupid, nit-picking regulation based almost entirely upon gauzy conjecture as to 'sleep and activity interference'. offers one more interference of bureaucracy gone berserk." kilpatrick pointed to successful local efforts to control garbage collection noise and decided, based on this case, that the entire NCA was superfluous. Kilpatrick, *This Noise Regulation Is Just Garbage*, reprinted in *Reauthorization Hearings*, supra note, at 63. kilpatrick later endorsed the "Buy quiet" program as an appropriate governmental response to noise acknowledging without a ONAC'S role in establishing the program. Kilpatrick, *Reaction from Memphis To Noise Level Column*, id. at 62.

116. Note 39 supra.

117. Memorandum from Samuel Gutter, Attorney, Air, Noise, and Radiation Division, to Robert Perry, General Counsel, Dec. 1, 1981, at 1

118. Memorandum from Robert P. Perry, General Counsel, EPA, to Kathleen Bennett, Assistant Administrator for Air, Noise, and Radiation, Dec. 10, 1981, at 1. EPA's General Counsel warned, that there were "serious risks to this approach, in part, because it relies on factors that the Act does not explicitly permit the Administrator to consider in determining what constitutes a 'major' source of noise, and, in part, because the [justifications] might be difficult to document." Id. He might have added that the two justifications were also internally contradictory. If local and state government established emission standards for the products identified by EPA as major noise sources, the affected manufacturers would likely need federal preemption to protect them from inconsistent and conflicting regulations.

119. 47 Fed. Reg. 54108 (1982).

120. 48 Fed. Reg. 32502 (1983).

121. *See Shapiro & Glicksman*, Supra note 49, at 832-33.

122. *See id.* at 830 (Congress intends Statutory deadlines to speed agency rulemaking).

123. 33 stat. 1257 (1905) (codified as amended at 31 U.S.C. §1517 (1988)).

124. *see National Association of Counties v. baker*. 842 F.2d 369 (D.C. Cir. 1988) (Secretary of Treasury may not disperse funds that were originally appropriated after Congress passed legislation withdrawing the appropriation).

125. *See Defendants's Reply in Support of Motion for Judgement on the Pleadings. Ross v. Reilly*. W.D. Tenn., Civil Action No. 88-1103 (Sept. 29, 1989), *TRANSPORTATION NOISE*, *infra* note 138, at 17. If a court did not agree that EPA could expend funds to implement the NCA, it could still hold that until Congress repeals the NCA. EPA is legally obligated to enforce it and must seek funding for that purpose. *Cf. Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1977) (appropriations decisions do not repeal Substantive Statutory requirements in absence of clear legislative intent that a repeal was intended). Such a decision would have the virtue of forcing Congress either to repeal the NCA or give EPA funds to enforce it.

126. When existing regulations were originally be promulgated, EPA required companies to test a certain number of products at random to ensure that they were in compliance with emission standards and to report the results to EPA. *See* 41 Fed. Reg. 57709 (1982)

(description of testing and reporting requirements). In December 1982, EPA revoked the reporting requirements because it lacked any

Staff to review industry compliance. 47 Fed. Reg. 57709 (1982).

127. One EPA official believes industry compliance remains high when manufacturers retooled production processes to accommodate noise emission Standards because of the considerable expense of changing manufacturing methods. When manufacturers can save money by not complying, however, he has found less compliance. For example, EPA brought an enforcement action against manufacturers of portable air compressors just before ONAC was abolished. Feith interview, *supra* note.

128. *Id.*

129. *Id.*

130. GENERAL ACCOUNTING OFFICE. TRANSPORTATION NOISE: FEDERAL CONTROL AND ABATEMENT RESPONSIBILITIES MAY NEED TO BE REVISED 53 (1989) [hereinafter cited as "TRANSPORTATION NOISE"].

131. NRA takes the position that if a mechanical problem causing noise emissions in excess of a standard is fixed, and a train nevertheless exceeds the standard, there is no violation because the railroad made a good faith effort to comply. *Id.* at 53-54.

132. Feith interview, *supra* note 16.

133. TRANSPORTATION NOISE, *supra* note 130, at 63-64.

134. *Id.* at 68. The American Trucking Association concedes that a few motor carriers may not be maintaining their trucks up to EPA standards, but if additional enforcement is needed, it should be done by state and local governments. *Id.* at 68-69. State and local government, however, are preempted from enforcement activity unless they adopt EPA regulations as their own laws. Note *supra* 23 & accompanying text.

135. Telephone interview with Ed DiPolvere, Director, New Jersey Office of Noise Control (Dec. 4, 1990).

136. TRANSPORTATION NOISE, *supra* note 130, at 67. Persons interviewed by GAO, including the American Trucking Association, indicated that future reductions in vehicle noise could be achieved by redesign of tires. *Id.* at 69.

137. Letter from Frank Wilcher, President, Industrial Safety Equipment Association, to Sidney Shapiro (April 1, 1991), at 2; NHCA Letter, *supra* note 100, at 2 (“NRA is a misleading and essentially useless number for estimating hearing protection effectiveness”); see Letter from Elliott Berger, Manager, Acoustical Engineering, Cabot Safety Corp., to David Pritzker, ACUS (April 1, 1991), at 3 illustrating studies). The studies indicate that real world attenuation is in the range of 8 to 56% of the NRRs for earplugs and 35 to 67% for earmuffs. Wilcher Letter, *supra*, at 2. The discrepancies arise because the testing methods required by EPA do not accurately reflect the conditions under which hearing protection equipment is used. Berger Letter, *supra*, at 3.

The NRRs are inaccurate in two other ways. First, because the NRA gives a single value, consumers are encouraged to compare NRA values in making a purchase. The fact that small differences in NRA values are not statistically significant leads consumers to conclude, erroneously, that small differences in NRRs are important. EPA labeling requirements, however, do not reflect this imprecision. Wilcher Letter, *supra*, at 3. Second, the EPA-mandated labeling fails to warn consumers that they may receive less protection than the NRA indicates in certain types of workplace situations. *Id.*

138. OSHA Instruction CPL 2-2.35A, Appendix A (Dec. 19, 1983), at A-1.

139. *See supra* note 132 & accompanying text (describing EPA's enforcement difficulties).

140. For example, although EPA has a standard for car coupling, which addresses the noise created when one car bangs into another, it does not have one for slack actions, or the noise created when a train is moved forward to tighten connections between the cars. Interview with Robert Greer, Industrial Hygienist. ERA, in Washington, DC (Feb. 27, 1991).

141. In some locations, ERA inspectors can not find terrain that matches the conditions established in the regulations for testing noise emissions. *Id.*

142. The railroads avoid the standard for switching engines, which would prohibit the emissions, by using other types of engines. The railroads are in compliance with the standard for these other engines, because there is a higher emissions limit. There is a higher emissions limit because EPA assumed these other engines would be used in the open country and not sitting in a rail yard. *Id.*

143. TRANSPORTATION NOISE, *supra* note 130, at 54.

144. Greer interview, *supra* note 140.

145. TRANSPORTATION NOISE, *supra* note 130, at 64. An EPA official responds that because DOT has three other methods to enforce the truck emissions standard, this problem is not disabling. Feith interview, *supra* note 50.

146. *See supra* Section 1C2.

147. Letter from Robert Hickling, Associate Director for Applied Research, Research Professor of Engineering, National Center for Physical Acoustics, University of Mississippi, to David Pritzker ACUS (Mar. 18, 1991), at 2. Professor Hickling explains:

It is now possible to conduct indoor tests to measure the sound power of manufactured items such as automobiles. Sound power tests measure the total noise output of a source, instead of sampling it at a point in space. Manufacturers prefer indoor tests because they are not subject to variations in the weather. Indoor sound-power tests have less variability in test data, making it possible to study noise due to variability in manufacturing, and the underlying mechanisms of noise generation.

*Id.*

148. *See* Mailing Letter, *infra* note 160, at 2 (product regulations do not have 'lasting value' because EPA 'never recognized sound power as a measure of noise emissions, and was unwilling to consider international efforts in specification of noise emission); *see infra* note 354 & accompanying text (discussing need for EPA to coordinate domestic and international regulation).

149. Feith interview, *supra* note 50.

150. Caccavari interview, *supra* note 92.

151. Interview with Cosey Caccavari, EPA, in Washington. DC (June 21, 1991).

152. *Id.*

153. Transportation Noise, *supra* note 130, at 33.

154. Mintz interview, *supra* note 54. For example, EPA rated an EIS concerning expansion of air cargo activity at the Toledo airport as unacceptable because it did not adequately disclose how increased noise activity could cause sleep disturbances for persons in the area of the airport. *Id.* After EPA threatened to appeal the adequacy of the EIS to the Council on Environmental Quality, the FAA agreed to revise the document. *Id.*

155. Interview with Jim Densmore, Director, Office of Environment and Energy, FAA, in Washington, DC (March 1, 1991). Densmore explains that EIS disclosures are based on measure of a day-night average noise level (DNL) and that EPA's objections concern intermittent noises that, when averaged with other noises, would not be reflected in the DNL. He notes that the DNL is widely used and that the FAA has never lost a court case concerning the adequacy of an EIS when it has relied on the DNL. *Id.* The FAA could, however, add a supplemental measure of noise to reflect intermittent noise in the interest of fuller disclosure. *See infra* note 366 & accompanying text.

156. Mintz interview, *supra* note 54. One other agency employee, who has another full-time assignment, sometimes also assists in these reviews. Feith interview, *supra* note 16.

157. Telephone interview with Fred Mintz, EPA (June 19, 1991); *see infra* note 366 & accompanying text (discussion of possible change in the way that FAA measures noise impacts).

158. Mintz interview, *supra* note 54. The employee is forced to photocopy documents in order to distribute them, but because of budget constraints, this method of dissemination is limited. *Id.*

159. *See Bibliography*, *supra* note 99.

160. Letter from George Maling, Jr., Editor, NOISE/NEWS, to David Pritzker, ACUS (mar. 30, 1990), at 2 ("At one time NBS (now NIST) had a list of EPA publications [but it] is no longer available."); Carney Letter, *supra* note 100, at 5 ("Since 1982, it has been difficult to track down many of the EPA publications and perhaps they are out of print."); Telephone interview with Clifford Bragdon, Professor of City Planning, Georgia Institute of Technology (Oct. 10, 1990); Gomez interview, *supra* note 10.

Some ONAC reports and documents were transferred to NANCO, an organization of local noise control officials. They are in the possession of one of its former officers who had to construct a shed in his backyard at his own expense to preserve them. DiPolvere interview, *supra* note 135; *see* Ruben, *supra* note 108, at 18 ("today, the archival information of [ONAC] is stored in a shed in DiPolvere's backyard in Trenton."). But an EPA official claims that the documents transferred to NANCO were duplicates of ONAC files retained by the government or were files that the government was not required to retain. Feith interview, *supra* note 50.

161. Feith interview, *supra* note 50; *see also* Luz Comments, *supra* note 16, at 1 ("Without a central ONAC to which to appeal, we are vulnerable to the vagaries of opinions from persons [in the EPA regions] who do not have professional expertise in noise assessment.")

162. Maling Letter, *supra* note 160, at 5; Gomez interview, *supra* note 10.

163. Feith, *supra* note 16. For example, communities are finding that without technical assistance it is difficult to know how to write ordinances to protect homeowners from noise that travels along the interior common walls of townhouses and condominiums. Caccavari interview, *supra* note 92 .

164. *E.g.*, Bragdon interview, *supra* note 160; Feith interview, *supra* note 16; Gomez interview, *supra* note 10.

165. Transportation Noise, *supra* note 130, at 10.

166. There are two problems in estimating the decline. First, it is not clear how many programs were in existence at the time ONAC was disbanded. In 1981, EPA told Congress that over 1,000 municipalities and 27 states had noise control legislation, but that only 13 states and 160 local communities had "on-going active noise control programs which are enforced today." *Reauthorization Hearings*, states, *supra* note 112, at 35 (Statement of Walter C. Barber, Jr., Deputy Administrator, EPA). A governmental unit is considered to have an on-going effort if one or more employees have noise abatement as a continuing part of their responsibilities. *Id.*

There is some evidence, however, that the number of on-going programs may have been higher. In 1981, over 300 communities sent a representative to a conference sponsored by ONAC to plan the transfer of regulatory responsibility to local governments. Unified Industries Inc., *A Case Study of The Closing Of A Federal Activity: A Report Prepared for ONAC 3-5* (1982). In addition, the National Association of Noise Control Officials (NANCO) had approximately 400 members at its zenith, although some of these persons were consultants. DiPolvere interview, *supra* note 135.

The second problem is estimating the number of current, on-going programs. A report done for EPA in 1990 concluded that of 93 communities that responded to a survey, 76 had some type of on-going program. J. Soporowski, III, *The Status of Key State and Local Noise Control Programs That Served As A Basis For Discontinuing A Federal Program*, Jan. 22, 1990, at 41. The study reasonably inferred that many, if not most, of the 112 municipalities that did not respond to the survey probably no longer had on-going programs. *Id.* The experience of the National Association of Noise Control Officials (NANCO) provides some indirect evidence that there has been a substantial decline in local and state efforts. NANCO membership has declined from a high of approximately 400 persons to its current membership level of 50 persons. DiPolvere interview, *supra* note 135.

167. Bragdon interview, *supra* note 160.

168. Transportation Noise, *supra* note 130, at 66.

169. DuBois interview, *supra* note 75.

170. *Id.*

171. *Id.*

172. *See* F. ANDERSON, D. MANDELKER, & D. TARLOCK, ENVIRONMENTAL PROTECTION: LAW & POLICY 64-65 (1990; Sevinsky, *Public Nuisance: A common Law Remedy Among The Statutes*, 5 NAT. RES. & ENV. 29, 30 (1990).

173. *See* W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW §5.3 (1977).

174. As noted earlier, the NCA states that a state or local government may not employ any "controls on Levels of environmental noise" unless EPA approves.

175. RESTATEMENT (SECOND) OF TORTS §§21D-E (1979) [cited hereinafter as "RESTATEMENT"]. If the defendant's conduct does not interfere with the use and enjoyment of a plaintiff's property, the plaintiff can allege a "public nuisance." A public nuisance is the unreasonable inference with a right common to the public, such as the public health, safety, and convenience. *Id.* §821B. Most of the elements of private and public nuisances are the same. An individual who brings a public nuisance action, however, must have an injury that is distinguishable from that sustained by other members of the general public. *See* Rothstein, *Private Actions For Public Nuisance: the Standing Problems*, 76 W. VA. L. REV. 453 (1974);

Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 198 (1966). Otherwise the proper party to bring such an action is the public official charged with the responsibility of abating noise pollution. Hines, *supra*, at 198.

176. RESTATEMENT, *supra* note 14, at §821F; W. RODGERS, *supra* note 12, at 107.

177. RESTATEMENT, *supra* note IS. §§822-25.

178. *Id.* §§826-31. A plaintiff can also establish the invasion is unreasonable if the harm to the plaintiff's land is serious and the financial burden of compensating for this and similar harm to others would not render it unfeasible for the defendant to continue the activity. *Id.*

179. *See* Rychlak, *Common-law Remedies For Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L. REV. 657, 681-82 (1989).

180. *See* W. RODGERS, *supra* note 12, at 118-119; Note, *State Air Pollution Control Legislation*, 9 B.C. INDUS. & COMM. L. REV. 712, 716 (1968).

181. W. RODGERS, *supra* note 12, at 559-60.

182. *See* W. RODGERS, *supra* note 12, at 118, 120; Rychlak, *supra* note 18, at 692.

183. Hines, *supra* note 14, at 200.

184. *Id.* at 200-201; Glicksman, *A Guide To Kansas Common Law Actions Against Industrial Pollution Sources*, 33 U. KAN. L. REV. 621, 650 (1985).

185. Hines, *supra* note 14, at 200.

186. *See* W. ROGERS, ENVIRONMENTAL LAW: AIR AND WATER 29 (2d ed. 1986) (public nuisance law useful adjunct to statutory law in abating pollution).

187. *See* *Silkwood v. Kerr-McGee Corp.*, 471 U.S. 707 (1985).

188. Congress empowered citizens to sue to enforce the emissions standards promulgated by EPA, but it also said that it did not intend to restrict "any fight which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise standard control requirement. 42 U.S.C. §4911.

189. *See e.g.*, *Cippollone v. Liggett Group, Inc.* 789 F.2d 181 (3rd Cir. 1986), *cert. denied* 479 U.S. 1043 (1987).

190. Bolt. Beranek & Newman. *Noise in America: The Extent of the Problem* (July, 1981).

191. Suter, Report To The Administrative Conference. November, 1991 (cited hereinafter as "Suter Report").

192. *Id*; *see also*, Letter from Howard Stone, Jr., Executive Director, Self-Help For Hard of Hearing People, Inc (SHHH), to David Pritzker. ACUS (Apr. 19, 1991) ("Without a concentrated effort to prevent it, noise levels will increase.").

193. *See supra* note 126 & accompanying text (discussion of EPA enforcement).

194. *See supra* note 131 & accompanying text (discussion of standards enforced by DOT).

195. Appendix I *infra*. State and local efforts abate some of the noise generated by these sources. Although there are reasons to doubt the adequacy of local regulation in many jurisdictions. *See supra* note 164 & accompanying text (discussion of paucity of local noise abatement efforts).

196. Note *supra* 164 & accompanying text.

197. Kessler Letter, *supra* note 94, at 2.

198. *See* Letter from William Melnick, Noise Advisory to the Executive Committee, American Academy of Audiology, to David Pritzker, ACUS (Mar. 27, 1991), at 2 ("Relying on data obtained a decade or even 2 decades ago can be misleading.")

199. *E.g.*, note 190 *Supra*.

200. Von Gierke interview, *supra* note 74.

201. National Institute of Health, Consensus Statement: Noise and Hearing Loss 16 (1990) (cited hereinafter as "Consensus Statement"). The statement was prepared by a nonadvocate, nonfederal panel of experts based on presentations by investigators working in the noise area and panel discussions.

202. *Id*.

203. Melnick Letter, *supra* note 198, at 1 ("The noise problem is still with us and continues to affect the living conditions of citizens of the United States.").

204. Carney Letter, *supra* note 100, at 1 ("Based on current national health promotion and prevention agendas, reviving the ONAC is not only desirable but necessary.").

205. NHCA Letter, *supra* note 100, at 1 ("Renewed activity [concerning the NCA] would provide tremendous benefits for the health and welfare of all Americas.").

206. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, PROPOSED NATIONAL STRATEGIES FOR THE PREVENTION OF LEADING WORK-RELATED DISEASES AND INJURIES: Part 2, at 56 - 60 (1988) (cited hereinafter as "NIOSH STRATEGIES").

207. Suter Report, *supra* note 191, at 26.

208. *Id.* at 47-49.

209. *Id.* at 36. Sleep disturbance can also cause health problems if chronic. *Id.*

210. *Id.* at 32. This problem can also be dangerous in some contexts. *Id.*

211. *Id.* at 46. ("[E]ven modest noise levels can increase anxiety, decrease the incidence of helping behavior, and increase the risk of hostile behavior in experimental subjects.")

212. *Oversight hearing, supra* note 84, at 59.

213. *Grey, Regulation and Federalism*, 1 YALE J. REG. 93, 93 (1983). Local programs were favored on the grounds they were more responsive to voters, *id.* at 94 (whereas, local government is in "close touch" with its constituents, the federal government is "generally remote from the citizen's day-to-day lives and concerns."), and more efficient in solving local regulatory problems. Local government is more efficient because of the smaller size of its programs, *id.* (whereas local government "can operate modest streamlined programs tailored to meet local needs," federal programs are "often unmanageable in size and rely on unnecessary levels of bureaucracy."), and because reliance on local government "fosters diversity and experimentation." *Id.* at 95. The presumption was rebuttable if local administration conflicted with other important goals, such as when the combined effect of disparate programs created intolerable burdens on interstate commerce. *Id.* at 96.

214. *Id.* at 98.

215. *Cf. Mashaw & Rose-Ackerman, Federalism & Regulation*, in THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT 166 (G. Fads & M. Fix eds. 1984) (local regulation is appropriate for regulatory problems that do not spill over to other jurisdictions).

216. *Cf. id.* at 118 (federal regulation has diseconomies of scale when regulation requires local information). This was the argument made by critics of EPA's garbage truck regulation. *See supra* note 112 & accompanying text (discussion of garbage truck regulation). Moreover, local governments have a wider variety of regulatory tools with which to address noise problems. *See supra* notes & accompanying text (describing local regulatory tools).

217. The Reagan administration believed that federal subsidies stimulated local governments to undertake activities that they would not desired to pursue without federal intervention. Palmer & Sawhill, *Overview*, in THE REAGAN RECORD: AN ASSESSMENT OF AMERICA'S CHANGING DOMESTIC PRIORITIES 16 (J. Palmer & I. Sawhill eds. 1984). It therefore preferred "dual federalism," which assigns each level of government independent and different responsibilities and, to the maximum extent possible, requires each level to find its own sources of funding to meet those responsibilities. Peterson, *the State and Local Sector*, in THE REAGAN EXPERIMENT: AN EXAMINATION OF ECONOMIC AND SOCIAL POLICIES UNDER THE REAGAN ADMINISTRATION 166-67 (J. Palmer & I. Sawhill eds. 1982).

218. *See supra* note 201 accompanying text.

219. Mashaw & Rose-Ackerman, *supra* note 215, at 112, 121-22; *see also* G. EADS & M. FIX, RELIEF OR REFORM: REAGAN'S REGULATORY DILEMMA 209 (1984).

220. Since information relevant to the entire country can be most efficiently created by the federal government, federal participation can obtain economies of scale. Mashaw & Rose-Ackerman, *supra* note, at 118. For example, national institutes can conduct research, develop regulatory technologies, and test the safety of products. *Id.* The diseconomies of scale of producing this type of information on a local level can also be a reason for underregulation by local and state governments. *See infra* note & accompanying text. When no federal program exists to provide such information, each locality must generate it on its own. This not only makes local programs more expensive, it increases the total cost of such programs because of the duplication of local activity.

221. Luz Comments, *supra* note 100, at 2; Gomez interview, *supra* note 10; DiPolvere interview, *supra* note 135. A government noise researcher explains:

There were no resources for helping (local regulators) purchase state-of-the-art automated noise monitoring equipment to serve as a labor-multiplier, no experts which they could consult as to whether they were technically correct in their conclusions, and no opportunities for career development. At the same time, noise assessment is too arcane a subject to be left to nontechnical legislators. It is not clear that legislators understood the reasoning behind various aspects of the EPA's model community noise ordinance.

Luz Comments, *supra*. A local noise official adds that most communities are "afraid" of the technical complexity involved in noise abatement. Gomez interview, *supra*.

222. *See* NHCA Letter, *supra* note 100, at 3 ("Without federal technical support and funding, [state and local agencies] on unlikely to operate actively again."); Schomer Letter, *supra* note 93, at 2 (Demise of technical support "probably contributed more to the loss of state and local programs than did any other factor."); Stewart Letter, *supra* note 8, at 2 ("History has shown that, except for the largest states and cities, these local and state programs can not survive without support from a central resource.").

After the elimination of ONAC, cities have few inexpensive options to train their employees or otherwise obtain the necessary expertise. In addition, it is difficult for cities to find out about what existing training resources and expertise exist because, with the elimination of ONAC, no organization makes such information available. ONAC had funded programs run by National League of Cities that provided information and updates to its members. Various issues of the League's *Environmental Reporter*, for example, covered noise abatement and control. *See, e.g.*, NATIONAL LEAGUE OF CITIES ENVIRONMENTAL REPORT Oct. 1, 1989; *id.*, Nov. 27, 1978; *id.*, July 29, 1978; *id.*, July 3, 1978. ONAC also published materials that informed cities how to write federal grant applications for funding from other agencies. *See* Environmental Protection Agency, Staff Resources For Noise Control, March, 1978.

223. The existence of active noise control programs in some locations, such as Los Angeles county, *see e.g.*, Carlton, *When Californians Use Leaf Blowers, Life Is Less Mellow*, WALL ST.

J., Dec. 4, 1990, at (eastern edition), does not contradict this analysis. Active programs tend to exist either where noise is an especially pressing problem or where programs were ongoing at the time ONAC was abolished. Although the cost of maintaining the program is now higher than before ONAC was abolished, the benefits from the program are also large where noise is a pressing problem. Gomez interview, supra note 10. In jurisdiction that had trained personnel prior to the time ONAC was abolished, the cost of maintaining the program is less than the start-up cost for a governmental unit without any pre-existing effort. In most of these locations, however, the size of the program has been cut back. DiPolvere interview, supra note 135. Moreover, in many places where a noise program has been retained, it has been folded into some other department, such as the public health department, or the environmental protection department. Although this has preserved the program, noise control usually receives significantly less attention than previously because it is not the primary mission of the department in which it is located. Bragdon interview, supra note 160.

224. See Wright, *The United States*, in INTERGOVERNMENTAL RELATIONS AND PUBLIC POLICY 64-65 (B. Galligan, O. Hughes, & C. Walsh eds. 1990); R. NATHAN & F. DOOLITE, THE CONSEQUENCES OF THE CUTS: THE EFFECTS OF THE REAGAN DOMESTIC PROGRAM ON STATE AND LOCAL GOVERNMENTS (1983); Hinds, *Strapped, Big Cities Take Painful Steps*, NEW YORK TIMES, Jan. 6, 1991, at Y9 (national edition); Hinds & Eckhom, *80's States and Cities in Need*, NEW YORK TIMES, Dec. 30, 1990, at A1 (national edition).

225. Gomez interview, supra note 10.

226. *Id.*

227. *Id.*

228. Feith Interview, supra note 16.

229. Bragdon interview, supra note 160.

230. Local regulation may be ineffective for two reasons. First, local regulators have an incentive to adopt weak regulatory policies when they face a "prisoners dilemma," *id.* at 117, or a situation where, lacking a mechanism to cooperate, players end up worse off by competing with each other. See D. MUELLER, PUBLIC CHOICE II 9-10 (1989). State regulation can present a "prisoner's dilemma" because "states may all try to attract businesses to their jurisdictions through tax breaks and regulatory laxness." Mashaw & Rose-Ackerman, supra note 215, at 117. Second, because political jurisdictions little incentive to produce regulatory benefits that do not accrue to that jurisdiction, they will underregulate problems that affect more than one jurisdiction. *Id.* At 116.

231. See supra note 8 & accompanying text.

232. Note supra & accompanying text.

233. Note 25 *supra*.

234. Letter from Terry L. Obteska to David M. Pritzker, ACUS. May 8, 1991.

235. Letter from Edward DiPolvere to David M. Pritzker, ACUS, May 1, 1991.

236. Letter from Dana K. Mount to David M. Pritzker. ACUS, June 3, 1991.

237. Letter from Ellwyn G. Brickson to David M. Pritzker, ACUS, May 20, 1991.

238. Letter from Pete C. Nicholas to David M. Pritzker, ACUS, Apr. 24, 1991.

239. U.S.C. §4905(c)(1).

240. *See* Appendix 1.

241. 42 U.S.C. §4905(c)(1).

242. *E.g.*, reauthorization, *supra* note 112, at 24.

243. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 146-47 (1975).

244. 42 U.S.D. §§4916(c). In *Baltimore & Ohio Cov. Oberty*, 837 F.2d 108 (3rd Cir. 1988), the Third Circuit held that Delaware was not preempted under the previous statutory language from regulating the noise emitted from trailers on flat cars (TOFCs) because EPA had not regulated this noise source:

We therefore conclude that section 17(c) means what it says: once a federal noise regulation has taken effect, a state may not regulate (unless it promulgates a standard that is "identical to a [federal] standard," 42 U.S.C. 4916 (c)(1) (1982)), the same rail equipment or facility. Since EPA had regulated neither TOFCs nor noise emissions at property lines, the federal Noise Control Act and the regulations thereunder do not preempt the mere existence of Delaware's regulations of such equipment and facilities.

*Id.* at 114-15.

245. *See* Appendix II.

246. *See supra* Section IC4.

247. *See infra* Section IIB2.

248. 42 U.S.C. §4907(c).

249. *See supra* note 137.

250. Feith interview, *supra* note 16 (industry claims of preemption have discouraged local noise initiatives in cases where such claims were dubious.)

251. Appellant's Jurisdictional Statement at 4, *Obolrly v. Baltimore & Ohio Railroad Co.*, 479 U.S. 980 (1986) [cited hereinafter as "Jurisdictional Statement"].

252. *Baltimore & Ohio Railroad Co. v. Obey*, 782 F.2d 29, 30 (3rd Cir. 1986) (*per curiam*), *affm.* 606 F. Supp. 1340 (D. Del. 1985).

253. Brief for the United States as Amicus Curiae at 6, n.6, *Oberly v. Baltimore & Ohio Railroad Co.*, 479 U.S. 980 (1986). The Solicitor General told the Court that the government's support of the railroad's position had not been approved by high level officials in the Department of Justice or the Solicitor General's Office:

The court of appeals noted that in an amicus curiae filing made at the court's request, the Environmental Protection Agency agreed that the federal regulators preempt application of state noise regulations... Regrettably, because of a failure of communication, that brief was filed in the court of appeals without having been brought to the attention of either the Assistant Attorney General for land and Natural Resources or the Solicitor General, and therefore without the former's approval or the latter's authorization.

*Id.*

254. *Baltimore & Ohio Railroad Co. v. Oberly*, 837 F.2d 108, 110 (3rd Cir. 1988). EPA's 1974 railroad noise emission standards covered locomotive operations under stationary and moving conditions and rail car operations. 39 Fed. Reg. 24580 (1974). The D.C. Circuit construed the NCA to inquire EPA to regulate all railroad "equipment and facilities" including the equipment and facilities omitted by EPA from its regulation. *Association of American Railroads v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977) EPA promulgated additional standards, 45 Fed. Reg. 1263 (1980), *amended at* 47 Fed. Reg. 14709 (1982) (codified at 40 C.F.R. §201 (1990)), but some aspects of railroad operations, including refrigerated trucks, were left unregulated. Because EPA had declined to regulate refrigerated trucks, Delaware contended that it was not preempted from regulating them. Appellant's Brief In Reply To Motion To Affirm, at 3-4, *oberly v. Baltimore & Ohio R.R. Co.*, 479 U.S. 980 (1986). EPA responded that because it had justified its decision not to regulate additional noise sources on the ground more regulation was "unnecessary" to abate railroad yard noise, it had preempted any local regulation. 782 F.2d at 30. The Third Circuit, however, declined to give EPA's decision preemptive effect because its statements in 1982 did not clearly indicate that this was its intent. 837 F.2d at 115.

255. Feith interview, *supra* note 16.

256. Consensus Statement, *supra* note 201, at 21

257. NIOSH STRATEGIES, *supra* note 206, at 57-58.

258. Letter from Edward Clark, Ostergaard Acoustical Associates, to David Pritzker, ACUS (Mar. 18, 1991) (EPA should underwrite research for quieting noise sources and help develop community noise control criteria or guidelines); Letter from Walter Eversman, Chairman, Noise Control and Acoustics Division, American Society of Mechanical Engineers, to David Pritzker, ACUS (Mar. 27, 1991), at 1 ("ONAC should provide a technical infrastructure which supports governments."); Letter from Kevin Lowther, Member, Board of Directors, Institute of Noise Control Engineering, to David Pritzker, ACUS (Mar. 28, 1991), at 2 (federal government should fund studies that "enhance the database of noise emissions from consumer and industrial equipment"; Letter from Nancy Timmerman, President, Institute of Noise Control Engineering, to David Pritzker, ACUS (Mar 29, 1991) ("A clearinghouse of information on noise control can be useful."); Maling Letter, *supra* note 160 at 5 (EPA should rewrite its model noise ordinance, its "Levels Document," support university teaching and research, and publication of technical information.); Stewart, *supra* note 8, at 6 ("Disgrace" that technical experts must depend "so heavily" on testing and research done by National Research Council of Canada).

259. Melnick Letter, *supra* note 198, at 1-2 (noise research is now "almost nonexistent" and "needs to be done"); NHCA Letter, *supra* note, at 2 (research programs on the general health effects of noise are "invaluable" and "need to be initiated again")

260. *E.g.*, DiPolvere Letter, *supra* note 94, at 3.

261. *See e.g.* Letter from Martin Hirschon, President, Industrial Acoustics Co., Inc., to David Pritzker, ACUS (Mar. 8, 1991) (computerized data "could be of great value"); Letter from Kevin Lowther, Member, Board of Directors, Institute of Noise Control engineering, to David Pritzker ACUS (Mar. 28, 1991)(computerized database "must be exploited"); Glaser Letters *supra* note 100. At 2 (computerized database would be a "boon" to professionals); Kessler Letter, *supra* note 94, at 5 ("If EPA does nothing else, it should assemble and have available databases."); Maling Letter, *supra* note 160, at 5 ("EPA should maintain a computerized 'noise bulletin'."); Stewart, *supra* note 8, at 5 ("It would be nice to have a really good computerized database").

262. Memorandum from David Stephens, Chief of the Acoustics Division, NASA Langley Research Center, to Harvey Hubbard (Mar. 8, 1991), *in* Letter from Harvey Hubbard to David Pritzker, ACUS (Mar. 12, 1991)(computerized database would "not be a productive exercise" for EPA); Melnick Letter, *supra* note 198, at 2 (computerized databse would be "extremely" useful); *but see* Luz Comments, *supra* note 100, at 3 (no need to duplicate "excellent" computerized databases developed through Air Force funding); Toothman, *supra* note 94, at 2 (computerized database could be "useful" but should be privately developed).

263. The NIH group concluded that "[h]igh visibility media campaigns are needed to develop public awareness of the effects of noise on hearing and the means of self-protection. Consensus Statement, *supra* note 201, at 18. It recommended:

Educational programs should be targeted toward children, parents, hobby groups, public role models, and professionals in influential positions, such as teachers, physicians, audiologists, and other health care professionals, engineers, architects, and legislators. In particular, primary health

care physicians and educators who deal with young people should be targeted through their professional organizations...

*Id.* At 17-18.

The NIOSH study recommended that long-term objectives for information dissemination should include efforts to:

Inform the public of the need to protect hearing to avoid the biological and social consequences of exposure to noise. All forms of media should be used. In addition, information shall be distributed to large public gatherings, such as state and local fairs, health conventions, etc.

Develop education programs and promote existing programs in primary and secondary schools and in universities for teaching the basic science of sound, including, its hazards, and methods of self-protection.

NIOSH STRATEGIES, *supra* note 206, at 58.

264. EPA SCIENCE ADVISORY BOARD, REDUCING RISK: SETTING PRIORTIES AND STRATGIES FOR ENVIRONMENTAL PROTECTION 24 (1990) [hereinafter cited as "SAB Report"].

265. *See supra* note 57 & accompanying text (ONAC received grudging support from EPA, in part, because agency personnel did not view noise abatement as an important element of EPA's mission).

266. The Department of Education might also play a role in the design of school education programs.

267. A former director of ONAC recommends that infrastructure activities that could not be assigned to the National Institute of Environmental Health Sciences be delegated to the National Academy of Engineering/National Research Council or that a National Advisory Commission on noise standards and control be established. Meyer Letter, *supra* note 51, at 1-2. He also supports a assigning responsibility for maintaining a computerized database to the National Bureau of Standards. *Id.* at 2. The former direc0tor prefers these arrangements because he distrusts that EPA will be friendly to infrastructure activities. *Id.* at 1. The problem with this recommendation is that parceling out the infrastructure activities would create coordination problems. *See infra* 268 we & accompanying text. Since EPA may have a new attitude concerning infrastructure activities, *see infra* note 271 & accompanying text, it would be better to determine whether EPA will support such activities before they are transferred elsewhere.

268. Overnight Hearings, *supra* note 84, at 18. testimony of David Hawkins, Assistant Administrator for Air and Waste Management, EPA).

269. For example, if EPA mains the function of product labeling, it would have to coordinate its activities with the educational efforts of another agency.

270. Shapiro & McGarty, Reorienting OSHA: Regulatory Alternatives and Legislative Reform, 6 YALE J. ON REG. 1, 58-59 (1989).

271. SAB Report, *supra* note 264, at 6. A former director of ONAC cautions, however, that "EPA and Administrations (regardless of party) simply will not provide the resources to EPA to implement a federal noise control program within EPA." Meyer Letter, *supra* note 51, at 1. He recommends therefore that Congress place noise infrastructure activities elsewhere. See note 267 *supra* (describing recommendation). As related earlier, however, there are disadvantages to giving up on EPA as the home for such efforts. See *supra* note 239 & accompanying text. EPA should therefore be given an opportunity to indicate that it will support such activities, but Congress should monitor the agency's efforts to determine its level of support.

272. EPA SCIENCE ADVISORY BOARD, APPENDIX A: REPORT OF THE ECOLOGY AND WELFARE SUBCOMMITTEE 34 (1990).

273. See EPA SCIENCE ADVISORY BOARD, APPENDIX B: REPORT OF THE HUMAN HEALTH COMMITTEE 11 (1990) (Comparative risks should be judged according to their risks of contributing to cancer, other adverse health effects, ecological damage, and societal welfare).

274. EPA SCIENCE ADVISORY BOARD, APPENDIX C: REPORT OF THE STRATEGIC OPTIONS SUBCOMMITTEE 33 (1990) [cited hereinafter as "STRATEGIC OPTIONS"].

275. Mashaw & Rose-Ackerman, *supra* note 215, at 118 ("Uniform national regulation frequently produces economies of scale for private firms in interstate commerce.")

276. Senate Report, *supra* note 17, at 7, 19. (1972). Moreover, the drafters understood that more extensive preemption was necessary for railroads and motor carriers. State and local governments may use time and place restrictions, such as zoning or licensing, to address noise emissions from products regulated by EPA, *supra* note 23, but EPA's approval is required to use these controls concerning railroad and motor carrier noise. Note 24 *supra*. EPA is authorized to permit local regulation if it is necessitated by special local conditions and local regulation would not be in conflict with EPA's regulation. *Id.* The NCA drafters included EPA approval because of "the need for active regulation of moving noise sources and the burdens placed on interstate carriers of differing State and local controls." SENATE REPORT, *supra* note 17, at 19.

277. Preemption was adopted over Senator Muskie's objection that the NCA was a "classic example" of how federal preemption weakens regulation by substituting less stringent federal standards for more stringent state and local regulations. SENATE REPORT, *supra* note 17, at 21-22. A national association of noise control officials asserts that, as Muskie predicted, EPA standards have replaced, or prevented, stricter regulation of noise sources such as new trucks and motorcycles. Reauthorization Hearings, *supra* note 1112, at 24, 28 (Testimony of Jesse Borthwick, Executive Director, National Association of Noise Control Officials (NANCO)). An EPA official replies that the regulations adopted by ONAC were as stringent as the NCA permitted. Faith interview, *supra* note 50.

278. E.g., *Oversight Hearings*, supra note 84, at 93-94 (Statement of James Arndt Deere & Company).

279. *Id.* at 124-127 (Statement of Motor Vehicle Manufacturers Assoc. of the U.S., Inc.).

280. *Reauthorization Hearing*, supra note 112, at 2-4 (Statement of William Dempsey, President, American Association of Railroads).

281. *Noise Control Oversight: Hearings Before The Subcomm. On Resource Protection Of the Senate Comm. on Environmental Public Works*, 95th Cong., 2d Sess. 69 (1978) [cited hereinafter as "NCA Oversight"] (Testimony of Larry Blackwood, Illinois Assistant Attorney General). Blackwood contends that some noise control problems created by railroad yards do not require national uniformity of treatment because they can be solved by changes in equipment or practices, or by installation of noise control barriers, designed for a particular location. *Id.*

282. EPA could make determinations concerning local exemptions without a standard. *See* 42 U.S.C. §§4916(c), 4917(c) (granting EPA the power to grant local exemptions). Without a standard, however, local governments have the responsibility to produce evidence that a local exemption is justified without prior notice concerning what standards EPA will use to weigh the evidence. Consider the case of Seattle, Washington, which sought a local exemption in response to petitions received from residents in a densely populated neighborhood near railroad switch yards. EPA responded that the noise measurement data supplied by the city was not consistent with the measurement methodology used to establish noise standards, and the city failed to submit a copy of the regulations that it proposed to enact. *See* Transportation Noise, supra note 130, at 51-52. When EPA has made similar demands on other cities, they have given up obtaining an exemption. Feith interview, supra note 16.

283. Note 275 supra & accompanying text.

284. *See* Transportation Noise, supra note 130, at 74 (proposing option that EPA be funded to regulate transportation noise sources).

285. *See* supra Section ID.

286. *See* Transportation Noise, supra note 130, at 75 (discussing moving responsibility for transportation standard setting to DOT).

287. 15 U.S.C. §2051(b)(1)(1988).

288. 29 C.F.R. §1910.95 (1990).

289. Transportation Noise, supra note 130, at 75; *see also* Letter from Sanford Fidell, Lead Scientist, BBN Systems and Technology, to David Pritzker, ACUS (Apr. 1, 1991), at 2 (No other agency besides EPA "Has provided a consistent interpretation of noise effects research uncolored by institutional interests"); Stewart Letter, supra note 8, at 3 (Agency "that does not have a

conflict of interest is very much needed" since a "first objective" of FAA, FHWA, and HUD "is to set criteria which allow their projects to be built.").

290. Tobias, *Revitalizing the Consumer Product Safety Commission*, 50 MONT. L. REV. 237 (1989); Adler, *From "Model Agency" To Basket Case-The Case of The Consumer Product Safety Commission*, 41 AD. L. REV. 61 (1989); Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982); Tobias, *Consumer Agency Falling Down on the Job*, LEGAL TIMES, Mar. 20, 1989, at 19, c. 1.

291. *See supra* note 271 & accompanying text (discussion of whether EPA will be more interested in noise abatement).

292. *Cf.* Shapiro. *Biotechnology and the Design of Regulation*, 17 ECOLOGY L.Q. 1. 6-7 (1990) [cited hereinafter as "*Regulation Design*"].

293. Levels Document, *supra* note 35.

294. Bolt Beranek and Newman, *Noise In American: The Extent of the Problem* (July, 1981).

295. *See supra* note 200 & accompanying text (recommending that EPA compile new exposure data).

296. *See* Lipscomb Letter, *supra* note 93, at 5 (production of a "revised and updated Criteria Document should be one of the first charges to a revived ONAC program"); Maling Letter, *supra* note 160, at 5 (EPA should "review and rewrite" "Levels Document").

297. *See* SAB Report, *supra* note 264. at 19 (recommending that EPA should reflect "risk-based priorities" in its strategic planning process). Under the relative risk approach recommended by the SAB, *id.* at 16, EPA would also have to compare the risk reduction that could be achieved in noise abatement with its other responsibilities. Since there is no up-to-date data concerning the extent of noise risks, note 190 *supra* & accompanying text, it is not clear how the risks associated with noise might compare to other opportunities for risk reduction.

298. Feith interview, *supra* note 50.

299. *Regulation Design*, *supra* note 292, at 37.

300. *See* SAB Report, *supra* note 264, at 21 (EPA should make greater use of all the tools available to reduce risk); STRATEGIC OPTIONS, *supra* note 274, at 33 (same).

301. NOISE POLLUTION, *supra* note 50, at 33.

302. *Cf.* P. ASCH, CONSUMER SAFETY REGULATION: PUTTING A PRICE ON LIFE AND LIMB 33-35 (1988) (properly functioning markets will supply the amount of safety demanded by consumers).

303. A rational consumer will seek information about a product until the costs of the person's search exceed the expected benefits at the margin. *Id.* at 49. When search costs are high, consumers will demand less safety than when search costs are lower. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws To Produce and Use Data*, 87 MICH. L. REV. 1795, 1815 (1989), A market will also not function properly if the purchasing decisions of individual consumers often the health of third persons. See *infra* note 318 & accompanying text (discussion of problem of spillover costs).

304. See Letter from M.G. Prasad, Professor of Mechanical Engineering, Vice-President for External Affairs, Stevens Institute of Technology, to David Pritzker, ACUS (Mar. 29, 1991) (Labeling will have a “positive impact on quality and marketing of products.”);

Melnick Letter, *supra* note 198, at 1 (“Labeling products would also provide the public with information which would assist them in making purchasing judgments and serve as a mechanism for an acceptable level of awareness.”)

An industry spokesman disagrees concerning the value of labeling because it would be “misleading and ineffective for the average person.” Toothman Letter, *supra* note 94, at 2. This problem, however, could be addressed by linking consumer education programs to product labeling. Moreover, EPA should work with industry to design labeling that is understandable to the average consumer. Finally, some types of consumers, such as industrial purchasers, *see infra* note 312 & accompanying text, or environmentally-sensitive consumers, *see infra* note 313 & accompanying text, would have the sophistication and interest to understand the labeling.

305. A seller would have an incentive to limit or skew information when its products were louder than its competitors. In this case, if disclosure were made at all, the seller has an incentive to skew the information by revealing it in a manner that makes it difficult for the firm's products to be compared to those of competitors. Beales, Craswell, & Salop, *The Efficient Regulation of Consumer Regulation*, 24 J. L. & ECON, 491 (1981); Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON, 311 (1970), Rothschild, *Models of Market Organization with Imperfect Information: A Survey*, 81 J. POL. ECON. 1283 (1973). The firm might also lie or mislead consumers about the level of noise created by its product. EPA's experience confirms this last possibility. See *supra* note 126 & accompanying text (EPA has found that manufacturer or hearing protection equipment made false claims).

306. 42 Fed. Reg. 2525 (1977).

307. Feith interview, *supra* note 16.

308. Interview with John Liskey, Director of Statistical and Technical Services, Outdoor Power Equipment Inst., in Alexandria, va., Dec. 5, 1990.

309. *Id.*

310. Other industries have also found little consumer interest in purchasing quieter products. For example, there has been little consumer demand for quieter household products such as vacuum

cleaners, dishwashers, and disposals. Eldred interview, *supra* note 59. By comparison, refrigerator manufacturers have made their product quieter in response to consumer demands. *Id.* The difference might be explained by how consumers treat occasional versus continuous noise. *Id.* As in the case of lawn mowers, however, consumers are apparently ill informed about the risks posed by noise, or the possibility that noise can be reduced.

311. Note 201 *supra* & accompanying text. Moreover, consumers are generally unaware that consumer products like air conditions have noise ratings that could be used for purposes of comparison shopping. Feith interview, *supra* note 16.

312. *See* Stewert Letter, *supra* note 8, at 4 (buyers of machinery in some industries "are having difficulty obtaining needed information and cooperation from machinery builders").

313. Glaser Letter, *supra* note 100, at 2 ("new breed of educated consumer" who "wants to know about environmental hazards" is likely to use noise information).

314. *See supra* Section IB3.

315. *See supra* note 61 & accompanying text (describing legal constraints on use of program).

316. EPA can rely on market forces in this manner, however, even if Congress does not amend the Noise Act. One of ONAC'S successes was helping communities purchase quieter products by writing model contract specifications that they could use. *See supra* note 61 & accompanying text (describing EPA's state and local buy quiet program). There are no legal constraints preventing EPA from renewing this approach.

317. *See* Consensus Statement, *supra* note 96, at 18 (Incentives for manufacturers to design quieter industrial and consumer goods are needed to reduce nonoccupational NIHL).

318. Since buyers have no incentive to take into account the effect of noise on other persons when they purchase a noise-emitting product, any protection that others receive is a function of the purchaser's desire for less noise. In many cases, third parties will be exposed to loud noises because buyers have little or no interest in reducing the noise of the products they purchase. Individuals who Wear hearing protection equipment while running a chain saw, for example, have no incentive to purchase a quieter product unless that option would be less expensive, which is unlikely. Also, the person who purchases a product may not hear the noise it creates. Those persons who manage the nation's railroads typically do not live next to railroad switching yards. In other cases, individuals will be present, but they may be risk takers. Individuals may purchase loud snowmobiles because they are willing to take the risk of possible hearing loss. Finally, some persons simply like noise, such as some motorcycle enthusiasts.

While persons affected by noise could reach an agreement with noise producers concerning the amount of noise they will emit in some cases, *cf. Coase, The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), in most cases such negotiations would be infeasible. Citizens, for example, would not be able to contract with the thousands of truck drivers who passed through their community to reduce their noise emissions. In addition, a market transaction will lead to an

economically appropriate amount of pollution only if the person subject to the pollution has good information concerning its effects on human health. Schroeder & Shapiro, *Responses To Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1241 (1984). Since some of the health effects of noise are not well understood, *see supra* note 191 & accompanying text (discussing health effects of noise), relying on market transactions to eliminate third party effects may also be inappropriate.

319. These third parties will receive protection if homeowners decide to seek quieter equipment to protect themselves, but homeowners may not purchase quieter mowers. For example, the homeowner may decide that wearing hearing protection equipment is a less expensive option. Or the buyer may believe that lawn mower noise is sufficient to warrant purchasing a more expensive lawn mower that makes less noise. In such situations neighbors may be able to negotiate with lawn mower owners to reduce their noise exposure, but this result is more unlikely in crowded neighborhoods, where the negotiations would involve dozens of persons both Produce the noise and are subject to it.

320. Suter, *Wendell Ford's Edsel-Or How To Delight The Lobbyist and Enrage The Citizens*, SOUND & VIBRATION, Jan. 1991, at 5 [cited hereinafter as "*Ford's Edsel*"].

321. *E.g.*, Sunstein, *Administrative Substance*, 1991 DUKE L.J., (forthcoming).

322. An emissions standard would not necessarily eliminate the usefulness of labeling. Although the standard would establish a minimum level of protection, labeling would permit consumers to purchase machines that exceeded the minimum standard if they desired.

323. *See supra* note 112 & accompanying text (garbage truck emissions standard was opposed by local noise officials as unnecessary).

324. 42 U.S.C. §4907(a).

325. Note 39 *supra* & accompanying text.

326. The NCA does not define what constitutes a "major" source of noise. *See* 42 U.S.C. at §§4902. 4904(b)(1). The House Report likewise contains no definition. *See* House Report, *supra* note 17, at 12-13. The Senate report notes that the concept of "environmental noise" refers to the "overall level of noise in a given area to which individuals are exposed, including the intensity, duration, and character of sounds from all sources." Senate Report, *supra* note 17, at 6. It also acknowledges that "[i]dentification as a major noise source is the first step in the development of noise emissions standards for particular products." *Id.* This last statement offers some support for the conclusion that a "major" noise source is one that requires a federal emissions standard for successful abatement.

Moreover, since Congress also authorized EPA to designate product for labeling if it "emits a noise capable of adversely affecting the public health or welfare," *id.*, §4907(a)(1), it must have anticipated that at least some noise problems could be addressed through the use of labels. This implies that EPA has to have flexibility in choosing its approach.

If Congress did not resolve whether EPA could rely on other forms of abatement in lieu of emissions standards, EPA can write its own definition of "major" noise source as long as it is consistent with the goals and purposes of the Act. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This construction would be consistent with the Act since it both results in the reduction of noise and preserves EPA's scarce resources to address problems that are intractable to other solutions (or which require federal regulation for purposes of preemption).

327. It would act, however, justify an indefinite delay in establishing federal standards. Since the goal of the Act is noise abatement. 42 U.S.C. §4901(2), once EPA recognized that other abatement techniques were not working, it would be obligated to identify problem as a "major" noise source and proceed to regulate it. *See supra* note 121 & accompanying text arguing that EPA can not postpone permanently the deadlines specified in the Noise Act by de-identifying noise sources because of a lack of money to regulate).

328. *See supra* note 49 & accompanying text (discussing why ONAC missed its deadlines).

329. A statutory deadline provides a clear, articulable standard easily used by oversight committees at agency and budget review time. Shapiro & McGarity, *supra* note 29, at 54. Missed deadlines generate public concern and thereby focus congressional attention on the deadlines. *Id.* at 53 n. 292.

330. *See* 5 U.S.C. §706(a)(1) (1988) (authorizing agencies to "compel agency action... unreasonably delayed").

331. Shapiro & McGarity, *supra* note 29, at 56.

332. Congress could assure farther accountability by providing that agency-set deadlines could be extended only for good cause and only for congressionally determined intervals. Finally, Congress could provide for judicial review of agency-set deadlines to prevent EPA from setting unreasonable long deadlines.

333. The Administrative Conference suggests that the problem of unreasonable deadlines and adverse effects on agency decisionmaking can be mitigated if the agency sets its own deadlines. 1 C.F.R. §305.78-3 (1990), because the deadlines reflect the agency's understanding of its own resources. *See* Shapiro & McGarity, *supra* note 29, at 56.

334. If EPA implements the NCA, there is a danger that agency administrators will once again ignore the act as they did previously. While there are reasons for believing this will not happen, note 271 *supra* & accompanying text, this approach would protect against history repeating itself.

335. *Cf.* Shapiro & McGarity, *supra* note 29, at 35.

336. Shapiro, *Scientific Issues and the Function of Hearing Procedures: Evaluating FDA's Public Board of Inquiry*, 1986 DUKE L.J. 288, 306-07; *But see* Shapiro, *Public Accountability of Advisory Committees*, 1 RISK 189, 190-92 (1990) (describing potential of advisory

Committees to make administrative process less accountable). EPA has the services of a Science Advisory Board (SAB), *see* Ashford, *Advisory Committees in OSHA and EPA: Their Use In Regulatory Decisionmaking*, 9 SCI., TECH. & HUM. VALUES 72 (1984) (describing the SAB), which advises the agency as a whole, but SAB members are unlikely to have expertise concerning noise issues.

337. Von Gierke interview, *supra* note 74.

338. Note 70 *supra* & accompanying text.

339. Von Gierke interview, *supra* note 74.

340. Procedures for Negotiating Proposed Regulations (Recommendation 85-5), 1 C.F.R. §305.85-5 (1990); 82-4, Procedures for Negotiating Proposed Regulations (Recommendation 82-4), *id.* §305.82-4. Negotiated rulemaking is a structured discussion among all interested parties, often with the aid of a mediator or facilitator, to arrive at a consensus concerning a proposed rule. When the process is successful, an agency can promulgate the proposed rule with substantial savings in time and costs. Administrative Conference of the United States, *Negotiated Rulemaking Sourcebook* (1990); Harter, *Negotiating Regulations: A Case of malaise*, 71 GEO. L.J. 1 (1982).

341. Thomas, *The successful Use of Regulatory Negotiation by EPA*, 13 ADMIN. L. NEWS 1 (Fall, 1987), *reprinted in* Sourcebook, *Supra* note 340, at 20.

342. *See supra* note & accompanying text (discussing need for such an exemption).

343. Procedures for Negotiating Proposed Regulations (Recommendation 82-4), 1 C.F.R. §305.82-4 (1990); *see* Harter, *supra* note 282, at 42-52 (listing conditions for successful negotiations).

344. SAB Report, *supra* note 74, at 23: STRATEGIC OPTIONS, *supra* note 274, at 43 ("Due to EPA'S limited jurisdiction, cooperation with other agencies... often presents the best opportunities to reduce environmental risks.")

345. Consensus Statement, *supra* note 201, at 18.

346. *See* Administrative Conference of the United States, *Federal Agency Interaction With Private Standard Setting Organizations in Health & Safety Regulation* (Recommendation 78-4), 1 C.F.R. §305.78-4 (1990) (health and safety regulatory agencies should take advantage of private standard setting activities): NIOSH STRATEGIES, *supra* note 206, at 57-58 (strategies to reduce noise should include promotion at national standards for noise control, hearing conservation practices, and product noise control through such organizations as American National Standards Institute and Acoustical Society of America).

347. Timmerman letter, *supra* note 258, at 3.

348. *See supra* note 70 & accompanying text (discussing criticism of ONAC). ONAC embarked on a project to work with professional groups and other environment agencies to develop common technical methods near the end of its tenure, but the project was ended when it lost its funding. *See supra* note 70 & accompanying text (discussing ONAC'S efforts to work with industry to develop measurement efforts).

349. *See e.g.* Kessler letter, *supra* note 94, at 5 (EPA should "encourage" but not "influence" consensus noise standard activities); Maling letter, *supra* 160, at 4 (federal involvement will end up in federal "control"); Toothman letter, *supra* note 94, at 2 ("Consensus standards activities are being adequately handled in this country; therefore, there is no need for federal activity. ").

350. *E. g.*, Kessler letter, *supra* note 94, at 5; Timmerman letter, *supra* note 258, at 3 ("only effective use for federal support" would be for travel expenses).

351. *E.g.*, Luz Comments, *supra* note 100, at 3 (standards should be developed by support to ANSI).

352. Stewart letter, *supra* note 8, at 5.

353. *Id.* Participation is limited because such individuals must usually bear their own expenses. *Id.*

354. Letter from Martin Hirschorn, President, Industrial Acoustics Co, Inc., to David Pritzker, ACUS (Mar. 8, 1991) ("highly desirable" to have uniform international standards); Eversman letter, *supra* note 258, at 1 (ISO standards are an "excellent" basis for establishing minimum standards for noise emissions); Hickling letter, *supra* note 147, at 2 (a primary need is to reconcile noise control in United States, with Europe and Japan); Luz Comments, *supra* note 100, at 9. (EPA should work with private standard-setting groups "to ensure that U.S. products will be competitive in the European market); Melnick letter, *supra* note 198, at 1 (federal assistance could "promote a stronger U.S. presence in the international standards community" and "facilitate" trade).

355. *See supra* note 72 & accompanying text (discussion of EPA's attempts to harmonize domestic and international standards).

356. Congress prohibited airport operators from adopting any airport noise or access restriction for Stage 3 aircraft unless the Secretary of Transportation finds that it meets a list of criteria specified by Congress including that the restriction does not pose an "undue burden" on interstate and foreign commerce or on the national aviation system. Aviation Noise and Capacity Act of 1990, §§9302(b), (d). A "stage 3" aircraft is one that meets the strictest of the FAA's regulations limiting aircraft noise emissions.

357. *Ford's Edsel*, *supra* note 320.

358. They assert that the sponsors of the legislation were able to sneak it through Congress during the chaos that accompanied the final days of the session. No public hearings were held,

and although committee staffers consulted industry lobbyists during the bill's markup, representatives of airport operators were not consulted. *Id.* They also claim that the legislation gives the FAA unlimited discretion to strike down local noise abatement efforts. They point to the FAA's authority to veto restrictions that put an "undue burden" on interstate and foreign commerce or on the national aviation system, 1990 Act, *supra* note 356, §§1904(d)(2)(B), (F), because Congress did not define what it meant by "undue burden." *Congress Approves Landmark Bill Setting Framework For Noise Policy*, 2 AIRPORT NOISE REP. 171, 176 (1990). The FAA, however, has proposed criteria to be used to determine whether to approve local programs. 56 Fed. Reg. 8628 (1991).

359. Telephone interview with Steve Kramer, President, National Organization to Insure A Sound-Controlled Environment (NOISE), Jan. 8, 1991; *see also* Kessler Letter, *supra* note 94, at 3 (EPA should be "strong advocate" for community residents impacted by aircraft noise).

360. This authority authorizes EPA to request information from the FAA concerning the nature, scope, and results of noise-control programs, and to publish a report concerning the status of efforts by other agencies, including the FAA, to reduce noise. 42 U.S.C. §4904(c)(1), (3). EPA could use the former of these powers to require the FAA to notify it concerning applications by airport operators for approval of noise restrictions, and it could use the latter to discuss the adequacy of the FAA's response to the applications. EPA is also authorized to recommend standards to the FAA for the control of noise. 42 U.S.C. §4903(c)(2). It is not clear how this authority relates to the FAA's new powers, although it may have no connection since the FAA will implement its approval or disapproval of local noise regulations by adjudication.

361. Meyer Letter, *supra* note 51, at 2.

362. ONAC'S efforts likely did nudge the FAA into being more protective, note 154 *supra* & accompanying text, but FAA officials deem EPA's past efforts to be largely unimportant or disruptive. Note 154 *supra* & accompanying text.

363. DiPolvere Letter, *supra* note 94, at 2. ONAC's original work concerning the day-night noise limit (Ldn) emphasized the limitations of the metric and the potential need to supplement it in appropriate cases. Stewart Letter, *supra* note 8, at 2. After ONAC was disbanded, however, the 65 Ldn became a universal measure and ONAC'S cautionary warnings were disregarded. *Id.*

364. Transportation Noise, *supra* note 130, at 21.

365. *See, e.g.*, Letter from Loren Simmer, President, National Airport Watch Group, to David Pritzker, ACUS (Mar. 26, 1991) (majority of noise complaints concerning Minneapolis-St. Paul airport are outside of the 65 Ldn contour).

366. Letter from Craig Cantoni, President, New Jersey Coalition Against Aircraft Noise, to David Pritzker, ACUS (Mar. 16, 1991), at 1-2.

367. Letter from Charles Price, Executive Director, National Organization To Insure A Sound-controlled Environment, to David Pritzker, ACUS (Mar. 5, 1991) (citizen group suggests EPA

devise new metric); *see* Cantoni letter, *supra* note 366, at 2 (citizen group complains that FAA is one of the most "blatant" examples of the Washington "revolving door"); Timmerman letter, *supra* note 258, at 2 (EPA in a position to adopt "balanced approach" that weighs impacts on people against economies and efficiencies).

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