DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-175137

DATE: AUG 9 1976

MATTER OF:

Environmental Protection Agency Regulation of Parking Facilities

DIGEST:

1. Activity of Environmental Protection Agency (EPA) regarding proposal to revise Oregon State Air Quality Implementation Plan to include indirect source and regional parking plan, submitted by Oregon to EPA for approval, is not contrary to provision in EPA's 1976 appropriation restricting EPA's regulation of parking facilities, since Oregon voluntarily promulgated proposed plan.

2. Environmental Protection Agency's (EPA) issuance of Order to enforce New York State Transportation Control Plan relating to New York City's parking facilities technically violates provision of EPA's 1975 appropriation act restricting EPA's regulation of parking facilities. However, EPA has not attempted, and does not intend, to enforce Order, in recognition of existing restriction in 1976 appropriation act. Also, there is pending litigation concerning State and city compliance with the Plan. Accordingly, EPA Order is moot and no action by GAO is necessary.

In response to numerous inquiries, we have considered the propriety of activities of the Environmental Protection Agency (EPA) with regard to the regulation of parking facilities in the States of Oregon and New York. The case of Oregon involved a proposal to revise the Oregon State Air Quality Implementation Plan to include an indirect source and regional parking plan, which was submitted by the State for approval to the Administrator of EPA and published in the Federal Register, 40 Fed. Reg. 54012 (November 20, 1975). In the case of New York, on September 27, 1975, EPA's Administrator for Region II issued an Order, Index No. 50217F, concerning implementation of Control Strategy B-3 "reduction of number of parking spaces in the CBD's /Central Business Districts/" of the New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls, submitted by the State of New York to EPA in April 1973

The inquiries suggest that the activities in question may be in violation of section 510 of the Agriculture-Environmental and Consumer Protection Appropriation Act, 1975, approved December 31, 1974, Pub. L. No. 93-563, 88 Stat. 1843, and section 407 of the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1976, approved October 17, 1975, Pub. L. No. 94-116, 87 Stat. 600.

Section 510 provides:

> "No part of any funds appropriated under this Act may be used by the Environmental Protection Agency to administer any program to tax, limit, or otherwise regulate parking facilities."

Section 407 provides:

> "No part of the funds appropriated under this Act may be used to administer or promulgate, directly or indirectly, any program to tax, limit or otherwise regulate parking that is not specifically required pursuant to subsequent legislation."

We have reviewed the legislative histories of section 510 of Pub. L. No. 93-563, and section 407 of Pub. L. No. 94-116, to determine the intended scope of this restriction. The basic purpose of the prohibition in section 510 of Pub. L. No. 93-563 was explained by Congressman Whitten during House consideration of the conference report on that legislation, 120 Cong. Rec. H11683 (daily ed., December 12, 1974), as follows:

> "Mr. Speaker, I am also concerned that some people may not fully understand the committee's position with respect to the regulation of parking. The committee in no way objects to the regulation of parking facilities by State or local authorities, this is as it should be. What the committee objects to is the regulation of parking facilities by someone in the bureaucracy here in Washington. If a mayor, or city council, or State agency wished to place restrictions on parking facilities within their own jurisdiction, that is fine, they must justify their action to their own constituents.
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> "However, if someone in EPA's headquarters here in Washington decides he wants to regulate parking facilities in New York or Los Angeles or any other of the great cities of this country or if a small group in such cities

> persuade him to do so, who does he have to justify his actions to? Who do the people of that city turn out of office if they feel their rights been been /sic/ infringed upon?
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> "Mr. Speaker, parking is a local problem and should be controlled by people at the local level."

To the same effect is the following portion of a colloquy relating to section 510 during Senate consideration of the conference report, 120 Cong. Rec. S21782 (daily ed., December 17, 1974);

> "Mr. MUSKIE. I take it that there is notintention on the part of the conferees to affect EPA's authority to make grants to States and otherwise make available technical assistance to assure compliance with plans for implementation of air quality standards, which plans may include local or State parking regulations. Is that correct?
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> "Mr. McGEE. The Senator is correct. To my knowledge there was no intention on the part of any of the conferees to affect in any way the grants made to the States or otherwise interfere with the States or local jurisdictions from developing or implementing parking programs. As a matter of fact, the States and local jurisdictions are encouraged to proceed in this regard and I believe EPA should be able to assist them under their regular programs which provide both financial and technical assistance."

Thus, the funding restriction was not intended to inhibit regulation of parking facilities at the State or local levels.

Moreover, the legislative history of section 407 of the fiscal year 1976 EPA appropriation clearly indicates that at least one basic test concerning the applicability of the appropriation restriction is whether programs regulating parking are voluntarily adopted by a State or local government. Thus, Congressman Boland observed during House consideration of the Conference Report on Pub. L. No. 94-116:

> "* * * I have been asked if the use of the word 'require' in this amendment means that no EPA funds could be used to assist in carrying out a program for regulation of parking if such program is voluntarily adopted by a State or local government and approved by EPA as part of the applicable implementation plan?

"The answer to this question is 'No.' This is certainly not the intent of the amendment. If a State or local government voluntarily adopts or maintains such a program, there would be no restriction on the use of the funds to carry out that program. This position simply means that EPA may not force a State or local government to carry out such a program or promulgate such a program unless expressly required by subsequent legislation." 121 Cong. Rec. H9567 (daily ed., October 3, 1975).

Congressman Casey added, id. at H9568:

"The language contained in section 407 does restrict the Agency from enforcing a parking program and forbids regulation of parking directly and indirectly by the EPA. I think the language is quite clear that no attempted evasions of this restriction could be tolerated since parking regulation is limited both directly and indirectly.

* * * * *

"I want to note also that EPA may assist States with voluntary parking programs so long as they are truly established by the States without any coercion by the EPA. I think the gentleman from Massachusetts would agree that there is nothing in this language which restricts EPA aid on its own initiative, but I emphasize that these programs must be voluntary."

The following colloquy also took place during Senate consideration of the conference report, id. at S17535:

"Mr. MUSKIE. I would like to address several questions regarding the intent of this amendment to Senator PROXMIRE, the distinguished floor manager of this bill. First, I would like to ask the Senator whether this language is meant to only prohibit the EPA from using its own funds to administer or promulgate parking programs, and that it does not, and is not intended to prevent States from adopting and implementing their own parking program as a part of State implementation plan?

"Mr. PROXMIRE. That is correct; this language does not in any way limit a State's ability to adopt and administer their own parking programs.

"Mr. MUSKIE. Would States be free then to use EPA grant money to promulgate or administer their own parking program?

"Mr. PROXMIRE. Yes; States would be eligible to use EPA grant money to promulgate and administer their own parking programs. This situation would not be considered a direct or indirect EPA administration or promulgation since the States would be implementing their own chosen and desired parking programs. While EPA may provide grant money to States for purposes related to parking, the Agency cannot require a State to implement parking controls in order to be eligible for such money. It should be noted that locally adopted parking programs are already an eligible item for section 9 grant money under the National Mass Transportation Assistance Act of 1974 to develop the transportation system management element of a transportation improvement program.

"Mr. MUSKIE. May the Agency continue to provide technical assistance, guidence, and so forth, to areas interested in establishing their own parking control programs?

"Mr. PROXMIRE. Yes, such assistance and guidance is not directly or indirectly, administering or promulgating any parking programs. The EPA is a source of information and knowledge on parking programs and the language is not to be interpreted so as to prevent the Agency from sharing its expertise with others."

Thus EPA's involvement in the regulation of the parking facilities of the States of Oregon and New York are consistent with section 407 and section 510 (in the case of New York) only to the extent that such involvement reflects voluntarily adopted State or local policy.

In the case of Oregon, we believe that EPA's involvement in the State's regulation of its parking facilities does not go beyond the State policy, but rather is in furtherance of it. EPA explained, and officials of Oregon's Department of Environmental Quality confirmed, that Oregon adopted its own parking regulations (Chapter 340 of the Oregon Administrative Rules, § 20-050) in its initial implementation

plan submitted for EPA approval in January 1972, prior to enactment of section 510 in December 1974 and, before EPA determined under court order that all implementation plans should include indirect source regulations (40 C.F.R. § 52.22(b)) for State plans, in February 1974. EPA explained that the Federal regulation was made applicable in Oregon because Oregon's own 1972 plan was not sufficiently comprehensive. However, EPA made clear at the time that Oregon and other States whose plans had been disapproved were free to amend their plans, and that if the modified State plans could be approved, the Federal regulation would be revoked. 39 Fed. Reg. 7271 (February 25, 1974).

In 1974, Oregon began the process of revising its 1972 parking regulation so that it could be incorporated into its implementation plan. EPA states that its only involvement in this revision was in the nature of providing technical assistance and guidance to Oregon. No enforcement action against Oregon was ever threatened, nor were any grant funds made contingent upon action by Oregon in this area. EPA personnel reviewed drafts of the Oregon revision, and informally commented on those drafts throughout 1974. On November 5, 1974, EPA submitted written comments on the proposed revision. However, EPA states that it did not insist that its comments be incorporated into the plan, and, in fact, Oregon refused to change its proposed regulation in the manner suggested by EPA on at least two points which EPA considered significant.

Oregon adopted its regulatory revisions to be effective December 12, 1974, and formally submitted them to EPA for approval on July 24, 1975. EPA's notice of proposed approval of the Oregon revisions appears at 40 Fed. Reg. 50412 (November 20, 1975).

EPA believes that its suspension of those portions of the Federal indirect source regulations covering parking-related facilities (40 Fed. Reg. 28064, July 3, 1975) and the enactment of section 407 itself provide a strong indication that the actions of Oregon in revising and seeking approval of its State implementation plan were voluntary. EPA also suggests that it is common knowledge among the States that presently there is no Federal consequence resulting from a State's failure to include an indirect source regulation in its implementation plan. In this regard, EPA points to the fact that even before it suspended its parking-related indirect source regulations, a number of States did not develop or submit an indirect source regulation to EPA. Recently the State of Washington, which is in the same EPA region as Oregon, revoked its already approved indirect source regulation.

Oregon's Department of Environmental Quality confirms the nature of EPA's involvement in the revised Oregon State Implementation. Moreover, these officials state that the decision to adopt its "Rules for Indirect Sources" was voluntary and not the result of EPA coercion. Accordingly, we do not find EPA's activities with regard to Oregon's indirect source and regional parking plan to be contrary to the restrictions imposed upon EPA by section 407 of the Department of Housing and Urban Development-Independent Agencies Appropriation, 1976.

However, EPA's order regulating parking in New York City's Central Business Districts goes beyond the existing policy of the State of New York or New York City, since EPA issued the order to enforce a policy to reduce the number of parking spaces in the Central Business Districts which neither the State or the city has seen fit to implement or enforce. EPA takes the position that its issuance of the order was not inconsistent with the restriction of section 510, the provision in effect at that time.* EPA argues that this restriction was intended to prohibit Federal pre-construction review of the planning, siting and design of parking-related facilities (termed "indirect source" regulations) under 40 C.F.R. § 52.22 (1974), relating to maintenance of national ambient air quality standards, while the case of New York involved attainment of these standards. The agency distinguishes section 510 from section 407, which it acknowledges would have prohibited issuance of the order had it been in effect. EPA further recognizes that section 407 prevents any action on its part to enforce the order. EPA has not undertaken any enforcement action to date, nor does it contemplate taking any enforcement action in the future.

We disagree with the distinction between these provisions drawn by EPA and believe that the section 510 restriction was sufficiently broad in application to prohibit issuance of an order to enforce State created parking restrictions which the State itself had failed to implement. Nevertheless, we consider the issuance of this order, without any attempt by EPA to enforce it, to be merely a technical violation of the provision under the circumstances. Furthermore, the United States District Court for the Southern District of New York has ordered the State and city to enforce Control Strategy B-3, Friends of the Earth, et al. v. Hugh Carey, et al. 74 Civ. 4500, April 29, 1976, and compliance with the court's order will render the issue moot. Accordingly, we do not consider it necessary to take exception to any expenditures of appropriations made by EPA in connection with its Order.

R.F.KELLER

Deputy Comptroller General
of the United States

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*The prohibition remained in effect during the period of fiscal year 1976 preceding enactment of Pub. L. No. 94-116 by operation of section 101(a)(2) and (4) of the "continuing resolution" for fiscal year 1976, approved June 27, 1975, 94-41, 89 Stat. 225-26.