

# Federal Preemption of Railroad Noise Control: A Case Study and Comment

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The United States Environmental Protection Agency (EPA), in administering the various federal environmental laws of the 1970's, has often been caught in the middle of hotly contested social disputes. EPA has been the focal point of such charged issues as whether the quality of air in pristine areas should be maintained if it may mean the cessation of economic development in those areas;<sup>1</sup> or whether Americans in major cities ought to be required to reduce the use of automobiles by 80% in order to restore their air to safe levels;<sup>2</sup> or whether the automobile industry should be required to work toward future compliance with air emission standards which they now say are unachievable.<sup>3</sup> These tugs-of-war most often represent a confrontation between two national interests, the need for regulation to protect public health and welfare, and the need of American industry to produce and profit in an atmosphere free of regulatory interference.

One such battle is currently being waged over a law dealing with the control of noise from interstate railroads. Though the stakes are

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1. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972) *aff'd by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

2. See 38 Fed. Reg. 2194 (1973), published under court order, *City of Riverside v. Ruckelshaus*, 4 ERC 1728 (C.D. Cal. 1972); 38 Fed. Reg. 17683 (1973); 38 Fed. Reg. 31232 (1973) (codified in 40 C.F.R. §§ 52.220-52.270 (1976)).

3. See J. QUARLES, *CLEANING UP AMERICA* 177-95 (1976); see also 40 Fed. Reg. 11900 (1975) (suspending the effective date of the 1977 model year emission standards for hydrocarbons and carbon monoxide). Two bills to further extend the effective date of those requirements died with the adjournment of the 94th Congress, see S. 3219, 94th Cong., 2d Sess. (1976); H.R. 10498, 94th Cong., 2d Sess. (1976); S. REP. No. 717, 94th Cong., 2d Sess. (1976); H.R. REP. NO. 1175, 94th Cong., 2d Sess. (1976).

much lower than in many of EPA's other disputes, the railroad noise matter deserves attention because these same two national interests, having now predictably collided, at one time formed a partnership that produced the law at issue. Thus, this case study adds a dynamic element which itself should be examined so that its operation may be anticipated in future interactions between these potentially competing interests.

While railroad noise may not necessarily be an environmental problem of national scope, EPA has estimated that about 2.3 million Americans are exposed to levels of railroad noise high enough to adversely affect their health or welfare.<sup>4</sup> In recent years, communities where railroad noise has been most intrusive have, each in its own manner, attempted to solve their problems by regulation.<sup>5</sup> The railroads in turn have come to view the proliferation of differing state and local noise control regulations as an intrusion on their freedom to go about the business of moving goods and people in interstate commerce.<sup>6</sup>

In the Noise Control Act of 1972,<sup>7</sup> Congress attempted to satisfy the divergent interests of the communities and the railroads. The railroads wanted relief from bothersome state and local regulations, and the environmentalists were willing not to fight them in exchange for their acceptance of effective noise control at the federal level. To reach this end Congress employed the legal device of preemption, whereby federal regulations once enacted would supersede those imposed under the authority of state and local governments to regulate.

As it has turned out, however, EPA, the federal agency chosen by Congress to administer this law, has found itself unable to provide effective national solutions to many of the specific noise

4. U.S. ENVIRONMENTAL PROTECTION AGENCY, BACKGROUND DOCUMENT FOR RAILROAD NOISE EMISSION STANDARDS 8-18 (1975). EPA has determined that adverse impact from noise begins at 55 Ldn, U.S. ENVIRONMENTAL PROTECTION AGENCY, INFORMATION ON LEVELS OF ENVIRONMENTAL NOISE REQUISITE TO PROTECT PUBLIC HEALTH AND WELFARE WITH AN ADEQUATE MARGIN OF SAFETY 29 (1974). "Ldn" is the noise level in decibels expressed in terms of a time-weighted average over a twenty-four hour period; this technique weighs more heavily the hours between 10:00 P.M. and 7:00 A.M. by adding 10 decibels to the readings taken, to account for the greater degree to which the same noise levels interfere with nighttime activity, *id.* at 13.

5. See notes 151-155 and accompanying text *infra*.

6. See notes 99-113 and accompanying text *infra*.

7. 42 U.S.C. §§ 4901-4918 (Supp. IV 1974).

problems that are local in nature, and unwilling under those circumstances to take action which would prevent state and local governments from acting on their own. The railroads are smarting from frustrated expectations.<sup>8</sup>

The issue has thus been joined: Does EPA have discretion with respect to its scope of regulation under the Act? May it be required to regulate beyond the boundaries it sets for itself? Can the railroads reasonably require broader federal preemption which serves their interests? Does any significant state and local authority to control railroad noise remain under the Act? This article explores these questions and the implications of their possible answers.

### I. PREEMPTION AND THE NOISE CONTROL ACT OF 1972

The Noise Control Act of 1972<sup>9</sup> evolved from a bill submitted by the Administration<sup>10</sup> and introduced in both Houses of Congress in early 1971.<sup>11</sup> The bill, like the final Act, proclaimed Congress' idealism for an environment for all Americans free from noise which jeopardizes their health or welfare.<sup>12</sup> At the same time, it asserted that while primary responsibility for control of noise rests with state and local governments, federal action is essential to deal with major noise problems requiring national uniformity of treatment.<sup>13</sup> These policies are reflected in numerous places throughout the Act, which authorizes EPA to set noise emission standards which become preemptive of the standards that state or local governments could otherwise have adopted or enforced.<sup>14</sup>

The doctrine of preemption has been developed by the courts for the purpose of avoiding "conflicting regulation of conduct by various official bodies which might have some authority over the

8. See Comments of the Association of American Railroads on Proposed Noise Emission Standards, August 19, 1974, EPA docket No. ONAC 7201002, at 24-36.

9. 42 U.S.C. §§ 4901-4918 (Supp. IV 1974).

10. See COUNCIL ON ENVIRONMENTAL QUALITY, THE PRESIDENT'S 1971 ENVIRONMENTAL PROGRAM 3, 186-96 (1971).

11. S. 1016, 92d Cong., 1st Sess. (1971); H.R. 5275, 92d Cong., 1st Sess. (1971); H.R. 5388, 92d Cong., 1st Sess. (1971); H.R. 6578, 92d Cong., 1st Sess. (1971) [identical bills, hereinafter cited as H.R. 5275].

12. H.R. 5275, *supra* note 11, § 2(b); 42 U.S.C. § 4901(b) (Supp. IV 1974).

13. H.R. 5275, *supra* note 11, § 2(a)(3); 42 U.S.C. § 4901(a)(3) (Supp. IV 1974).

14. On the subject of preemption and environmental control generally, see P. Soper, *The Constitutional Framework of Environmental Law*, in FEDERAL ENVIRONMENTAL LAW 20, 77-100 (1974).

subject matter."<sup>15</sup> In the field of interstate commerce the conflict arises from two causes. First, the regulation of commerce is a power granted to the federal government<sup>16</sup> but not denied the states,<sup>17</sup> thus leaving the states with some residual authority over commerce.<sup>18</sup> Where the federal government and the states regulate the same problem, there is often conflict.<sup>19</sup> Courts have also held that federal *inaction* can sometimes override state authority,<sup>20</sup> and although such cases should not be considered preemption cases in the pure sense of the word,<sup>21</sup> these decisions have provided important ideological roots for the pure preemption cases.

The second source of conflict is particularly relevant to our discussion: state and local governments, in taking legitimate actions under their police power to protect public health, welfare and safety, may thereby regulate interstate commerce in a manner inconsistent with federal law. To the extent there is such inconsistency, the federal law is entitled, under the Supremacy Clause of the United States Constitution, to prevail.<sup>22</sup> But, in general, "evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by Federal action,"<sup>23</sup> or unduly burdensome on interstate commerce.<sup>24</sup>

The basic test of whether state action is preempted is twofold: (1) Does the nature of the subject matter require that federal action shall be exclusive? (2) If not, did Congress' clear and manifest intent demand that its action be exclusive?<sup>25</sup>

15. *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971).

16. U.S. CONST. art. I, § 8, cl. 2.

17. *See* U.S. CONST. art. I, § 10.

18. U.S. CONST. amend. X.

19. *See, e.g., Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Hill v. Florida*, 325 U.S. 538 (1945); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

20. *See* note 26 and accompanying text *infra*.

21. On this issue, *see Freeman, Dynamic Federalism and the Concept of Preemption*, 21 DEPAUL L. REV. 630 (1972); *Comment, A Conceptual Refinement of the Doctrine of Federal Preemption*, 22 J. PUB. L. 391 (1973); *Note, Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

22. U.S. CONST. art. VI, § 2.

23. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960).

24. *Id.* at 443. Although it is beyond the scope of this article to consider the extent to which any state action may constitute an undue burden on interstate commerce, it must be kept in mind that any law or regulation which passes the preemption test must still be subjected to this separate inquiry.

25. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *see Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

In early cases, the courts were frequently presented with state laws in areas where the Congress had not acted. Preemption was therefore based necessarily on whether the state law intruded in a field which by its nature demanded that all regulation be federal. Where the imperative of federal exclusivity was found, the state laws were found unconstitutional, even though there was no federal law with which to conflict and hence no indication of congressional intent.<sup>26</sup> Where the imperative was lacking, the federal inaction was taken as an indication that the states were free to act.<sup>27</sup>

As Congress has gradually expanded the scope of the subjects it has regulated, it has become increasingly possible for the courts to supplement this inquiry with findings of congressional intent as to whether federal action was thought to be properly exclusive. Courts still find that some fields, such as the conduct of foreign affairs, by nature demand federal exclusivity because of a dominant federal interest.<sup>28</sup> But almost always there is some related federal law which permits a further inquiry into Congress' intent.<sup>29</sup> In such cases, the objectives of federal enactments are examined to determine whether a state law presents an obstacle to fulfilling those objectives,<sup>30</sup> or whether Congress' scheme of regulation is so pervasive as to have left little room for state or local action.<sup>31</sup> Thus, congressional intent is emerging as the overriding basis for deciding preemption cases.

This has been particularly true in cases involving the police power. Because this power has been historically reserved to the states,<sup>32</sup> the inherent exclusivity test never stands alone. Rather, the courts start with the "assumption that the historic police powers of the States were not to be superseded by the federal Act unless that was the clear and manifest purpose of Congress."<sup>33</sup>

26. *E.g.*, *Leisy v. Hardin*, 135 U.S. 100 (1890); *Cooley v. Board of Wardens of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

27. *E.g.*, *Plumly v. Massachusetts*, 155 U.S. 461 (1894).

28. *E.g.*, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

29. *See id.*

30. *E.g.*, *Hines v. Davidowitz*, 312 U.S. 52 (1941).

31. *E.g.*, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). *See Note, Aircraft Noise Abatement: Is There Room for Local Regulation?* 60 CORNELL L. REV. 269 (1975).

32. *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *Munn v. Illinois*, 94 U.S. 113 (1877).

33. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Southern Pacific Co. v.*

Clear and manifest does not necessarily mean expressed, and the courts have gone into the legislative history, the statement of purpose clauses and the other sections of the federal legislation in order to divine Congress' purpose.<sup>34</sup>

To aid the courts in interpreting its intent with respect to preemption, Congress often includes in statutes clauses which specifically preempt, or specifically limit the amount of preemption which the courts may otherwise have implied.<sup>35</sup> This practice has been common in the drafting of environmental legislation in the 1970's. For example, the Clean Air Act and the Federal Water Pollution Control Act contain omnibus preemption-limiting sections which mandate that, except as expressly provided elsewhere in those Acts, nothing therein be interpreted to preclude or deny the power of states or their political subdivisions to adopt and enforce standards for the emission of pollutants.<sup>36</sup> Both sections, however, restrict both state and local authority from setting standards less stringent than federal standards.

Preemption sections are found in most environmental statutes. Some state clearly that there shall be no preemption,<sup>37</sup> and others specify that state and local governments may no longer establish requirements which are not identical to the federal requirements.<sup>38</sup>

Arizona, 325 U.S. 761 (1945); *Florida Line and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Maurer v. Hamilton*, 309 U.S. 598 (1940); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

34. *E.g.*, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Florida Lime and Avocado Growers, Inc. v. Paul*, 372 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

35. In these cases as well, the courts, in interpreting preemptive language, have operated under a presumption in favor of maintaining the police power of the states. *See, e.g.*, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Chrysler Corp. v. Rhodes*, 416 F.2d 319 (1st Cir. 1969); *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969); *Exxon Corp. v. City of New York*, 372 F. Supp. 335 (S.D.N.Y. 1974); *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

36. Clean Air Act § 116, 42 U.S.C. § 1857d-1 (Supp. IV 1974); Federal Water Pollution Control Act § 510, 33 U.S.C. § 1370 (Supp. IV 1974).

37. *E.g.*, Federal Water Pollution Control Act §§ 303(f), 311(o)(2), 33 U.S.C. §§ 1313(f), 1321(o)(2) (Supp. IV 1974) (water quality standards and liability for spills of oil and hazardous substances).

38. *E.g.*, Federal Environmental Pesticide Control Act of 1972 § 24(b), 7 U.S.C. § 136v(b) (Supp. IV 1974) (labeling and packaging of pesticides); Clean Air Act §§ 211(c)(4)(A), 233, 42 U.S.C. §§ 1857f-6(c)(4)(A), 1857f-11 (1970) (motor vehicle fuels and air pollution from aircraft).

In between these two ends of the spectrum are provisions which prohibit only those state and local laws which relieve any person of having to comply with federal requirements;<sup>39</sup> those which prohibit only state or local actions which either do not meet the objectives of the federal legislation,<sup>40</sup> or are in conflict with it, where the context indicates that "conflict" means inconsistency with the pollution control objectives of the federal law;<sup>41</sup> those which prohibit state or local laws which are in conflict with the federal standards, where the objectives of the federal law include some interstate commerce considerations;<sup>42</sup> those which prohibit certain specified types of state or local laws and permit other types;<sup>43</sup> and those which require federal approval before the state or locality can act.<sup>44</sup> None of the environmental statutes contains an absolute prohibition against state or local regulatory action.

A study of these preemption provisions reveals that those toward the more federally exclusive end of the spectrum tend to be most often related to mobile pollution sources, or sources distributed in interstate commerce, and those which are more permissive toward state and local authority tend to relate to fixed sources. This correlation implies that national uniformity is an important interstate commerce interest in choosing a preemption standard. Legislative history and expressions of statutory purpose also show the goal of national uniformity. And even though national uniformity is a common goal of federal environmental legislation, it is most often

39. *E.g.*, Safe Drinking Water Act §§ 1414(e), 1423(c), 42 U.S.C. §§ 300g-3(e), 300h-2(c) (Supp. IV 1974) (public water systems and underground drinking water); Federal Environmental Pesticide Control Act of 1972 § 24(a), 7 U.S.C. § 136v(a) (Supp. IV 1974) (control of pesticides).

40. *E.g.*, Federal Water Pollution Control Act §§ 303(a)(2), (3), 33 U.S.C. §§ 1313(a)(2), (3) (Supp. IV 1974) (water quality standards).

41. *E.g.*, *id.* §§ 307(b)(4), 311(o)(3), 33 U.S.C. §§ 1317(b)(4), 1321(o)(3) (Supp. IV 1974) (pretreatment effluent standards, and oil and hazardous substance liability).

42. *E.g.*, Noise Control Act of 1972 § 8(c), 42 U.S.C. § 4907(c) (Supp. IV 1974) (noise labeling).

43. *E.g.*, Federal Water Pollution Control Act § 312(f), 33 U.S.C. § 1322(f) (Supp. IV 1974) (marine sanitation devices); Clean Air Act § 209(a), (c), 42 U.S.C. §§ 1857f-6a(a), (c) (1970) (air pollution from motor vehicles); Noise Control Act of 1972 § 6(e), 42 U.S.C. § 4905(e) (Supp. IV 1974) (noise from products distributed in commerce).

44. *E.g.*, Federal Environmental Pesticide Control Act of 1972 §§ 4(a)(2), (f), 24(c), 7 U.S.C. §§ 136(b)(a)(2), (f), 136v(c) (Supp. IV 1974) (certification and registration of pesticides); Clean Air Act § 209(b), 42 U.S.C. § 1857f-6a(b) (1970) (air pollution from motor vehicles).

*mandated* in connection with products or sources that move in interstate commerce.

#### A. *Noise Control Act*

The Noise Control Act explicitly states a national uniformity objective.<sup>45</sup> Its sections dealing with mobile sources and products distributed in commerce contain preemption provisions which place restrictions on the authority of state and local governments to set standards, but preserve their authority to regulate sources of noise in ways other than standard setting.<sup>46</sup> This approach assures national uniformity with respect to requirements placed upon manufacturers and carriers which, if different from place to place, could make their interstate commercial operations hopelessly complex. At the same time, it retains state and local initiatives regarding activities which may differ without causing such disruption.

Section 6, dealing with products distributed in commerce, is the most broadly reaching standard-setting authority in the Noise Control Act, allowing EPA to require the quieting of virtually any noisy product.<sup>47</sup> Section 6(e)(1) provides that

[n]o State or political subdivision thereof may adopt or enforce with respect to any new product for which a regulation has been prescribed by the Administrator under this section, any law or regulation which sets a limit on noise emissions from such new product and which is not identical to such regulation of the Administrator.<sup>48</sup>

Section 6(e)(2), however, operates as a caveat, that,

[s]ubject to sections 17 and 18, nothing in this section precludes or denies the right of any State or political subdivision thereof to establish and enforce controls on environmental noise (or one or

45. Noise Control Act of 1972 § 2(a)(3), 42 U.S.C. § 4901(a)(3) (Supp. IV 1974). On the subject of national uniformity and preemption under the Noise Control Act, see A. Greenwald, *Preemption and Jurisdiction, Noise Law Chameleons*, [1976] 54 NOISE REG. REP. D-1 (BNA); S. Plager, *Preserving State Law from Federal Preemption under the 1972 Noise Control Act*, 2 ENV'T'L CONTROL NEWSLETTER No. 12, at 14 (1974).

46. Noise Control Act of 1972 §§ 6(e), 8(c), 17(c), 18(c), 42 U.S.C. §§ 4905(e), 4907(c), 4916(c), 4917(c) (Supp. IV 1974).

47. *Id.* § 6, 42 U.S.C. § 4905 (Supp. IV 1974). For a discussion of this section, see Comment, *Toward the Comprehensive Abatement of Noise Pollution: Recent Federal and New York City Noise Control Legislation*, 4 ECOLOGY L.Q. 109, 115-26 (1974); Note, *The Noise Control Act of 1972—Congress Acts to Fill the Gap in Environmental Legislation*, 58 MINN. L. REV. 273, 288-91 (1973).

48. Noise Control Act of 1972 § 6(e)(1), 42 U.S.C. § 4905(e)(1) (Supp. IV 1974).



more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products.<sup>49</sup>

The preemption provision found in section 17, dealing with interstate railroads, goes further than that for products regulated under section 6. Rather than totally reserving control of the use, operation or movement of products to the states and local governments, it provides that in some instances these also will be preempted, although the Administrator of EPA may in defined cases waive such preemption.<sup>50</sup>

Section 17(a) required the Administrator of EPA to publish, within one year after passage of the Act, final regulations for surface carriers engaged in interstate commerce by railroad. These regulations were to include "noise emission standards setting such limits on noise emissions resulting from operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad which reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance."<sup>51</sup> Such regulations and any amendments are to be promulgated only after consultation with the Secretary of Transportation on matters of safety and availability of technology.<sup>52</sup> The preemption clause is section 17(c):

(c)(1) Subject to paragraph (2) but notwithstanding any other provision of this Act, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political

49. *Id.* § 6(e)(2), 42 U.S.C. § 4905(e)(2) (Supp. IV 1974). Note the exclusion of rail and motor carriers, which operates to avoid any ambiguity as to the breadth of the caveat.

50. Noise Control Act of 1972 § 17(c), 42 U.S.C. § 4916(c) (Supp. IV 1974). Section 18(c) of the Act, 42 U.S.C. § 4917(c) (Supp. IV 1974), which applies to motor carriers, is structured virtually identically, and therefore much of what is said about section 17 will be true of section 18 as well. The differences in the operating circumstances of railroads and motor carriers, however, make it impossible to assume that conclusions reached with respect to section 17 will necessarily hold for section 18.

51. Noise Control Act of 1972 § 17(a)(1), 42 U.S.C. § 4916(a)(1) (Supp. IV 1974). Note that, unlike section 6, section 17 requires that standard setting be driven not by considerations of public health and welfare, but by cost and technological considerations. Thus, EPA could conceivably set standards under section 17 which are more stringent than those requisite to protect public health and welfare.

52. Noise Control Act of 1972 § 17(a)(3), 42 U.S.C. § 4916(a)(3) (Supp. IV 1974).

subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.<sup>53</sup>

Thus, Congress has delegated to the Environmental Protection Agency the responsibility for developing, in consultation with the Secretary of Transportation, regulations which would control railroad noise and ease the burden on the railroads from conflicting state and local noise controls. As with all statutes, the intent and spirit which complete the explicit statutory language can be discovered only by looking to the legislative history.

### B. *Legislative History*

Of the several noise control bills which were being considered in 1971-1972,<sup>54</sup> none directly addressed railroad noise. It was in the Senate Public Works Committee that section 17 originated. That committee's version of the Noise Control Bill, S.3342, did not deal with railroads when originally introduced on March 4, 1972.<sup>55</sup> During the hearings which were held on this and similar noise bills, the Association of American Railroads (AAR), the railroad industry trade association, submitted a letter to the committee suggesting an amendment to the bill that "provide[d] for Federal regulation of noise relating to interstate carriers."<sup>56</sup> The language would have

53. Noise Control Act of 1972 § 17(c), 42 U.S.C. § 4916(c) (Supp. IV 1974).

54. See *Hearings on H.R. 5275 and Other Bills Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971); *Hearings on S. 1016 and S. 1566 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. (1971); *Hearings on S. 1016, S. 3342 and H.R. 11021 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess. (1972).

55. See *Public Works Committee Hearings*, *supra* note 54, at 2.

56. *Id.* at 489.

required EPA to commence a study and investigate interstate carrier noise, its health and welfare effects and the technological feasibility of controlling it. Further, it would have required the Administrator of EPA to propose regulations which

shall include noise emission standards setting such limits on noise emissions resulting from operation of the equipment and facilities of surface carriers engaged in interstate commerce as in the Administrator's judgment, base [sic] upon the published report of his study and investigation, are reasonably required to protect the public health and welfare.<sup>57</sup>

The proposal contained a preemption provision requiring identity between federal standards and those promulgated by political subdivisions. However, provision was made for exceptions upon appeal to the Administrator.<sup>58</sup>

Although the House Committee which was considering a noise bill did not include the AAR suggestions,<sup>59</sup> the Senate Public Works Committee reported out S.3342 on September 19, 1972,<sup>60</sup> which contained sections on railroad noise. However, they were different from the AAR recommendations in several respects. First, rail and motor carriers were dealt with in separate but virtually identical sections. Second, the study and investigation were eliminated. Third, the basic criterion of the standards, the "level reasonably required to protect public health and welfare," had been changed to the level which "reflect[s] the degree of noise reduction achievable through application of the best available technology, taking into account the cost of compliance."<sup>61</sup> Finally, the

57. *Id.* at 490.

58. The provision read as follows:

Notwithstanding any other provision of this Act, no State or political subdivision thereof may adopt or enforce any standard respecting noise emissions resulting from the operation of equipment or facilities of surface carriers engaged in interstate commerce unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section: Provided however, that the Administrator may by regulation, upon the petition of a State or political subdivision thereof, permit such exceptions as in his judgment are necessitated by special local conditions and will not place unreasonable burdens upon commerce.

*Id.*

59. The House Committee reported out a bill on February 19, 1972, H.R. 11021, 92d Cong., 2d Sess. (1972). H.R. 11021 was passed by the House of Representatives on February 29, 1972, 118 CONG. REC. 6065 (1972).

60. S. 3342, 92d Cong., 2d Sess. (1972). S. REP. NO. 1160, 92d Cong., 2d Sess. (1972).

61. S. 3342, 92d Cong., 2d Sess. § 511(a), 118 CONG. REC. 35892 (1972).

proviso to the preemption provision left more power to political subdivisions.<sup>62</sup>

This section of the bill, section 513, was the topic for floor debate in the Senate on October 12 and 13, 1972, and the subject of preemption was extensively discussed. Two issues which were of greatest interest were the breadth of preemption and the circumstances under which the EPA Administrator could waive preemption. As to the latter subject, the report which accompanied this bill, though straightforward in most respects, contained a statement that was on its face puzzling: that the Administrator could waive preemption with respect to a state or local regulation if he "determines it to be *necessitated by special local conditions* or not in conflict with regulations under this part."<sup>63</sup> The explanation for the Senate Report's analysis lay in section 408 of the bill, dealing with new product standards. That section had its own preemption provision, section 408(e)(2), which had a proviso relating to rail and motor carrier regulations to clarify the intended relationships of the three sections. In the proviso it was allowed that nothing in that section was intended to diminish the rights of state and local governments to establish and enforce such more restrictive limits on rail carrier noise through the application of use, operation or movement controls as the Administrator of EPA may determine were necessitated by special local conditions. Thus, the bill appeared to set up, through sections 513 and 408(e)(2), alternative bases for waiver of preemption. Recognizing this intent as explained in the Report, Senator Hartke moved to amend section 513 to insert before "not in conflict" the words "necessitated by special local conditions or."<sup>64</sup> The amendment was passed.<sup>65</sup>

It was Senator Hartke who, in advocating his amendment, provided the most detailed discussion of the preemptive effect of EPA standards. In his speech he emphasized the need to balance local power to respond to special situations against federal preemption to

62. *Id.* § 513, which, in relevant part, read as follows:

Provided, however, That nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate or restrict the use, operation or movement of any product as the Administrator, after consultation with the Secretary of Transportation may determine to be not in conflict with regulations promulgated under this part.

63. S. REP. NO. 1160, 92d Cong., 2d Sess. 19 (1972) (emphasis added).

64. 118 CONG. REC. 35881 (1972).

65. 118 CONG. REC. 35882-83 (1972).

protect interstate carriers.<sup>66</sup>

Senator Tunney, the floor manager of the bill, said:

The reason we put this language into the bill was that we wanted to make it clear that it was Federal preemption for interstate trades and the railroads. It was not initially in the bill, so we put in the preemption so that we would give the railroads and the carriers some awareness and some security that they would not have to abide by 50 different State jurisdictions and Lord knows how many tens of thousands of local jurisdictions. It is in the bill now. It is a complete preemption.<sup>67</sup>

These seemingly dispositive exchanges still leave questions as to the totality of preemption, because the language to which they were referring did not survive final enactment into law. The bill was, however, passed by the Senate on that day, October 13, 1972,<sup>68</sup> reading as follows:

66. 118 CONG. REC. 35881 (1972):

Mr. President, one of the basic purposes of title V of this bill, as explained in the committee report, is to assure the maximum practical uniformity in regulating the noise characteristics of interstate carriers such as the railroads and motor carriers which operate from coast to coast and through all the States, and in hundreds of communities and localities.

Without some degree of uniformity, provided by Federal regulations of countrywide applicability which will by statute preempt and supersede any different State and local regulations or standards, there would be great confusion and chaos. Carriers, if there were not Federal preemption, would be subject to a great variety of differing and perhaps inconsistent standards and requirements from place to place. This would be excessively burdensome and would not be in the public interest.

At the same time, States and localities ought to have and retain the power to develop and enforce noise standards and regulations that are needed and designed to meet special local situations even though such standards and regulations may differ from the Federal rules.

The problem, of course, is to strike a proper balance that will take account of and protect all of these interests.

.....

This amendment applies to an interstate carrier that moves across the Nation. It provides that they shall not be subjected to and harassed by unreasonable standards in separate localities. It provides that local communities can still have standards which are more strict than those at the Federal level, but that there shall be a standard in the regulations that shall be governed by such items which are necessities to deal with the local noise conditions. Otherwise, the trains and the carriers coming through could have 75 different regulations which would apply to them.

67. 118 CONG. REC. 35882 (1972); *see also* comments of Senators Magnuson and Cannon, 118 CONG. REC. 35881-82 (1972); Senator Randolph, 118 CONG. REC. 35412 (1972); Senator Tunney, 118 CONG. REC. 35418-19 (1972), 118 CONG. REC. 37317-18 (1972).

68. 118 CONG. REC. 35886 (1972).

Sec. 513. Notwithstanding any other provision of this Act, after the effective date of regulations under this part, no State or political subdivision thereof may adopt or enforce any standard respecting noise emissions resulting from the operation of equipment or facilities of surface carriers engaged in interstate commerce by railroad unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section: Provided however, That nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate or restrict the use, operation, or movement of any product as the Administrator, after consultation with the Secretary of Transportation may determine to be necessitated by special local conditions or not in conflict with regulations promulgated under this part.<sup>69</sup>

The form in which this provision was finally passed by both houses differed in two critical respects. The first change was to make the preemption applicable only to "any standard applicable to noise emissions resulting from the operation of *the same* equipment or facility,"<sup>70</sup> as regulated by EPA. The impact of this addition appears to be a severe narrowing of the preemption. Whereas in the Senate version there was preemption with respect to State and local standards on *all* equipment and facilities after the first EPA standard was set, no matter how narrow the scope of its coverage, the final version was preemptive only with respect to equipment or facilities which EPA had expressly regulated.

The second change appeared in the clause which Senator Hartke had added. Careful eleventh-hour draftsmen had deleted the language in section 6(e) (formerly section 408(e)(2)) which the Hartke amendment had rendered unnecessary, but had inexplicably changed "or" to "and" in section 17(c)(2), again substantially affecting its meaning.<sup>71</sup> These changes did not seem earthshaking, and were lost in the shuffle as the bill was approved first by the House<sup>72</sup> and then by the Senate<sup>73</sup> on October 18, 1972, the last day of the 92d Congress. Unfortunately, the animus behind these changes remains a mystery, because the bills, having been up for

69. S. 3342, 92d Cong., 2d Sess. § 513, 118 CONG. REC. 35893 (1972).

70. Noise Control Act of 1972 § 17(c)(1), 42 U.S.C. § 4916(c)(1) (Supp. IV 1974) (added language emphasized).

71. See notes 179-202 and accompanying text *infra*.

72. 118 CONG. REC. 37088 (1972).

73. 118 CONG. REC. 37319 (1972).

reconciliation on the eve of adjournment, did not have the luxury of a committee of conference or conference report. The Act was signed into law on October 27, 1972.<sup>74</sup>

## II. EPA ACTIONS UNDER SECTION 17

On February 1, 1973, three months after the Noise Control Act became law, EPA took the first formal step to implement section 17 by issuing an advance notice of proposed rulemaking announcing its intent to develop regulations, and inviting the participation of all interested parties.<sup>75</sup> This notice allowed 60 days for comments and solicited specific response to eight questions, dealing with identifying the major sources of railroad noise, their health and welfare impact, possible technological solutions and their cost, alternative strategies to deal with the general problem of railroad noise, safety factors, and the possible impact of federal regulations on existing standards.<sup>76</sup> The comment period was subsequently extended to June 1, 1973.<sup>77</sup>

On the basis of its early work, EPA discovered the complexity of the industry it had undertaken to regulate. It was not until July 3, 1974, almost one year past the statutory deadline,<sup>78</sup> that proposed regulations were published.<sup>79</sup> Following the proposal, a public hearing was held in Chicago, Illinois, on August 14, 1974, to allow for further public participation.<sup>80</sup>

The proposed rule announced EPA's intention to regulate rail cars and locomotives, and discussed in detail its rationale for doing so and for excluding other equipment and facilities of rail carriers.<sup>81</sup> The notice asked for public comments on EPA's proposed action, and announced the availability of a detailed "Background Document" supporting its position.<sup>82</sup>

After having studied the problem for 1½ years and engaging the assistance of a major contractor and the National Bureau of Standards, EPA had in July 1974 concluded that many railroad-related

74. 8 PRESIDENTIAL DOCUMENTS 1583 (1972).

75. 38 Fed. Reg. 3086 (1973).

76. *Id.*

77. 38 Fed. Reg. 10644 (1973).

78. Noise Control Act of 1972 § 17(a)(1), 42 U.S.C. § 4916(a)(1) (Supp. IV 1974).

79. 39 Fed. Reg. 24580 (1974).

80. *See* 39 Fed. Reg. 28316 (1974).

81. 39 Fed. Reg. 24580-83 (1974).

82. *See* 39 Fed. Reg. 24585 (1974).

noise sources would be more properly controlled by state and local actions.<sup>83</sup>

EPA's final regulation was published on January 14, 1976,<sup>84</sup> over two years behind the statutory schedule.<sup>85</sup> It did not represent a change in the principles expressed in EPA's earlier notice. EPA remained of the view that of all railroad noise sources, trains—rail cars and locomotives—have the greatest noise impact, and that these moving sources bear the greatest vulnerability to interference by differing state and local standards.<sup>86</sup> On this basis, EPA's first regulation for railroad noise covered only these two classes of railroad equipment, and excluded facilities.<sup>87</sup>

83. 39 Fed. Reg. 24580-81 (1974):

Many railroad noise problems can best be controlled by measures which do not require national uniformity of treatment to facilitate interstate commerce at this time. The network of railroad operations is imbedded into every corner of the country, including rights-of-way, spurs, stations, terminals, sidings, marshaling yards, maintenance shops, etc. Protection of the environment for such a complex and pervasive industry is not simply a problem of modifying noisy equipment, but get [*sic*] down into the minutiae of countless daily railroad operations at thousands of locations across the country. The environmental impact of a given railroad operation will vary depending on whether it takes place, for example, in a desert or adjacent to a residential area. For this reason, EPA believes that State and local authorities are better suited than the Federal government to consider fine details such as the addition of sound insulation or noise barriers to particular facilities, or the location of noisy railroad equipment within those facilities as far as possible from noise-sensitive areas, etc. There is no indication, at present, that differences in requirements for such measures from place to place impose any significant burden upon interstate commerce. At this time, therefore, it appears that national uniformity of treatment of such measures is not needed to facilitate interstate commerce and would not be in the best interest of environmental protection.

The national effort to control noise has only just begun, however; and it is inevitable that some presently unknown problems will come to light as the effort progresses. Experience may teach that there are better approaches to some aspects of the problem than those which now appear most desirable. The situation may change so as to call for a different approach. Section 17 of the Noise Control Act clearly gives the Administrator of the Environmental Protection Agency authority to set noise emission standards on the operation of all types of equipment and facilities of interstate railroads. If in the future it appears that a different approach is called for, either in regulating more equipment and facilities, or fewer, or regulating them in a different way or with different standards consistent with the criteria set forth in section 17, these regulations will be revised accordingly.

84. 41 Fed. Reg. 2183 (1976).

85. Noise Control Act of 1972 § 17(a)(2), 42 U.S.C. § 4916(a)(2) (Supp. IV 1974).

86. 41 Fed. Reg. 2185 (1976).

87. Note the distinction between "equipment," or movable property, and "facilities" or fixed installations. Although the terms are not defined in the Act, they come from historical railroad usage. See 45 U.S.C. §§ 432, 435, 562 (1970).



The standards were a limited first attempt, but EPA was bound by the Act to consider cost as a constraint on the stringency of the standards.<sup>88</sup> EPA has estimated that at least until 1980, the standards will serve only to prevent an increase in train noise levels.<sup>89</sup> They require all locomotives to meet a noise level of 93dBA at all throttle settings, and 73dBA at idle, when standing still and measured at 100 feet.<sup>90</sup> For locomotives under moving conditions the standard is 96dBA.<sup>91</sup> New locomotives—those of which manufacture is completed after December 31, 1979—will have to reduce those levels by six, three and six dBA, respectively.<sup>92</sup> These standards represent a partial retreat from the July 1974 proposal which would have required that all locomotives, rather than just newly manufactured locomotives, meet the more stringent standards in 1980.<sup>93</sup> The shift in position resulted from data submitted by the industry which called into question certain of EPA's findings on cost and technological capability.<sup>94</sup> The final standards for rail cars, which became effective December 31, 1976, prohibit the operation of rail cars which, alone or in combination with other cars, produce levels in excess of 88dBA at speeds of 45 miles per hour or less, or 93dBA at speeds over 45 miles per hour.<sup>95</sup> As a result of these standards, EPA estimates that the total number of people adversely impacted by railroad noise may eventually be reduced by up to 500,000,<sup>96</sup> leaving 1.8 million people exposed to undesirable noise levels.<sup>97</sup>

EPA's most recent action on railroad noise control was the publication of a proposed regulation under subsection 17(c) which would

88. Noise Control Act of 1972 § 17(a)(1), 42 U.S.C. § 4916(a)(1) (Supp. IV 1974).

89. BACKGROUND DOCUMENT, *supra* note 4, at 8-1.

90. 40 C.F.R. § 201.11(a) (1976). DbA is the abbreviation for decibels on the A-weighted scale; the A-weighting is a means of expressing as a single number the sound level of a noise containing a wide range of frequencies, in a manner representative of the human ear's response. See U.S. ENVIRONMENTAL PROTECTION AGENCY, PUBLIC HEALTH AND WELFARE CRITERIA FOR NOISE, at Glossary-1 (1973).

91. 40 C.F.R. § 201.12(a) (1976).

92. 40 C.F.R. §§ 201.11(b), 201.12(b) (1976).

93. 39 Fed. Reg. 24586 (1974).

94. 41 Fed. Reg. 2189 (1976).

95. 40 C.F.R. § 201.13 (1976).

96. 41 Fed. Reg. 2190 (1976).

97. BACKGROUND DOCUMENT, *supra* note 4, at 8-18. The Department of Transportation, as required by section 17(b), has published a proposed regulation setting forth the procedures by which it will enforce the EPA standards. 41 Fed. Reg. 49183 (1976).

provide guidance for state and local governments seeking from the Administrator a waiver of preemption with respect to regulations which are necessitated by special local conditions and not in conflict with federal standards.<sup>98</sup>

### III. THE DISPUTE BETWEEN EPA AND THE RAILROADS: THE PREEMPTIVE REACH OF SECTION 17

The preemptive reach of section 17 is governed by two subsections, 17(a), the EPA standard-setting requirement, and 17(c), the preemption provision. Section 17(a) is relevant because section 17(c) takes effect only after the effective date of EPA regulations, and is limited in extent by the breadth of EPA's regulations (although this latter point may be subject to dispute).

Because the railroads' basic concern has always been preemption, and EPA's concern has always been noise control, they have never been in agreement on how best to implement section 17 of the Noise Control Act. The Association of American Railroads has participated tirelessly in EPA's rulemaking under section 17,<sup>99</sup> and has from the beginning attempted to convince EPA that Congress intended the federal government to exercise virtually exclusive dominion over the control of railroad noise, replacing state and local authority except in the narrowly defined cases falling under section 17(c)(2).<sup>100</sup>

EPA has never been convinced that such was the congressional intent. Rather, EPA sees section 17 as allowing an integrated solution to railroad noise: state and local standards where those are most effective and do not pose burdens on interstate commerce because of their diversity, and national standards where they can be effective or where the need for uniformity compels national standards.<sup>101</sup>

98. Railroad Noise Emission Standards, Special Local Determinations, Notice of Proposed Rulemaking, 41 Fed. Reg. 52317 (1976) [hereinafter cited as Proposed Rule]. This document proposes to amend 40 C.F.R. Part 201 by adding Subpart C, §§ 201.30-201.34.

99. See Statement of the Association of American Railroads to EPA, April 2, 1973, EPA Docket No. ONAC 7201001; Comments of the Association of American Railroads on Proposed Railroad Noise Emission Standards, August 19, 1974, EPA Docket No. ONAC 7201002 [hereinafter cited as 1974 AAR Comment].

100. 1974 AAR Comment, *supra* note 99, at 36-38. The U.S. Departments of Transportation and Commerce have supported this position. Record, documents 107, 112, AAR v. Train, No. 76-1353 (D.C. Cir., filed Apr. 13, 1976).

101. See 39 Fed. Reg. 24580-81 (1974).

A. *The Mandate of Section 17(a)*

AAR has recognized that the two ways to gain the desired preemption are to broaden the reading of section 17(c), and to require EPA to claim the whole field by regulating all noise sources under 17(a). Thus, since the issue as to the breadth of 17(c) awaits an actual controversy, or at least a petition for review of EPA's preemption regulations,<sup>102</sup> AAR has up to now principally pursued the argument that section 17(a) places a mandatory duty on EPA to regulate all sources of railroad noise. The Association has consistently objected to any narrowing of the scope of EPA regulations. When EPA published its proposed standards in July 1974,<sup>103</sup> AAR offered a counter proposal:

[T]he railroads recommend that the EPA specifically prescribe noise standards regulating the noise emitted by area-type sources such as yards and terminals. Such standards would apply to all noise generated within area-type sources. To the extent that noise from retarders, shops, switching impacts, idling locomotives, and standing refrigerator cars is propagated within yards and terminals, such noise would be blanketed by the area-noise standard. There would thus be no necessity for specific noise standards applicable to those named sources.

. . . .  
The railroads [further] recommend that the EPA promptly establish special noise limits applicable to the noise from special purpose equipment that is operated on tracks such as track-laying equipment, cranes, and snow plows.<sup>104</sup>

AAR suggested that these standards be set at currently prevailing railroad noise levels, and take effect within 270 days. EPA was thereafter to investigate the feasibility of any reductions in noise that could be achieved in the future.<sup>105</sup>

EPA rejected AAR's recommendation. The Agency determined that the types and characteristics of all area-type railroad noise sources in the nation were extremely diverse, and that as a result, effective control at the national level was not possible.<sup>106</sup> State and local governments, EPA concluded, were best suited to address fixed noise sources within their jurisdictions,<sup>107</sup> and because there

102. See note 98 and accompanying text *supra*.

103. 39 Fed. Reg. 24580 (1974).

104. 1974 AAR Comment, *supra* note 99, at 40-42.

105. *Id.* at 41.

106. 41 Fed. Reg. 2186 (1976).

107. *Id.*

was no indication that interjurisdictional differences in standards presented a problem with respect to fixed sources, national uniformity was not necessary.<sup>108</sup> On the other hand, EPA found, those sources operating within such facilities which move through various jurisdictions and thus require national uniformity—trains—were protected by EPA's standards for rail cars and locomotives.<sup>109</sup>

After the EPA regulation was published in January 1976, the AAR filed a petition for judicial review.<sup>110</sup> The State of Illinois intervened as a party respondent. In that lawsuit, AAR has argued the general proposition that the structure of section 17 and its legislative history make clear Congress' intent that state and local governments be preempted from the field of railroad noise control. The evils Congress thus hoped to cure were three-fold, they argue:

- (1) State and local regulations which would conflict with and frustrate the purposes of the Act and interfere with Federal regulation of the railroad industry;
- (2) state and local regulations which would impose a burden upon and interfere with interstate commerce; and
- (3) uncertainty about jurisdiction over railroad noise control which would produce unnecessary and unending litigation, tying up the courts, costing governmental bodies and the railroad industry enormous sums of money, and delaying interminably the effectuation of the purposes of the Noise Control Act.<sup>111</sup>

More specifically, AAR has challenged the sufficiency of EPA's regulation setting standards on rail cars and locomotives on the grounds that the Noise Control Act expressly requires EPA to issue standards covering *all* railroad equipment and facilities. In support of this proposition AAR analyzes the language of the Act,<sup>112</sup> passages in the legislative history where preemption was referred to as "total" or "complete",<sup>113</sup> and caselaw on preemption.

A case principally relied upon is *Burbank v. Lockheed Air*

108. *Id.*

109. *Id.*

110. *AAR v. Train*, No. 76-1353 (D.C. Cir., filed Apr. 13, 1976). This petition was filed in the U.S. Court of Appeals for the District of Columbia Circuit, as required by section 16 of the Noise Control Act, 42 U.S.C. § 4915 (Supp. IV 1974).

111. *AAR v. Train*, No. 76-1353 (D.C. Cir., filed Apr. 13, 1976), Brief of Petitioners, 8-9; *see also id.* at 32-50.

112. *Id.* at 17-22.

113. *Id.* at 22-30; *see*, note 67 and accompanying text *supra*.

*Terminal, Inc.*,<sup>114</sup> a 1973 Supreme Court decision which found preemption under section 7 of the Noise Control Act (amending section 611 of the Federal Aviation Act).<sup>115</sup> Section 7 contains no preemptive provision; the Court based its finding on the pervasive nature of federal regulation of aircraft noise. *Burbank*, AAR argued, is important to the controversy over section 17 of the Act because (1) it is the first and only Supreme Court decision on the preemptive effect of the Noise Control Act, (2) it finds preemption under section 7 even though preemption was not specifically provided in the Act, (3) the preemption language of section 17 is virtually identical to that deleted from the original Senate version of section 7 which the Court referred to as an express preemption section, and (4) the Court looked carefully at the possible cumulative effects of a decision upholding the Burbank ordinance.<sup>116</sup>

On the specific point at issue in *AAR v. Train*, EPA defends the limited scope of its regulation by arguing that it exercised reasoned discretion in determining which sources of railroad noise to regulate, a discretion that was within the intent of Congress and effectuates the purposes of the Noise Control Act.<sup>117</sup> EPA's position is that the Act does not on its face say that EPA is required to regulate every source of railroad noise,<sup>118</sup> and that to interpret the Act that way would lead to an absurd result since the term "facilities and equipment" in section 17(a) includes such things as office typewriters and building air conditioners.<sup>119</sup> Accordingly, EPA argues, an exercise of reasoned discretion is necessary to determine which sources to regulate and which to leave unregulated.<sup>120</sup> The State of Illinois as intervenor took the same positions as EPA on these issues.<sup>121</sup>

114. 411 U.S. 624 (1973).

115. Noise Control Act of 1972 § 7, 42 U.S.C. § 4906 (Supp. IV 1974), amending 49 U.S.C. § 1431 (Supp. IV 1974).

116. Brief of Petitioners at 14-15, *AAR v. Train*, No. 76-1353 (D.C. Cir., filed Apr. 13, 1976). With respect to the third point, it is not in fact the case that section 17(c) contains any language virtually identical to that referred to in *Burbank*. *Burbank's* reference, 411 U.S. at 636, was to the version of S. 3342 which passed the Senate, which contained an aviation preemption provision stating: "No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof." S. 3342, 92d Cong., 2d Sess. § 505, 118 CONG. REC. 35892 (1972).

117. Brief of Respondents at 6-7.

118. *Id.* at 9-14.

119. *Id.* at 22-23.

120. *Id.* at 24-26.

121. Brief of Intervenor.

Although AAR did not press its challenge so far as to say that if EPA had discretion, it abused it or exercised it arbitrarily or capriciously in violation of the Administrative Procedure Act,<sup>122</sup> EPA pursued this question. It described the approach the Administrator had used in deciding what to regulate and showed how he had derived that approach from express elements of congressional objectives stated in the Noise Control Act.<sup>123</sup> It pointed to four areas of inquiry which it had applied to the prospective sources of railroad noise:

- (1) Is it a significant noise source? (2) Is state or local control of this source more appropriate than federal regulation? (3) Does the burden imposed by differing state and local controls require national uniformity with respect to this source? (4) Would a federal noise standard have undesirable safety implications?<sup>124</sup>

The application of this inquiry may be seen in the preambles to EPA's final regulation,<sup>125</sup> and to the proposed regulation.<sup>126</sup> As the basis for these questions, EPA's brief pointed to the purposes and policies stated in the Noise Control Act:<sup>127</sup> (1) that it is the policy of Congress to promote an environment free from noise which jeopardizes public health or welfare;<sup>128</sup> (2) that "primary responsibility for control of noise rests with State and local governments";<sup>129</sup> and (3) that "Federal action is essential to deal with major noise sources in commerce control of which requires national uniformity of treatment."<sup>130</sup>

A good deal of AAR's strategy in arguing that EPA's regulation was too narrow in scope was to impress the court with the problems flowing from state and local regulation, and to argue that Congress intended broad preemption. However, lest that argument affect the interpretation of section 17(c), on which EPA and AAR again would surely differ when that issue ripens, EPA protested in its brief in *AAR v. Train* that the meaning of section 17(c) was not at issue there. This case simply posed a question of legislative in-

122. 5 U.S.C. § 706 (1970).

123. Brief of Respondents at 26-36.

124. *Id.* at 28.

125. 41 Fed. Reg. 2184-88 (1976).

126. 39 Fed. Reg. 24580-83 (1974).

127. Brief of Respondents at 26-36.

128. Noise Control Act of 1972 § 2(b), 42 U.S.C. § 4901(b) (Supp. IV 1974).

129. Noise Control Act of 1972 § 2(a)(3), 42 U.S.C. § 4901(a)(3) (Supp. IV 1974).

130. *Id.*

tent as to the discretion EPA had to select which sources of railroad noise it would regulate. Both EPA and Illinois, however, devoted part of their briefs to countering AAR's argument on preemption. On the matter of the relevance of *Burbank v. Lockheed Air Terminal, Inc.*, both EPA and Illinois minimized its relevance to the railroad preemption question, principally because of the different statutory frameworks of the two sections of the Act.<sup>131</sup> Whereas the railroad section contained a specific preemption provision, the aircraft section at issue in *Burbank* did not. EPA and Illinois contended that other caselaw is more relevant, namely cases where courts were being asked to interpret congressional intent on specific preemption provisions,<sup>132</sup> rather than to search for "evidence of a 'pervasive federal scheme of regulation' from which to infer preemption."<sup>133</sup> In those cases, they argued, courts have interpreted the language narrowly, particularly in areas where the police power, which has traditionally been reserved to state and local government, is at issue. The language of section 17(c), they argued, is replete with bases for narrow interpretation.<sup>134</sup>

Further, the legislative history as viewed by EPA favored a narrow interpretation of section 17(c). By rejecting a provision which would have preempted with respect to all railroad sources even though EPA's standards might apply to only a narrow group of sources,<sup>135</sup> Congress had evidenced both a desire to narrow the scope of preemption under 17(c), and an acknowledgement that EPA may in fact not decide to regulate every source.<sup>136</sup> Because the statements in the legislative history relating to "total" and "complete" preemption referred to this earlier version, which was in a sense total preemption, EPA argued that such statements did not detract from its narrower interpretation of the final Act.<sup>137</sup>

#### B. *The Meaning of Section 17(c)*

The meaning of section 17(c) is discussed at length below. However, one aspect of the issue deserves mention at this point (al-

131. See Brief of Intervenor at 13; Brief of Respondents at 19.

132. Brief of Intervenor at 10-13; Brief of Respondents at 14-16.

133. Brief of Intervenor at 13.

134. *Id.* at 12-14; Brief of Respondents at 16-19. See sections III B. and IV A. *infra*.

135. See note 69 and accompanying text *supra*.

136. Brief of Respondents at 13-14.

137. *Id.* at 18.

though this may turn out not to be a serious question): how would a party argue that section 17(c) does not restrict its preemptive coverage to only those noise sources regulated by EPA? AAR's August 1974 comment to EPA provides some insight into the subject. At that time, AAR's tentative position was to place section 17(c)(2) in the role as the operative preemption language. They interpreted that subsection as prohibiting any state or local railroad regulation which establishes standards or controls on levels of environmental noise, or which controls, licenses, regulates or restricts the use, operation or movement of any product, without EPA's first determining that such law is necessitated by special local conditions and is not in conflict with EPA's regulations.<sup>138</sup> Under this analysis, subsection 17(c)(1) would have to be viewed as an exception to 17(c)(2), allowing states and communities to set standards without going through the 17(c)(2) determination process if such standards are on EPA regulated equipment or facilities and are identical to the federal standards.

Again, AAR relied on statements made by Senators during the floor debates relating to "complete" or "total" preemption.<sup>139</sup> It should be noted, however, that AAR stressed the importance of EPA's decision not to regulate sources other than rail cars and locomotives. "The failure to regulate is closely tied to the subject of preemption. With respect to noise sources that are regulated by EPA, federal preemption will occur. With respect to noise sources that are not regulated, it can be argued—as EPA argues—that there is no preemption."<sup>140</sup>

EPA has indeed made that argument, as its proposed preemption regulation explains. EPA views subsection 17(c)(1) as the basic preemption provision which lays down the general rule that once EPA has regulated a noise source, the states and local governments are precluded from setting or enforcing emission standards on the same source, unless those standards are identical. Subsection 17(c)(2), then, does not expand the preemption prescribed in 17(c)(1); rather it provides that any action precluded by 17(c)(1) may be taken if EPA, in consultation with the Department of Transportation, waives the preemption according to the specified criteria. The enumeration in 17(c)(2) of standards, controls on en-

138. 1974 AAR Comment, *supra* note 99, at 29.

139. *Id.* at 32-35; *see* note 66 *supra*.

140. *Id.* at 29.



vironmental noise, and use, operation or movement restrictions suggests that the term "standards" as used in subsection 17(c)(1) was intended, EPA argues, to include any action which would have the same effect as setting an emission standard on the federally regulated source.<sup>141</sup>

The difference between these two approaches to section 17(c) has great practical significance. If the EPA interpretation is adopted there will be a large class of state and local actions which will not be subject to preemption and can thus be taken without EPA involvement. If the other approach is adopted, once EPA's limited standards take effect, no state or local government can thereafter regulate any interstate railroad noise source unless it either (1) sets an emission standard on a federally regulated source that is identical to the federal standard, or (2) gets a waiver of preemption from EPA after satisfying the "not in conflict" and "special local conditions" criteria of section 17(c)(2).

Assuming that the EPA approach prevails, a difficult but unavoidable question will arise: what exactly is included in the term "the same . . . equipment" under section 17(c)(1)?

There are some pieces of railroad equipment, of course, such as office typewriters, that have little to do with rail cars or locomotives, and are obviously not "the same." However, many pieces of railroad equipment are not so obviously independent. Some are included on a piece of regulated equipment. For example, when EPA set a moving standard for rail cars, it was aiming at the sound of the car moving. Some rail cars, however, have refrigerator units which make noise. Do the states and localities retain authority to regulate those units? EPA answered no, reasoning that since the sound of the refrigerator could not be differentiated from the other sounds of a moving car, the standard applied to the "total noise."<sup>142</sup> The fact remains that it can be a separate noise, and a separate problem, particularly when the car is left standing overnight on a siding with its cooling unit running.<sup>143</sup>

Another difficult problem is presented by rails. The railroad car

141. 41 Fed. Reg. 52317 (1976). This approach differs slightly from one earlier suggested by EPA in the preamble to EPA's standards, 41 Fed. Reg. 2192-3 (1976). That analysis would have preempted standards on regulated equipment, as well as any other kind of controls on such equipment which were not standards; however, in the case of the latter, EPA could waive preemption under § 17(c)(2) criteria.

142. 41 Fed. Reg. 2193 (1976).

143. See BACKGROUND DOCUMENT, *supra* note 4, at 0-1, 0-2, R-18 to -21.

standard was designed to quiet the noisy episodes of rail-wheel interaction resulting from poorly maintained wheels.<sup>144</sup> However, as EPA has acknowledged, poorly maintained track can also cause high noise levels.<sup>145</sup> Are the states and localities free to set maintenance standards for tracks, or are they preempted because the EPA standard for rail cars applies to rail-wheel noise? EPA answered that they were preempted, reasoning that rails and wheels are the integrated source of rail car noise.<sup>146</sup> Presumably, the railroads would agree with EPA on this point.

On a related issue involving retarders, the railroads and EPA are not in agreement. Retarders are devices affixed to rails which apply pressure to the wheels of free-rolling rail cars to slow them down. They are used in "humping yards," where cars roll freely downhill on segregating tracks to assemble trains. The friction between the retarder and the wheel causes a very loud, high-pitched squeal. EPA has stated that because it has not regulated retarders it regards the state and local authorities as being free to do so.<sup>147</sup> The railroads are expected to argue that, like rail-wheel noise, the noise of retarders is "caused" by rail cars, and therefore the rail car standard preempts with respect to retarders. This issue may be left for the courts to decide in later challenges.

#### IV. WHAT REMAINS FOR STATE AND LOCAL ACTION: EPA'S PRESCRIPTION

Despite the pendency of the legal issues discussed above, state and local regulators, besieged by continuing complaints of railroad noise, are asking what they can do. EPA has confronted this question over the last several years, and, having found it to have many subtle complications, has proposed a comprehensive regulation to define its interpretation of the preemptive effect of section 17, and to explain how it will interpret the terms "necessitated by special local conditions" and "not in conflict" when deciding whether to grant waivers of preemption.<sup>148</sup> It is this proposal which is ex-

144. 41 Fed. Reg. 2187 (1976).

145. *Id.* See also BACKGROUND DOCUMENT, *supra* note 4, at P-1 to -11.

146. 41 Fed. Reg. 2187, 2193 (1976).

147. 41 Fed. Reg. 2193 (1976).

148. 41 Fed. Reg. 52317 (1976). This step, while not necessarily unprecedented, will certainly be viewed as unorthodox by some commentators. As early as August 1974, AAR assailed EPA for expounding in the preamble to the proposed standards on its theory of the preemptive effect of section 17. AAR contended that "Federal

pected to bring to a head the issues not yet ripe in *AAR v. Train*. After taking comments on the proposal, EPA will publish a final regulation in 1977. In all likelihood it will be subjected to judicial review by whichever of the widely divergent points of view it offends most greatly.<sup>149</sup>

### A. *Types of State and Local Actions Preempted*

At the outset it is helpful to examine the several options available to a regulatory body developing a strategy to control railroad noise. First, it can set emission standards, standards limiting the noise level which can be produced by a piece of equipment or a facility. An example is EPA's standards for locomotives and rail cars.<sup>150</sup> Emission standards could also be set on facilities, requiring that at the perimeter of the facility, a single event noise level of XdBA could never be exceeded<sup>151</sup> or requiring that the 24-hour average day-night noise level could not exceed YLdn.<sup>152</sup>

Another option would be to set equipment standards or design standards on railroad equipment or facilities, that is, require a

administrative agencies, such as EPA, have no jurisdiction to offer binding interpretations or advisory opinions on the subject of preemption." 1974 AAR Comment, *supra* note 99, at 36. EPA responded in its January 1976 preamble that:

[T]he Noise Control Act of 1972 is clear in its contemplation that Federal and State governments work together in the control of noise. However, the Act also provides, in some cases, that the Federal authority be preemptive. The Agency therefore feels that it is proper for it to explain the extent of its regulations and to indicate the point beyond which the States and local governments may act; and that it is not prohibited from assisting the State and local governments by indicating ways in which the Agency believes they may augment its regulatory efforts.

41 Fed. Reg. 2190 (1976). In the same philosophical vein, EPA has now proposed to elevate its advice to the status of regulations, citing as authority both section 17 of the Noise Control Act and the Administrative Procedure Act requirement that Agencies publish rules of procedure and Agency interpretations of general applicability. 5 U.S.C. §§ 552(a)(1)(C), (D). Section 16 of the Noise Control Act provides a mechanism for judicial review of that regulation.

149. Or, as is not uncommon with EPA, it may be challenged by both. *See, e.g., Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976), where environmental groups, power companies and a state challenged an EPA regulation to implement the Clean Air Act's policy that the quality of the air should not be significantly degraded.

150. *See* notes 90-95 and accompanying text *supra*.

151. *See, e.g., Chicago, Ill., Environmental Control Ordinance* § 17-4.12 (1969); Bloomfield, N.J., *Ordinance Providing Measurement Regulations and Control of Railroad Noise* § 2(a) (1975).

152. For an example of a time-weighted noise standard on railroads, *see Minnesota Pollution Control Agency, Noise Pollution Control Regulations* § NPC 2(b) (1974); *see also Minneapolis, Minn., Noise Control Ordinances* § 948.030 (1972).

specific type of noise control technology. For example, an ordinance might require that every locomotive operating within the jurisdiction be equipped with a muffler meeting certain specifications. Or it might require that any rail yard be surrounded by a noise barrier meeting certain criteria.

A third approach would be to impose controls on the use, operation or movement of facilities or equipment. One such control would be a requirement that no refrigerator car be permitted to idle overnight within 100 yards of the railroad boundary.<sup>153</sup> Another such control would be a speed limit on all movements through a town. Many communities favor night curfews on railroad yard operations.<sup>154</sup> Other examples are legion, and are tailored to specific communities' particular noise problems.

A different type of regulation which has been employed is the receiving land-use standard.<sup>155</sup> This regulation is distinguished from a facility noise emission standard by the fact that a receiving land-use standard relates to noise levels at the perimeter of the impacted property rather than the noise producing property. Such a standard may require, for example, that no school shall be subjected to exterior noise levels in excess of 60 Ldn. This kind of standard is most useful for preconstruction screening of land uses; but it has been imposed in many cases where both the sources and receivers are already established.<sup>156</sup> In the latter case, it could have the effect of setting a standard with which a railroad might have to comply.

Section 17(c)(2) categorizes these various types of potential state or local regulations as: (1) standards, (2) controls on levels of environmental noise, and (3) regulations which control, license, regulate or restrict the use, operation or movement of a piece of equipment or a facility. How does this categorization affect pre-emption?

153. See, e.g., Ordinance Regulating the Idling of Diesel Powered Railroad Engines Within the City of Jenkins, Kentucky (1974).

154. It is a common practice for regulations to set dual standards, one applicable during the day and a more stringent standard applicable during nighttime hours. See, e.g., Minnesota Regulations, *supra* note 152, § NPC 2(b); Bloomfield, N.J., Ordinance, *supra* note 151, § 2(a). A very stringent nighttime standard could result in a de facto curfew.

155. See, e.g., PORTLAND, ORE., CODE tit. 18 § 18.10.010 (1976); Illinois Pollution Control Board, Rules ch. 8, rules 202-07 (1973).

156. See, e.g., ordinances cited in note 155 *supra*.

As has been pointed out above,<sup>157</sup> EPA considers section 17(c)(1) to be the operative preemption provision. Under this interpretation, the only action subject to preemption in the first instance is “any *standard* applicable to noise emissions resulting from operation of the same equipment or facility”<sup>158</sup> regulated by EPA. The term “standard” as generally understood, and as used in other parts of the Noise Control Act, refers to an emission limitation, a criterion for specifying the maximum permissible noise level, and is quite distinct from controls on the use, operation or movement of products.<sup>159</sup> The compendium contained in section 17(c)(2), however, seems to contemplate that the term “standard” in section 17(c)(1) may include these other types of controls. In order to reconcile the two subsections, EPA has concluded that the term “standards” should include these other types of controls in any case where they would have the same effect as setting a standard on a piece of federally regulated equipment, that is, where they would require it to meet a higher standard.<sup>160</sup> This interpretation serves as a fundamental principle in EPA’s regulation of railroad noise because it defines the class of preempted regulations.

Applying this principle, the proposal provides that a state or local action is preempted only if it (1) sets a more stringent numerical noise standard on a federally regulated source, or (2) by its terms requires physical modification of a federally regulated source, or (3) effectively requires the physical modification of a federally regulated source.<sup>161</sup> “Effectively requires” is defined as: “[a]ny action imposing a requirement such that compliance can be achieved by physical modification of Federally-regulated equipment or facilities, and no reasonable alternative exists which does not involve physical modification of Federally-regulated equipment or facilities.”<sup>162</sup> “Physical modification of Federally regulated equipment or facilities” is in turn defined as: “[p]hysical modifications in addition to or more stringent than those necessary for the equip-

157. See note 141 and accompanying text *supra*.

158. Noise Control Act of 1972 § 17(c)(1), 42 U.S.C. § 4916(c)(1) (Supp. IV 1974) (emphasis added).

159. See Noise Control Act of 1972 §§ 6(c)(1), 7(a), 17(a), (c), 18(a), (c), 42 U.S.C. §§ 4905(c)(1), 4906(a), 4916(a), (c), 4917(a), (c) (Supp. IV 1974).

160. Proposed Rule, *supra* note 98, §§ 201.30(g), 201.30(h), 201.32(b), 41 Fed. Reg. 52318-19 (1976).

161. *Id.* § 201.32(b), 41 Fed. Reg. 52319 (1976).

162. *Id.* § 201.30(g), 41 Fed. Reg. 52318 (1976).

ment or facilities to meet the Federal standards."<sup>163</sup>

Under this construct, as EPA explains it, a state or local action is not preempted if it applies only to equipment that EPA has not regulated.<sup>164</sup> Nor would an action be preempted if it applies to federally unregulated rail facilities (such as rail yards and terminals), if it does not effectively require physical modification of a federally regulated piece of equipment.<sup>165</sup> An example of a preempted regulation under this test might be a noise emission standard on a rail yard which is so stringent that it cannot be achieved without reducing the noise level of locomotives below the EPA standard. On the other hand, if it could be achieved by moving idling refrigerator cars to the interior of the yard overnight, it would not be preempted under this test.

Design standards on facilities that are not federally regulated would never be preempted.<sup>166</sup> Additionally, a regulation which does apply to federally regulated equipment but which controls only use, operation or movement of such equipment (without setting a standard) is not preempted unless it effectively requires physical modification.<sup>167</sup> One such regulation which would be preempted would be a community ordinance stating that locomotives may not use the main rail line in town after 8:00 P.M. unless they produce noise levels 10 dBA below the EPA standard, where ceasing nighttime operations is not a viable alternative for the railroads.

Another class of non-preempted actions are those which set standards identical to EPA's.<sup>168</sup> As a logical consequence EPA has judged that Congress intended to also permit standards which are less stringent,<sup>169</sup> based upon the obvious, but unstated, assumption that if section 17(c)(1) clearly permits the state and local governments to add their enforcement effort to EPA's standards by setting identical standards, Congress did not intend to preclude them from adding a lesser effort by enforcing against only those who are greatly exceeding EPA's standards.

163. *Id.* § 201.30(h), 41 Fed. Reg. 52318 (1976).

164. *Id.* § 201.32(e)(4), 41 Fed. Reg. 52319 (1976). Note the distinction between facilities and equipment, *supra* note 87.

165. *Id.* § 201.32(e)(5), (6), 41 Fed. Reg. 52319 (1976).

166. *Id.* § 201.32(e)(7), 41 Fed. Reg. 52319 (1976).

167. *Id.* § 201.32(e)(3), 41 Fed. Reg. 52319 (1976).

168. *Id.* § 201.32(e)(1), 41 Fed. Reg. 52319 (1976).

169. *Id.* § 201.32(e)(2), 41 Fed. Reg. 52319 (1976).

A related issue is whether the identity of standards implies that enforcement procedures must be identical as well. Clearly, something more than the simple numerical standard must be identical. A number by itself means nothing; it becomes a standard when the conditions, instrumentation and measurement distances are defined. Not every element of the compliance procedures<sup>170</sup> is necessarily so definitive, however. This is an issue which the courts have not yet faced.<sup>171</sup> When they do, they will probably continue to interpret preemptive provisions narrowly and find only certain elements essential to the "identity" of the standard, and others subject to state and local flexibility.<sup>172</sup>

Three other classes of regulations would not be preempted under EPA's approach: (1) restrictions on the use of warning devices (horns, whistles, etc.),<sup>173</sup> which were specifically excluded from compliance with EPA's standards;<sup>174</sup> (2) receiving land-use standards<sup>175</sup> which can be met reasonably without physical modification of federally regulated railroad equipment;<sup>176</sup> and (3) use, operation or movement controls imposed for reasons other than noise control.<sup>177</sup>

With the exception of identical standards, this large class of unpreempted state or local actions would be totally eliminated by the broad preemption approach which the railroads favor. Presumably, the states and local governments, which have a correspondingly large class of railroad noise problems which EPA's standards do not solve, will strongly favor the EPA preemption interpretation.

170. 40 C.F.R. §§ 201.20-201.24 (1976) (EPA measurement methodology); 41 Fed. Reg. 49183 (1976) (U.S. Dept. of Transportation proposed compliance procedures).

171. *Cf.*, *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) *cert. denied*, 417 U.S. 921 (1974), which recognized that the test methodology used in developing the standard is an essential piece of information for the public to review during informal rulemaking.

172. For example, the D.O.T. proposed Railroad Noise Emission Compliance Regulations, 41 Fed. Reg. 49183 (1976), contains provisions relating to who may perform tests and under what circumstances, when a non-complying locomotive may be moved, and requirements as to frequency of calibration of measurement equipment. None of these procedural requirements effects the stringency of the standard.

173. Proposed Rule, *supra* note 98, § 201.32(e)(9), 41 Fed. Reg. 52319 (1976).

174. 40 C.F.R. § 201.10 (1976).

175. *See* notes 155-56 and accompanying text *supra*.

176. Proposed Rule, *supra* note 98, § 201.32(e)(8), 41 Fed. Reg. 52319 (1976).

177. *Id.* § 201.32(e)(10), 41 Fed. Reg. 52319 (1976). Again, there is an unstated but intuitive assumption that this Noise Control Act could not have intended to free the railroads from State and local control of all kinds for all purposes.

B. *The Meaning of "Special Local Condition" and "Not in Conflict"*

EPA has been struggling for several years with the issues raised by section 17(c)(2) and the similar provision for motor carriers in section 18(c)(2).<sup>178</sup> When the interstate motor carrier noise standards were published in October of 1974,<sup>179</sup> EPA stated that it would publish guidelines for special local determinations under that section within 120 days.<sup>180</sup> These were finally proposed on November 29, 1976.<sup>181</sup>

Much of the delay resulted from a reluctance to come to grips with the preemption issues discussed above. However, a good deal of the difficulty springs from the illogic of the language of section 17(c)(2) itself. It allows the Administrator to waive preemption if he determines that both conditions exist, that is, that the state or local regulation is necessitated by special local conditions, and that it is not in conflict with the federal regulations. One is compelled to ask, if the state or local regulation is not in conflict with the federal regulation, why must EPA be concerned with it? If it does not conflict, it does not hamper the national uniformity goals of section 17; therefore, logically, it should be permitted irrespective of the existence of any special local conditions.

Indeed, the legislative history of this part of the Act indicates that this was Congress' original intent. The "and" between "necessitated by special local conditions" and "not in conflict" was "or" in the version passed in the Senate on October 13, 1972.<sup>182</sup> Given the fact that the "and" is there and must be dealt with, the question becomes one of how to relate the two elements. Should EPA have a clear test of "not in conflict," and if that is not met deny the application regardless of the special conditions? Should they have a firm requirement for "special local conditions," and if that is not met deny the application without reaching the question of conflict? Or, should EPA engage in some qualitative weighing, permitting state and local regulations which, although conflicting to some extent, remedy a very special situation, or which, though treating a problem not overly special, present no conflict at all.

178. Noise Control Act of 1972 § 18(c)(2), 42 U.S.C. § 4917(c)(2) (Supp. IV 1974).

179. 40 C.F.R. §§ 202.10-202.23 (1976).

180. 39 Fed. Reg. 38214 (1974).

181. 41 Fed. Reg. 52320 (1976).

182. See note 64 and accompanying text *supra*.



The language of the Noise Control Act would not preclude a balancing approach, and the legislative history suggests that Congress might favor such an approach. Statements made on the floor of the Senate during consideration of the Bill discussed the need to protect the public, and the need to allow communities to do their own regulating where the federal standards are not adequate to protect them.<sup>183</sup>

EPA's draft regulation proposes to adopt a balancing approach. It states that EPA will not treat each of the two criteria of section 17(c)(2) ("not in conflict" and "necessitated by special local conditions") as independently dispositive. In other words, it does not say that if the slightest degree of conflict exists it will not waive preemption. Rather, it announces that EPA will weigh three factors: (1) the degree of the conflict, (2) the severity of the special conditions, and (3) the existence of alternative means of achieving the needed noise control that are not preempted.<sup>184</sup> This third factor relates both to the question of conflict (since conflict is more offensive if there are non-conflicting ways to solve the problem), and to the question of "necessitated" (since the regulation in question is not necessary if there are other means).

EPA interprets the statute this way to be consistent with its interpretation of the preemptive intent of section 17(c). If EPA were to deem a regulation to be in conflict because it requires physical modification of a federally regulated piece of equipment, and lets this be dispositive, then every request for waiver would necessarily be denied, since every regulation which is preempted (requiring waiver) would, by EPA's definition, effectively require modification of federally regulated equipment.<sup>185</sup>

Having announced that it would weigh the degree of conflict against the severity of the special local condition, how will EPA define these terms? Does "conflict" mean that compliance with the local regulation inhibits compliance with the federal standard? Does it mean that the local standard requires the railroad to modify equipment which meets the federal standard? It probably means both of these. Suppose, however, that a local regulation does not expressly require modification of federally regulated equipment

183. See 118 CONG. REC. 35881-82, 37318 (1972).

184. Proposed Rule, *supra* note 98, § 201.34(b), 41 Fed. Reg. 52320 (1976).

185. See criteria for determining whether an action is preempted, notes 161-62 and accompanying text *supra*.

and such modification is only one of the means of compliance. Under EPA's preemption theory, if it is preempted at all, modification is the only way to comply at reasonable cost. Is the amount of cost relevant to determining the degree of conflict? More generally, is it a conflict if a state or local law requires the railroads to spend too much money on noise control? Some would find it troubling to answer that EPA should engage in this inquiry. Had Congress considered the question, which it probably did not, it is doubtful that it would have answered that EPA, by virtue of section 17 of the Noise Control Act, is to be the guardian of the railroads' economic health. And yet, how can EPA avoid considering cost?

Conflict has other dimensions, moreover. Consider a yard locomotive which never goes out on the rights of way, but shuttles cars back and forth in a rail yard. Since it operates in a fixed location, it will not be subject to numerous different standards in different jurisdictions—the problem section 17 was intended to combat.<sup>186</sup> National uniformity is not necessary if the locomotive has to meet the standard of only one jurisdiction.

EPA has avoided giving complete rules in its draft regulation but does enumerate the factors it will consider. EPA states that in assessing the degree of conflict with the federal regulatory scheme, the Agency will "consider the degree to which granting the application would be inconsistent with the policy of the Noise Control Act of providing federal standards for sources of noise in commerce which require national uniformity of treatment."<sup>187</sup> Considered relevant in such assessment will be: (1) the number of pieces of railroad equipment that would be affected; (2) the degree to which affected equipment operates in jurisdictions other than that which seeks to regulate them; (3) whether the state or local action would impose burdensome testing requirements that differ from the federal requirements; and (4) the degree to which the free flow of commerce would be impeded by the regulation.<sup>188</sup>

Defining "special local conditions" is a matter with which EPA is understandably more comfortable. Although the meaning of the term is discussed nowhere in the legislative history, the context in which it is used indicates that it means some prevailing circum-

186. See note 67 and accompanying text *supra*.

187. Proposed Rule, *supra* note 98, § 201.34(d), 41 Fed. Reg. 52320 (1976).

188. *Id.*

stances in a given community or state which would cause the Administrator to determine that more noise reduction should be achieved there. This will require some showing of special or unusual circumstances. If the test were simply whether the federal standards adequately protect health and welfare, almost every community would qualify, since EPA's analysis shows that the limiting constraints of cost and available technology prevented EPA from setting the standards at levels low enough to eliminate adverse impacts on all persons.<sup>189</sup>

What is a community with a *special* condition? Is it one with a heightened interest in noise control? Probably not, since the Noise Control Act's recognition that *all* Americans are entitled to an environment free from noise which jeopardizes their health and welfare would indicate that *all* are entitled to be interested in noise control.<sup>190</sup> Is it a community with a historically low ambient noise level, such as Moab, Utah, or Yumatilla, Oregon, where increases in noise are especially noticeable? Is it a community with a high ambient noise level and a high population density, such as Chicago and New York, where increases may cause more people to be impacted in terms of annoyance or even hearing loss? Or is it something more specific, such as an unusually large concentration of noise sensitive activities around a railroad facility, such as schools, libraries, churches, concert halls, hospitals, nursing homes, large housing developments? Or is it a geographical factor, such as a steep hill in town where railroad engines must labor noisily? It may be a special condition more closely related to railroad operations. For example, some communities have only one or two trains a day; others have several tracks that are major freight routes, or major commuter lines which run scores of trains a day beginning before dawn and ending after the children have gone to bed. Some towns have only a small station; others have huge freight yards.

EPA's answer begins in the same legal philosophical terms as its definition of conflict: in assessing the severity of the special local condition "the Administrator will consider the degree to which denying the application would be inconsistent with the policy of the Noise Control Act of providing an environment free from noise that jeopardizes the public health and welfare."<sup>191</sup> The Administrator

189. See notes 96-97 and accompanying text *supra*.

190. Noise Control Act of 1972 § 2(b), 42 U.S.C. § 4901(b) (Supp. IV 1974).

191. Proposed Rule, *supra* note 98, § 201.34(c), 41 Fed. Reg. 52320 (1976).

will consider whether there exist geographical, topographical or demographic conditions which render the federal standards inadequate to protect public health and welfare. "Such factors as the proximity of noise-sensitive populations to noise sources, or conditions which increase either the duration or intensity of noise will be considered relevant."<sup>192</sup>

These criteria, by their nature, leave room for considerable subjectivity. This is particularly true in light of the balancing process in which EPA would engage. If this entire approach ever emerges as a final regulation, and if it survives the legal challenges in the Court of Appeals, the inevitable challenges to EPA's decisions on individual applications for waivers of preemption will serve as the final testing ground of the reasonableness and usefulness of this balancing approach.<sup>193</sup>

All waivers of preemption granted (or denied) by EPA under section 17(c)(2) will be subject to judicial review by any party who is aggrieved.<sup>194</sup> In any such lawsuits, the scope of review will be that prescribed in the Administrative Procedure Act.<sup>195</sup> The issues will therefore include whether EPA's action granting or denying the waiver was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;<sup>196</sup> whether it was contrary to constitutional right, power, privilege or immunity;<sup>197</sup> and whether it was in excess of the Administrator's statutory jurisdiction, authority or limitations, or short of statutory right.<sup>198</sup>

The Environmental Protection Agency and many other federal agencies have been respondents in a long line of cases under the

192. *Id.* § 201.34(c)(1), 41 Fed. Reg. 52320 (1976).

193. The initial testing ground was the interagency review process under which the draft regulation was circulated before proposal. This review was engrafted upon the rulemaking requirements of the Administrative Procedure Act by the Director, Office of Management and Budget, through a memorandum to the heads of all Departments and Agencies of the federal government on October 5, 1971. This directive required that all proposals and final rules pertaining to environmental quality, consumer protection and occupational safety and health be submitted before proposal and before final publication to the Office of Management and Budget and distributed for comment to all interested federal agencies. In EPA's case the process is, at its worst, a forum for pressure politics and, at its best, a severe test of the logic, legitimacy and thoroughness of EPA rulemaking.

194. 5 U.S.C. §§ 702, 704 (1970); 28 U.S.C. § 1331, *as amended by* Pub. L. No. 94-574, 90 Stat. 2721; *see* *Califano v. Sanders*, 97 S. Ct. 980 (1977).

195. 5 U.S.C. § 706 (1970).

196. 5 U.S.C. § 706(2)(A) (1970).

197. 5 U.S.C. § 706(2)(B) (1970).

198. 5 U.S.C. § 706(2)(C) (1970).

Administrative Procedure Act. The courts have established a rigorous test of the Agencies' actions,<sup>199</sup> and engage in a "searching and careful" inquiry into the facts in order to determine whether there has been a "clear error of judgment."<sup>200</sup> This experience<sup>201</sup> has made it clear that EPA will need detailed information in order to support its grants or denials of waivers.

The gathering of this detailed information will represent a significant burden, much of which will fall on the state or community, and some of which may fall on the railroads. The process will probably involve public notice and comment procedures,<sup>202</sup> and possibly public hearings, further adding to the complexity and expense. For these reasons, EPA has tried in its draft proposed regulation to identify those types of state and local actions which are not preempted, so that they will not have to engage unnecessarily in this cumbersome process.

The resource demands of the waiver application process emphasize the importance of clarifying the scope of preemption. More fundamentally, section 17(c)(2) imposes with respect to the preempted regulation one significant legal hurdle that it would not otherwise have faced. Before the Noise Control Act of 1972, a state or community could constitutionally defend a noise control on an interstate railroad simply by establishing that it did not impose an undue burden on interstate commerce. Now, any regulation which is preempted must be shown to be necessitated by special local

199. See Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Leventhal, *Environmental Decisionmaking and the role of the Courts*, 122 U. PA. L. REV. 509 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

200. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). *Accord*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 37 n.79 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); *Sierra Club v. EPA*, 540 F.2d 1114, 1123 (D.C. Cir. 1976).

201. For a glimpse of EPA's history in judicial review, see *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974); *Texas v. EPA*, 499 F.2d 289 (5th Cir. 1974), *cert. denied*, 421 U.S. 945 (1975); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), *aff'd on rehearing sub. nom. Portland Cement Ass'n v. Train*, 513 F.2d 506 (1975); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

202. EPA issued in conjunction with its proposed waiver regulation guidelines setting forth the procedures it would expect applicants to follow and types of information which their applications should contain. See 41 Fed. Reg. 52317 (1976). These guidelines were to have been a part of the regulation, but were removed at the request of the Office of Management and Budget as a gesture toward decreasing the volume of federal regulations.

conditions and not in conflict with federal noise regulations; and in addition it still may not impose an undue burden on interstate commerce.<sup>203</sup>

## V. COMMENT

All of these uncertainties will be resolved by the courts in due time, but it is difficult to resist the temptation to suggest how, in this writer's opinion, they ought to be resolved. If Congress had considered all the complex practical implications which have been touched on above, the answers might be easier. It is axiomatic, however, that Congress could never devote that kind of attention to an issue like railroad noise. Nor is the Act sufficiently clear on its face to resolve these questions. It is probably true that the railroads, who persuaded the Senate Public Works Committee to include their recommended section in the Noise Control Bill, S. 3342, thought that they knew exactly what the implications were and exactly what they wanted to achieve. But policies much broader than the railroads' perceived need for freedom from the burdens of state and local regulation inhibit the EPA from uncritically accepting the railroads' interpretation of the Noise Control Act.

A reasonable resolution of the question of the degree of preemption prescribed by section 17 of the Noise Control Act requires that three propositions (none of which will be fully accepted by all parties) be kept clearly in mind. First, the states and their political subdivisions have traditionally enjoyed the power to regulate for the protection of the health and welfare of their citizens, and that power should not be diminished without good reason. Courts have treated this as a basic principle in preemption cases, both in searching for Congress' intent in the absence of preemption language, and in the narrow interpretation given to preemption sections.<sup>204</sup>

Second, if there is a dominant theme in the legislative history of section 17, it is that the burdens on interstate commerce which Congress hoped to ease by preemption were those which could be eased by national uniformity. Again and again, references were made to the chaos and confusion that would result from moving

203. See 41 Fed. Reg. 52318 (1976).

204. See notes 33-35 and accompanying text *supra*.

noise sources traveling through different jurisdictions with differing and inconsistent requirements.<sup>205</sup> All local regulations represent some degree of burden on carriers because compliance costs reduce profits. Yet at no time in the legislative history was it said that all local regulations should be preempted; nowhere in the Act does the term "burden on interstate commerce" appear.<sup>206</sup>

Third, the primary objective of the Noise Control Act is to control noise.<sup>207</sup> Despite the concomitant objective of national uniformity, in none of the Act's preemption provisions does preemption take effect before the effective date of EPA regulations, and none of these provisions forbids state or local governments from enacting their own standards identical to EPA's.<sup>208</sup>

Based upon these propositions, the doubts as to whether section 17(a) orders EPA to fully occupy the field, and whether section 17(c) preempts broadly or narrowly, should be resolved in favor of the maintenance of state and local authority. In the absence of an unequivocal requirement that EPA regulate every fixed and moving instrumentality of the interstate rail carriers, EPA ought to be able to exercise a reasoned discretion in determining which sources it will regulate. A determination based upon a weighing of the need for national uniformity with respect to a specific type of facility or equipment against the ability to regulate more effectively at the local level seems most legitimate.<sup>209</sup>

By the same token it would be fundamentally unsound for a court to interpret section 17(c) so as to preempt state and local control of facilities or equipment not regulated by EPA.<sup>210</sup> It seems necessary, however, to include within the preemptive scope all equipment which is a part producer of the particular noise to which EPA standards apply if preemption is to have any meaning.

The closer issue is the validity of EPA's intricate analysis of what is preempted and what is not.<sup>211</sup> It is based upon the distinction

205. See notes 63-67 and accompanying text *supra*.

206. By contrast, AAR used the term in its proposal to the Senate Public Welfare Committee, see note 58 *supra*.

207. Noise Control Act of 1972 §§ 2(a)(1), (2), (b), 42 U.S.C. § 4901(a)(1), (2), (b) (Supp. IV 1974).

208. Noise Control Act of 1972 §§ 6(e)(1), 17(c)(1), 18(c)(1), 42 U.S.C. §§ 4905(e)(1), 4916(c)(1), 4917(c)(1) (Supp. IV 1974).

209. See section III A. *supra*.

210. See section III B. *supra*.

211. See section IV *supra*.

between emission standards and other types of noise control measures, a distinction well known in Congress and recognized in various parts of the Act.<sup>212</sup> Moreover, EPA includes as standards anything which effectively requires physical modification of federally regulated sources.<sup>213</sup> This benchmark is a recognition that emission standards are technological requirements, and that conversely technological requirements are basically emission standards. By applying this benchmark, EPA is able to account for and harmonize all the language of section 17(c).

Finally, EPA's approach of publishing its preemption interpretation as a regulation subject to judicial review<sup>214</sup> provides a three-prong program for resolving the many issues raised by the Act. It gives guidance on a complex legal and technical subject in the absence of which state and local governments may have been discouraged from taking action within their power. It sets up a unified thesis for judicial interpretation in an area traditionally reserved for the courts. And it assures an early, central, authoritative and orderly resolution of the legal issues without engaging many lower courts over many years.

Following the EPA prescription all the way would result in a preemption far narrower than what the railroads hoped to obtain in 1971 when they started all of this. To be sure, the business of setting noise emission standards on equipment that moves from one jurisdiction to another does rightfully demand national uniformity, and EPA's standards serve a useful purpose. It cannot be denied, however, that railroad noise is a localized problem. Strategies involving special fixes, use, operation and movement controls and other approaches could be tailored to individual communities' noise situations to bring immediate and specific relief to those most affected without affecting EPA's standards and without causing chaos or confusion by their lack of uniformity. Moreover, they would still be subject to the traditional constitutional test of undue burden on interstate commerce.

If the courts agree with the railroads on these issues, communities will be left helpless to decide for themselves that they have a noise problem and to solve it their own way. To find them preempted would throw a gauntlet before them, requiring them at

212. See note 159 and accompanying text *supra*.

213. See notes 161-62 and accompanying text *supra*.

214. See note 148 and accompanying text *supra*.



great expense to convince EPA and a reviewing court that they have a special local condition that necessitates their action and that such action is not in conflict with federal regulations, two tests which are subjective and not clearly defined, and which may or may not permit a balancing of public need against the interference with interstate commerce. In the face of such a burden state and local governments may simply decide that they cannot afford to take the steps necessary for the protection of their citizens' health and welfare.