

Conformity as Catalyst: Environmental Defense Fund v. Environmental Protection Agency

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This Note argues that in Environmental Defense Fund v. Environmental Protection Agency, the Court of Appeals for the D.C. Circuit correctly overturned a set of EPA regulations that undermined the conformity provision of the 1990 Clean Air Act (CAA). The Note explores the policy implications of rigorous enforcement of the 1990 CAA conformity requirement combined with complementary changes in federal transportation law under the Intermodal Surface Transportation and Efficiency Act (ISTEA). The newly created Georgia Regional Transportation Authority (GRTA) is discussed as a case study of the type of regional planning innovation "catalyzed" by conformity. The Note concludes that conformity and ISTEA are encouraging much-needed institutional changes at the state and regional level.

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INTRODUCTION

The world as we knew it just ended in the business of transportation. [The court of appeals' decision] calls out in an even louder voice the need to get into conformity immediately. It puts even more at stake, and it reinforces the need to have a regional authority that can get a handle on these problems.

— Sam Williams, President of the Atlanta Metro Chamber of Commerce.¹

On March 2, 1999, the Court of Appeals for the District of Columbia Circuit resurrected the Clean Air Act's long-dormant

1. David Goldberg, *Ruling May Halt Metro Roads; Judges Reject Clean Air Exception*, ATLANTA J. & CONST., Mar. 4, 1999, at A1.

transportation planning and air quality "conformity" requirements, calling into question the legality of billions of road building projects in areas where auto emissions are a significant contributor to air quality problems. In *Environmental Defense Fund v. Environmental Protection Agency*,² the court found that the Environmental Protection Agency's (EPA) 1997 Final Rule³ for determining the compatibility of individual transportation projects with state vehicle emission goals violated the plain language and substantive goals of the conformity requirements of the 1990 Clean Air Act (CAA) Amendments.⁴ EPA had loosely interpreted the conformity requirement and generously read a "grandfather" provision into the language of the Act, thus exempting some transportation projects from later review. In response, the court struck down two of the "grandfather" provisions, one that permitted approval of on-going locally funded transportation projects⁵ without a currently conforming regional transportation plan,⁶ and another that applied stricter rules to federally financed projects.⁷ The court also rejected three provisions⁸ that would have allowed projects to meet the conformity requirements based on new or revised vehicle emission budgets not approved by EPA. EPA declined to appeal the decision, entered into consultations with the Environmental Defense Fund (EDF) and the Department of Transportation (DOT), and issued a final guidance in June 1999 that translated the court's decision into new regulatory guidelines.⁹

The court's decision also strengthened the case for coordinated regional transportation, air quality, and land use planning by indirectly reinforcing important policy goals of the Transportation Equity Act for the 21st Century (TEA-21).¹⁰ After decades of lax enforcement, the court's ruling and EPA's response forced many metro regions, including Atlanta, to take conformity goals seriously.

2. 167 F.3d 641 (D.C. Cir. 1999).

3. 62 Fed. Reg. 43,780 (Aug. 15, 1997) (revised Subpart A, effective Sept. 15, 1997).

4. 42 U.S.C. § 7410(c) (1999).

5. Non-federal-aid highways make up over three-fourths of all highway miles. See U.S. DEPT OF TRANSP., FED. HIGHWAY ADMIN., HIGHWAY STAT. 1997 TABLE HM-18 (1998).

6. 40 C.F.R. § 93.121(a)(1) (2000).

7. See *id.* § 93.102(c)(1).

8. See 40 C.F.R. §§ 93.118(e)(1), 93.120(a)(2), 93.124(b) (2000).

9. See Arnall, Golden & Gregory, *Environmental Groups and DOT Settle Lawsuit on Road Projects*, GEORGIA ENVTL. L. LETTER, July 1999.

10. Pub. L. No. 105-178, § 1(a), 112 Stat. 107 (1998) (codified as amended at 23 U.S.C. § 101 *et seq.*).

In May 1996, Metro Atlanta was notified that it would lose the right to spend billions in federal transportation dollars on new road expansions when its transportation improvement program expired in late 1997 because it had failed (after several extensions) to develop a long-range regional transportation plan that conformed to state and federal air quality targets.¹¹ Faced with a December 1997 deadline, Georgia transportation officials attempted to grandfather as many road building projects as possible before the region's outdated transportation plan lapsed.¹² By late December, they had approved a total of 55—more than any other similarly threatened area had ever attempted.¹³ In early 1998, a coalition of environmental and transportation activists from the Atlanta area challenged sixty-one of these last-minute road expansion approvals, totaling more than \$700 million.¹⁴ The coalition accused the state and federal DOT of intentionally misusing EPA's grandfathering rules to approve projects which would further erode Atlanta's deteriorating air quality.¹⁵ Soon after the D.C. Circuit handed down its decision in *EDF v. EPA*, the Federal DOT and the Georgia DOT decided to settle the local lawsuit. Under the terms of the settlement, only seventeen of the grandfathered highway expansion projects were allowed to proceed.¹⁶

The combination of losing local control over federal highway dollars, combined with a growing perception that Atlanta was becoming the "next L.A.," convinced Georgia legislators to support a bold experiment in regional government. On April 6,

11. See David Goldberg, *Heads up, Atlanta; Cities Scrambling to Comply with the Clean Air Act's Strict New Rules*, *PLANNING*, July 1998, at 20.

12. See *id.*

13. See *id.*

14. Leon Eplan, *Atlanta Aims Its Options*, *PLANNING*, November 1999, at 14-15. (The Georgia Conservancy, the Sierra Club, and Georgians for Alternative Transportation filed the lawsuit.)

15. See *id.*

16. The remaining forty-four projects named in the lawsuit were put on hold until the region is able to adopt a conforming transportation plan. See Eplan, *supra* note 14, at 15. The 17 projects allowed to proceed are worth about \$125 million and were already funded for construction. Telephone conversation with Bryan Hagar, Sierra Club, Georgia Chapter, Aug. 2, 2000.

Other terms of the settlement include: (1) a comprehensive study of the transportation needs in the north metro Atlanta area; (2) a panel of experts overseeing ARC's use of computer models to predict the air quality effect of its transportation plans; and (3) an analysis of whether transportation funds currently being spent are helping or hurting minority and poor populations.

1999, under the leadership of newly elected Governor Roy Barnes, the Georgia Legislature passed legislation creating the Georgia Regional Transit Authority (GRTA, affectionately referred to as "Greta").¹⁷ GRTA is a super-regional transportation agency with power to veto local land use and transportation decisions in any area of the state that has not attained national air quality standards.¹⁸

Part I of this Note summarizes the relationship between air quality and vehicle miles traveled. Part II explores the history of the conformity requirement. Part III analyzes the court's decision in *EDF v. EPA*. Part IV discusses the effect of strict interpretation and enforcement of the 1990 conformity provisions on policy innovation at the state and regional level, using the GRTA as a case study.

I

AIR QUALITY, EMISSIONS, AND VEHICLE MILES TRAVELED

To protect public health and welfare, EPA has established primary National Ambient Air Quality Standards (NAAQS) for seven "criteria" pollutants: ozone (O₃), carbon monoxide (CO), nitrogen dioxide (NO₂), sulfur dioxide (SO₂), lead (Pb), coarse suspended particles under 10 microns in diameter (PM₁₀), and fine suspended particles under 2.5 microns in diameter (PM_{2.5}).¹⁹ The health effects of these criteria pollutants vary but include respiratory and cardiopulmonary problems, headaches, reduced learning ability, and premature mortality.²⁰ These pollutants also contribute to acid rain, reduced agricultural yields, harm to vegetation, damage to building materials, and decreased visibility.²¹

Of EPA's seven criteria pollutants, carbon monoxide, ozone, and particulate matter are the greatest contributors to regional and local urban air quality problems in the United States.²² Of these three, ground level ozone (O₃) is the most pervasive air

17. See S.B. 57, 145th Leg. (Ga. 1999).

18. See *id.*

19. See 42 U.S.C. § 7409 (2000).

20. See U.S. ENVTL. PROTECTION AGENCY, EPA 230-R-99-001, INDICATORS OF THE ENVIRONMENTAL IMPACTS OF TRANSPORTATION 12 (1999) [hereinafter INDICATORS].

21. See *id.*

22. Motor vehicle emissions of lead and SO₂ have declined in significance. Since EPA's regulatory efforts to remove lead from gasoline began in 1970, transportation sector emissions of lead have declined dramatically leading to the virtual elimination of lead as an ambient air quality problem. As of 1997, transportation only contributes about 3 percent of total SO₂ emissions nationwide. See *id.* at 14-15.

pollution problem in the United States.²³ Despite a 30 percent decline in one-hour ozone concentrations between 1978 and 1997, about 47.9 million Americans lived in 77 counties with ozone concentrations above the NAAQS in 1997, and 101.6 million Americans lived in counties with ozone concentrations above the level of the new eight-hour ozone NAAQS.²⁴ In 1997, light- and heavy-duty motor vehicles emitted approximately 31 percent of volatile organic compounds (VOCs) and 36 percent of oxides of nitrogen (NO_x)—the two major contributors to ozone formation.²⁵

Despite a significant decline in violations of the carbon monoxide NAAQS since 1970, localized concentrations still pose threats in urban areas with heavy traffic congestion like Atlanta. By EPA estimates, the transportation sector contributes 61 percent of total U.S. carbon monoxide emissions, most generated by light- and heavy-duty motor vehicles.²⁶ In some cities, on-road vehicles generate as much as 95 percent of CO emissions.²⁷

Studies of mortality in polluted cities suggest that fine particle pollution, much of it from motor vehicles, is associated with decreased lung function, increased respiratory symptoms and disease, and premature death.²⁸ Motorized travel contributes 4 percent of PM_{2.5} and 1 percent of PM₁₀ emissions nationally; much of this pollution is concentrated in urban areas.²⁹

23. VOC emissions from transportation sources have dropped 56 percent between 1970 and 1997, but NO_x emissions have proven more difficult to control. Nationally, NO_x emissions from motor vehicles dropped 5 percent between 1970 and 1997, despite a 127 percent increase in vehicle miles traveled. *See id.* at 13-14.

24. *See id.* at 13.

25. Ozone is formed in the atmosphere through the reaction of volatile organic compounds (VOCs) and oxides of nitrogen (NO_x) in the presence of heat and sunlight. *See id.* at 14.

26. *See id.* at 13.

27. *See id.*

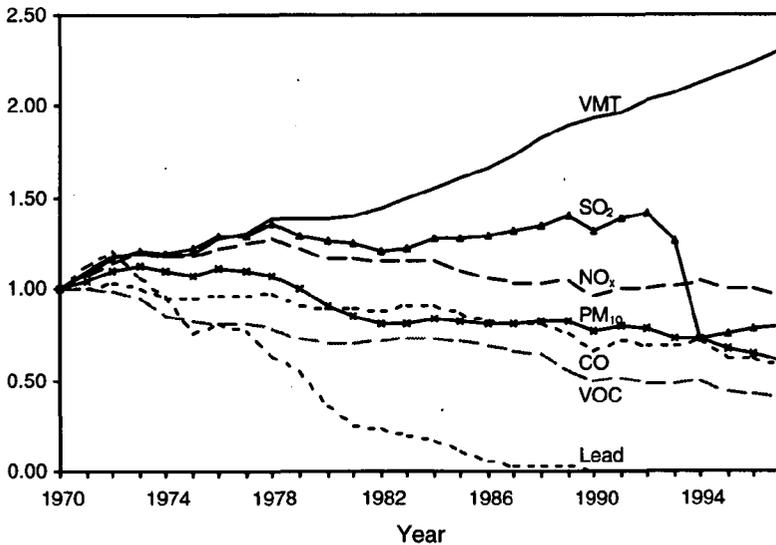
28. *See* William Brown, *Dying From Too Much Dust*, NEW SCIENTIST, Mar. 12, 1994, at 12-13. *See generally* DEBORAH SHEIMAN SHPRENTZ, BREATH TAKING, PREMATURE MORTALITY DUE TO PARTICULATE AIR POLLUTION IN 239 AMERICAN CITIES (Natural Resources Defense Council ed., 1996).

29. Most particulate matter emissions come from sources such as wind erosion, fugitive dust from paved and unpaved roads, and agriculture. Particulate matter emissions tend to be associated most with diesel engines; so heavy-duty motor vehicles are the largest source of transportation-related PM emissions. In contrast to their share of most other pollutants, light-duty motor vehicles make up a relatively small portion of transportation emissions. Direct emissions of PM₁₀ from the transportation sector declined by 26 percent between 1970 and 1997. *See INDICATORS, supra* note 20, at 15.

A. Policy Success and Failure

Despite huge increases in auto use over the past three decades, the CAA has dramatically reduced air pollution through improved vehicle technologies and cleaner burning fuels. Emissions of all criteria pollutants from motor vehicles have fallen since 1970.³⁰ Between 1978 and 1997, concentrations of ozone (one-hour) have fallen 30 percent, carbon monoxide concentrations have fallen 60 percent, and lead concentrations have fallen 97 percent.³¹ Figure 1 (below) demonstrates this relationship graphically.

FIGURE 1
CHANGE IN CRITERIA POLLUTANT EMISSIONS
COMPARED TO VEHICLE TRAVEL, 1970-1997³²
(1970 = 1)



While technological approaches to emission reduction have been enormously successful at reducing criteria pollutants,³³

30. See *id.* at 58.

31. See *id.* at 57.

32. *Id.* at 58.

33. The National Low-Emission Vehicle (NLEV) and Reformulated Gasoline (RFG) programs are important examples of control programs that are in place and will continue to help reduce car and light-duty truck emissions into the near future. See Control of Air Pollution From New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements; Final Rule, 65 Fed. Reg. 6698 (Feb. 2000) (to be codified at 40 C.F.R. Parts 80, 85, and 86) [hereinafter Tier 2

efforts to reduce emissions by limiting the growth in vehicle miles travelled (VMT) have failed completely.³⁴ Annual VMT grew from one trillion in 1970 to 2.5 trillion in 1997,³⁵ roughly doubling over the last twelve to twenty years.³⁶ In many urban areas, VMT is growing at rates of 3.5 to 6 percent per year, with Atlanta topping the list at 8 percent in the 1990s.³⁷ This explosive growth in VMT helps explain why approximately 107 million Americans still live in metro areas where the national air quality standards are violated.³⁸ In 1998, EPA concluded that tighter tailpipe emission standards were necessary to maintain improvements in air quality in many metropolitan areas (and in some cases to prevent significant deterioration) due to the dramatic increase in VMT and the continued growth in sales of higher-polluting light-duty trucks, such as sport-utility vehicles (SUVs).³⁹

In February 2000, EPA adopted a final rule, the "Tier 2/Gasoline Sulfur Program," designed to further reduce emission standards for passenger cars, light trucks, and large passenger vehicles (including sport-utility vehicles, minivans, vans, and pickup trucks) and to reduce the sulfur content of gasoline.⁴⁰ Under the new rule, automakers must produce vehicles designed to have very low emissions when operated on low-sulfur gasoline, and oil refiners must provide the much cleaner low-sulfur gasoline nationwide.⁴¹ As the Tier 2 tailpipe and sulfur standards are implemented over the next six years, Americans will benefit from the clean-air equivalent of removing

Standards].

34. See INDICATORS, *supra* note 20, at 58.

35. See U.S. ENVTL. PROTECTION AGENCY, EPA420-F-99-051, EPA'S PROGRAM FOR CLEANER VEHICLES AND CLEANER GASOLINE 3 (1999) [hereinafter EPA'S PROGRAM FOR CLEANER VEHICLES].

36. In the United States, the number of motor vehicles has grown from 108 million in 1970 to 193 million in 1993. If present trends continue, there could be well over 240 million motor vehicles on U.S. roads by 2010. See James MacKenzie, *Driving the Road to Sustainable Ground Transportation*, in FRONTIERS OF SUSTAINABILITY: ENVIRONMENTALLY SOUND AGRICULTURE, FORESTRY, TRANSPORTATION AND POWER PRODUCTION 121, 133 (Roger Dower et al. eds., 1997).

37. See METRO ATLANTA CHAMBER OF COMMERCE, METRO ATLANTA TRANSPORTATION INITIATIVE 4 (1997).

38. See Tier 2 Standards, *supra* note 33, at 6705.

39. Light-duty trucks, such as SUVs, comprised half of new vehicle sales in 1999. The emission contribution of these vehicles now matches that of passenger cars because of the combination of growth in miles traveled by light trucks and the fact that their emission standards are currently less stringent than those of passenger cars. See EPA'S PROGRAM FOR CLEANER VEHICLES, *supra* note 35, at 3.

40. See Tier 2 Standards, *supra* note 33, at 6698.

41. See *id.*

164 million cars from the road.⁴² These new standards require passenger vehicles to be 77 to 95 percent cleaner than those on the road today and require the sulfur content of gasoline to be reduced by up to 90 percent.⁴³ Even with Tier 2 in place, however, unchecked growth in VMT will continue to pose significant short- and long-term threats to air quality in many metropolitan regions.

B. Beyond the Criteria Pollutants

In stark contrast to the dramatic reductions in emissions of criteria pollutants, greenhouse gas emissions from motor vehicles have been rapidly rising as growth of VMT outpaces improvements in transportation energy efficiency and engine design.⁴⁴ Carbon dioxide emissions have increased by nearly 10 percent a year since 1970.⁴⁵ Transportation sources—mainly motorized vehicles—emitted approximately 31-36 percent⁴⁶ of all carbon dioxide from fossil fuel combustion in the United States in 1997.⁴⁷ Carbon dioxide emissions are recognized as a major contributor to global warming.

In addition to global warming, there are many other negative environmental and social impacts associated with greater motor vehicle use. The list includes: the fragmentation of sensitive ecological resources and wildlife habitat due to road construction; the loss of functional open space and farmland due to low-density, auto-dependent "sprawl;"⁴⁸ non-point source

42. See EPA'S PROGRAM FOR CLEANER VEHICLES, *supra* note 35, at 1.

43. See *id.*

44. See INDICATORS, *supra* note 20, at 21.

45. See *id.* at 22.

46. Emissions from refining petroleum in the United States for transportation sector use comprised about 5 percent of total emissions. See *id.* at 21.

47. See *id.*

48. From 1970 to 1990, the urbanized land area of metro Los Angeles increased at a rate *six times* greater than its population growth (urbanized land increased 300 percent, while population increased only 45 percent). Metro Chicago is even worse. The urbanized area increased at a rate *ten times* faster than its population (urbanized land increased 46 percent, while the metro population only grew 4 percent). The vast expanse of low-density, segregated-use, and multi-centered urban development surrounding most major American cities has dramatically increased automobile-dependence, forcing the average household to use a car for even the smallest errand. See generally, Reid Ewing, *Is Los Angeles-Style Sprawl Desirable?*, J. OF THE AM. PLAN. ASS'N (Winter 1997); Paul Mitchell Hess, et al., NEIGHBORHOOD SITE DESIGN AND PEDESTRIAN TRAVEL, Paper submitted to the *Transportation Research Board Annual Meeting* (January, 1999); PETER NEWMAN & JEFFREY KENWORTHY, CITIES AND AUTOMOBILE DEPENDENCE (1989). A full discussion of the economic and social factors driving low-density development patterns is beyond the scope of this Note. For an excellent summary of the myriad federal laws encouraging sprawl, see PIETRO S.

water pollution caused by run-off from parking lots and roadways; and "heat-island" effects in urbanized areas with extensive paved surfaces. Although it is difficult to precisely measure the automobile's effects on neighborhood livability, few people would disagree that excessive traffic tends to negatively impact the quality of urban places. Numerous authors have documented the disturbing spread of "placeless" strip malls and parking lots across the American urban landscape, and the concomitant destruction and abandonment of traditional "main street" downtowns due to our growing auto-dependent culture.⁴⁹

Reducing dependence on motor vehicles is an extremely difficult task because one of the most powerful planning tools for combating the long-term growth of VMT— control over local land use planning— is jealously guarded by local governments. In most metropolitan regions, authority over land use decisionmaking is fragmented among competing municipalities, county agencies, and state transportation departments. Few regions have developed the institutions and policy tools necessary for coordinating regional transportation, land use, and air quality planning.⁵⁰

The conformity provisions in the 1990 CAA Amendments, together with the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA),⁵¹ reauthorized in 1998 as TEA-21, represent Congress' most ambitious attempt yet to integrate transportation and air quality planning. Both the 1990 CAA Amendments and TEA-21 responded to previous unsuccessful efforts to impose federal planning solutions, outlined below.

II

THE EVOLUTION OF CONFORMITY UNDER THE CLEAN AIR ACT

Since 1977, the CAA has required that all federally assisted transportation projects "conform" to the air quality goals and priorities established in state air quality implementation plans

NIVOLA, *LAWS OF THE LANDSCAPE* (1999).

49. See generally ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000); JANE HOLTZ KAY, *ASPHALT NATION: HOW THE AUTOMOBILE TOOK OVER AMERICA, AND HOW WE CAN TAKE IT BACK* (1997); JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993); TONY HISS, *THE EXPERIENCE OF PLACE* (1990).

50. Coordinated regional planning could channel growth into more compact transit and pedestrian-supportive forms, thereby maximizing the benefits of transportation infrastructure, especially mass transit.

51. Pub. L. No. 102-240, 105 Stat. 2031 *et seq.* (1991) (codified as amended at 23 U.S.C. § 101 *et seq.*).

for attaining Clean Air Act air quality standards.⁵² The following section outlines the evolution and contours of this legal landscape.

A. Basic Clean Air Act Requirements

Enacted in 1970⁵³ and significantly amended in 1977 and 1990, the CAA⁵⁴ establishes a joint state and federal program for regulating air quality throughout the United States. Under the CAA, EPA must establish NAAQS to protect the public health "within an adequate margin of safety."⁵⁵ The CAA also requires every state to adopt a State Implementation Plan (SIP) that must provide for "implementation, maintenance, and enforcement" of the NAAQS in every air quality control region within a given state.⁵⁶ SIPs must include "enforceable emission limitations and other control measures, means, or techniques . . . as well as schedules and timetables for compliance" to meet the NAAQS, often referred to as "emission budgets."⁵⁷ SIPs are submitted to the EPA for final approval; states are expected to revise the plan if necessary to take account of new revisions of the NAAQS or whenever EPA finds that a SIP is "substantially inadequate to attain" the NAAQS.⁵⁸ EPA may impose a Federal Implementation Plan (FIP) if, after two years, a state fails to submit an adequate SIP.⁵⁹ Since 1977, the emission budgets developed under each state's SIP or FIP serve as pollution caps for the long-range transportation plans and transportation improvement plans required under Title 23 or the Urban Mass Transportation Act⁶⁰ (UMTA) (as amended by ISTEA and TEA-21).

52. See 42 U.S.C. § 7506(c) (2000).

53. Technically, Congress first enacted the Clean Air Act (CAA) in 1955, amending it in 1963, 1967, and 1970. The 1970 amendments dramatically increased the scope and regulatory power of the Act, established the basic structure of the modern statute and introduced a unique regulatory relationship between states and the federal government.

54. 42 U.S.C. §§ 7401-7671q (2000).

55. Most of the references to NAAQS in this Note refer to the primary, or health-based, standards. See 42 U.S.C. § 7409(b)(1988). Public health includes "the health of susceptible individuals as well as healthy adults," a strict standard. S. REP. NO. 91-1196, at 9, 10 (1970); H.R. REP. 95-294, at 50 (1977).

56. 42 U.S.C. § 7410(a)(1) (1999).

57. *Id.* § 7410(a)(2)(A) (1999).

58. *Id.* § 7410(a)(2)(H) (1999).

59. See *id.* § 7410(c)(1) (1999).

60. Urban Mass Transportation Act, Pub. L. No. 88-365, (1964) (codified as amended at 49 U.S.C. § 5303 *et seq.*).

B. Basic Federal Transportation Planning Requirements

Since the early 1960s, metropolitan areas have been required, under both the Federal Aid Highway Act⁶¹ and Urban Mass Transportation Act,⁶² to develop comprehensive regional transportation plans that provide for a "continuing, cooperative and comprehensive" region-wide approach to transportation-infrastructure planning and development.⁶³ The "3-C process" was designed to encourage fragmented metropolitan areas to agree on a regional-focused transportation plan but was never fully realized in its early years because of a lack of coordination between funding decisions and statutory mandates.⁶⁴ In the early 1980s, the substance of the "3-C's" requirement was gutted by the Reagan Administration which was ideologically opposed to the notion of federal control over state and local agency decisionmaking.⁶⁵ In 1991, passage of the ISTEA reinstated and strengthened the original goals of the "3-C" program by requiring that every metropolitan region⁶⁶ designate a Metropolitan Planning Organization (MPO) in order to receive federal transportation funding.⁶⁷

MPOs are required to develop a long-range regional transportation plan (RTP) that specifies the facilities, services,

61. Federal-Aid Highway Act, Pub. L. No. 87-866, § 9(a) (1962) (codified as amended at 23 U.S.C. § 134 *et seq.*).

62. 49 U.S.C. § 5303.

63. 23 U.S.C. § 134(a) (1988).

64. See Robert E. Yuhnke, *The Amendments to Reform Transportation Planning in the Clean Air Act Amendments of 1990*, 5 TUL. ENVTL. L.J. 239, 242 (1991).

65. Telephone interview with Michael Replogle, Senior Attorney, Environmental Defense, Washington D.C. (Apr. 24, 2000).

66. The Census Bureau defines Metropolitan Areas as any county or group of counties with a city of 50,000 or more population, or a Bureau-defined urbanized area of at least 50,000, provided that the component county/counties of the metropolitan statistical area have a total population of at least 100,000. See 49 U.S.C. §§ 5303(c)(1), 134(b).

67. The origins of MPOs began with the 1962 Amendments to the Federal Highway Act, which mandated that by 1965, metro areas create a comprehensive regional transportation planning process or lose funding. See Pub. L. No. 87-866, § 9(a), 76 Stat. 1148 (1962) (codified as amended at 23 U.S.C. § 134 (2000)). The Demonstration Cities (later Model Cities) and Metropolitan Development Act of 1966 required all applications by local government for federal funds to be reviewed by an area-wide planning agency (popularly known as A-95 review). See Pub. L. No. 89-754, Title I, § 104, 80 Stat. 1257 (1966) (codified as amended at 42 U.S.C. § 3304 (2000)). This trend of state and federal intervention into the local planning process has often been referred to as the "Quiet Revolution." It accelerated in the early 1970s with heightened environmental concerns, expanded federal transportation, urban development and housing programs, a proliferation of conflicting local agency decisions, and finally an early concern with suburban sprawl. See ROBERT WRIGHT & MORTON GITELMAN, *LAND USE* 309 (5th ed. 1997).

financing techniques, and management policies that comprise the area's transportation system over a twenty-year period.⁶⁸ In conjunction with the RTP, MPOs must also develop short-range transportation improvement programs (TIPs) that identify specific projects to be carried out over a three-year period.⁶⁹ Projects not included in a RTP or TIP are generally ineligible for federal funding.

*C. Early Federal Attempts to Coordinate Air Quality,
Transportation, and Land Use Planning*

Congress first attempted to link air quality with regional transportation planning under the Federal Aid Highway Act of 1970.⁷⁰ Under regulations promulgated by the DOT, any project or regional plan that prevented or delayed attainment of the NAAQS, or interfered with maintenance standards already attained, was deemed inconsistent with the Act.⁷¹ In practice, these criteria were universally ignored.⁷² DOT never required Metropolitan Planning Organizations to conduct an air quality review of their regional transportation plans.⁷³

Initially, the 1970 CAA applied a top-down approach to coordinating air quality and transportation planning, requiring SIPs to include "land use and transportation controls" if technology-based controls failed to meet the NAAQS on time.⁷⁴ Designed to reduce VMT, the list of transportation control programs (TCPs) permitted under the 1970 CAA included: parking surcharges, gasoline rationing, limited driving days, limitations on the number of parking spaces, and pre-construction review of facilities that stimulated auto use, such as highways, office buildings, and shopping centers.⁷⁵ None of the state or regional transportation agencies shared any responsibility for the development or implementation of any of the TCPs; thus, they often refused to implement them in their

68. See 49 U.S.C. § 5303(f) (2000).

69. See *id.* § 5304(b) (2000).

70. The Act required the Secretary of Transportation, after consultation with the Administrator of the EPA, to assure that highways constructed in the federal-aid system are consistent with SIPs. See Pub. L. No. 91-605, § 136(b), 84 Stat. 1713, 1734 (1970) (codified as amended at 23 U.S.C. § 109(j) (1988)).

71. 23 U.S.C. § 109(i) (1988).

72. See Yuhnke, *supra* note 64, at 242.

73. See *id.*

74. See 42 U.S.C. § 7410(a)(2)(B) (2000).

75. See JOHN DWYER, ENVIRONMENTAL LAW AND POLICY 4-121 (1999) (unpublished manuscript on file with *Ecology Law Quarterly*).

SIPs. In 1974, a D.C. Circuit court decision⁷⁶ forced EPA to issue Federal Implementation Plans for Boston, the D.C. metro area, and several California cities, including a radical fuel-rationing plan for Los Angeles.⁷⁷ EPA's poorly developed proposals sparked a political backlash, provoked in part by the specter of federal control over local community development decisions.⁷⁸

In 1974, Congress responded by enacting legislation forbidding the EPA from requiring "parking surcharges" in any SIP.⁷⁹ Facing continuing hostile opposition from many states and a series of 10th Amendment challenges,⁸⁰ Congress substantially amended the Act in 1977, eliminating land use as a possible component of any mandatory SIP and abolishing EPA's "indirect source" program, which required pre-construction review of facilities that "attracted" cars.⁸¹ Since then, local land use regulation remains the prerogative of state and local governments, with the exception of decisions that affect endangered species.⁸²

D. Conformity Introduced in 1977 as an Alternative to Direct Federal Control

Realizing that it had completely ignored MPOs and local governments, Congress amended the Act in 1977 to ensure that transportation planning at the local level conformed to pollution controls in approved SIPs.⁸³ As an alternative to direct federal intervention, Congress added sanctions and a requirement that RTPs and TIPs conform to SIPs.⁸⁴ To enforce this requirement, the 1977 Amendments prohibited federal agencies from assisting, approving, or supporting any transportation activity

76. See *Natural Resources Defense Council v. EPA*, 475 F.2d 968, 972 (D.C. Cir. 1973) (reversing EPA's decision to give the states an additional two years to submit acceptable TCPs as part of their SIPs).

77. See 38 Fed. Reg. 31,232, 31,237 (1973).

78. See YUHNKE, *supra* note 64, at 243.

79. See 42 U.S.C. § 7410(c)(2)(B) (2000).

80. See, e.g., *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated as moot* 431 U.S. 99 (1977) (upholding some provisions, but not others); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated as moot* 431 U.S. 99 (1977) (construing the Act as not giving EPA the authority to enforce against the states).

81. See 42 U.S.C. § 7410(a)(5) (2000).

82. "The history of land use controls in the United States has primarily been one of delegation of the power to implement plans at that level of government. One major effect of localizing land use controls has been the fostering of parochialism and the avoidance of a rational basis for dealing with regulatory problems." WRIGHT & GITELMAN, *supra* note 67, at 309.

83. See 42 U.S.C. § 7506(c)(2) (2000).

84. See *id.*

that did not conform to an applicable SIP.⁸⁵ Due to a lack of specificity in the statutory language, federal agencies largely ignored the 1977 conformity requirements.⁸⁶

E. *Conformity Is Strengthened in the 1990 Amendments*

In the 1980s, growing congestion and air quality violations in many major U.S. metropolitan areas motivated members of Congress to rethink the 1977 Amendments. In 1990, Congress added five new initiatives aimed at reducing vehicle emissions.⁸⁷ Most notably, Congress strengthened the long-neglected 1977 conformity requirements. Under the 1990 Amendments to the CAA, a transportation activity must “conform” to the SIP’s “purpose of eliminating or reducing the severity and number of violations of the [NAAQS] and achieving expeditious attainment of such standards.”⁸⁸ Proposed activities cannot:

- (i) cause or contribute to any new violation of any standard in any area;
- (ii) increase the frequency or severity of any existing violation of any standard in any area; or
- (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.⁸⁹

After 1990, the heads of federal agencies were given the “affirmative responsibility” of insuring that any federally assisted or approved activity conformed to the applicable SIP.⁹⁰ One of the most significant requirements added under the 1990 amendments is that *quantitative* mobile source emission targets must be incorporated into every RTP and TIP in order to qualify as “conforming.”⁹¹ Congress’ intent in adding quantitative targets is clearly stated in the Conference Report:

The purpose of the new “conformity” requirement is to ensure

85. See 42 U.S.C. § 7506(c)(1) (2000).

86. For example, many metro areas, including Denver, Chicago, Phoenix, and Los Angeles, never completed RTPs that provided for attainment of vehicle-related ozone or carbon monoxide NAAQS. EPA refused to sanction them. See YUHNKE, *supra* note 64, at 245.

87. These included: (1) tighter tailpipe standards for new vehicles; (2) advanced inspection and maintenance programs to detect and correct excessive emitters on the road; (3) conversion of centrally garaged fleet vehicles to low-emitting alternative fuels; (4) express requirements for transportation control measures in severe nonattainment areas; and (5) new linkages between RTPs and the attainment of NAAQS. See generally 42 U.S.C. § 7401 *et seq.* (2000).

88. 42 U.S.C. § 7506(c)(1) (2000).

89. *Id.*

90. *Id.*

91. See 42 U.S.C. § 7506(c)(2)(D) (2000).

that the transportation choices made by [the MPO] and incorporated into the [RTP] required by Title 23 or [UMTA] are consistent with achieving allowable emission targets for each pollutant assigned to mobile sources in the SIP.⁹²

The 1990 amendments added teeth to these quantitative goals by expressly prohibiting any federal agency or MPO from approving, accepting, or funding any RTP, TIP, or project "until a final determination has been made that emissions expected from implementation of [the RTP and TIP] are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable [SIP]."⁹³ A transportation project may only be approved, accepted, or funded by the federal DOT if it "comes from a conforming plan and program."⁹⁴ If the project does *not* come from a conforming RTP or TIP, it may only be treated as conforming if:

it is demonstrated that the projected emissions from such project, when considered together with emissions projected for the conforming [RTPs and TIPs] within the nonattainment area, do not cause such [RTPs or TIPs] to exceed the emission reduction projections and schedules assigned to such [RTPs and TIPs] in the applicable [SIP].⁹⁵

The above conformity provisions only apply to "nonattainment" areas (that is, metro areas that have not met a NAAQS for a regulated pollutant) and to "maintenance" areas (that is, former nonattainment areas that have met the NAAQS).⁹⁶ Attainment deadlines vary depending on the severity of the air quality problem and the type of pollutants involved.⁹⁷

92. *Environmental Defense Fund v. EPA*, 167 F.3d at 644 (quoting 136 CONG. REC. at 36,106 col. 2 (1990)).

93. 42 U.S.C. § 7506(c)(2)(A) (1999).

94. *Id.* § 7506(c)(2)(C)(i).

95. *Id.* § 7506(c)(2)(D).

96. The CAA determines the categories according to the severity of the area's air pollution. For ozone nonattainment areas, the categories are (in order of increasing severity): marginal, moderate, serious, severe, and extreme. See 42 U.S.C. § 7511(a)(1) (1990). For carbon monoxide nonattainment areas, the categories are moderate and serious. See *id.* § 7512(a).

97. See 42 U.S.C. § 7502(a)(2) (2000) (general provision); see also *id.* §§ 7511(a)(1) (ozone), 7512(a)(1) (carbon monoxide). These nonattainment area provisions are extremely detailed in their requirements. For example, a region designated as "serious" nonattainment for ozone must comply with its NAAQS within nine years of the enactment of the 1990 Amendments. The region can obtain up to two one-year extensions if it satisfies certain requirements. See *id.* § 7511(a)(5). A failure to achieve those deadlines results in an automatic classification to the next highest level (as in Atlanta's case, from "serious" to "severe") resulting in the area having to meet the new level's increased requirements. See *id.* § 7511(b)(2)(A). Metropolitan areas classified as "moderate" were required to achieve "attainment" with the NAAQS by 1996. See *id.* § 7511(a)(1). "Serious" violators got a 1999 deadline

The 1990 CAA Amendments also included sanctions against states failing to meet attainment deadlines, including a cutoff of highway funding.⁹⁸ This is precisely the type of sanction that the Atlanta region faced in 1997.

F. ISTEAs Strengthens Conformity and the Power of MPOs

Congress emphasized the need for coordinated planning and conformity with the passage of ISTEAs in 1991 and TEA-21 in 1998. ISTEAs strengthened the relationship between federal transportation funding and environmental protection efforts by directly linking several of its provisions to the conformity requirements in the 1990 CAA Amendments.⁹⁹ In addition, ISTEAs enhanced the power of MPOs,¹⁰⁰ dramatically increased the flexibility of transportation funding, and broadened the scope of the long-range, fiscally constrained regional transportation plan (RTP).¹⁰¹ All of these changes reinforce the substantive goals of the 1990 conformity requirements by furthering the integration of transportation and air quality planning goals.

G. EPA's Final 1997 Rule Implementing Conformity

The 1990 amendments authorized EPA to promulgate regulations for determining conformity of RTPs and TIPs.¹⁰² EPA first issued criteria and procedures for making such determinations in 1993¹⁰³ and amended them in a series of rulemakings in 1995.¹⁰⁴ The 1995 regulations added greater flexibility to avoid "retroactive" implementation of the (relatively)

and "severe" areas were given until 2005 or 2007. "Extreme" violators—in this case only Los Angeles—have until 2010 to attain the NAAQS. *See id.* § 7511(a)(1).

98. *See* 42 U.S.C. § 7509(b)(1) (2000).

99. ISTEAs directly reinforces Section 7506(c) of the CAA by requiring RTPs and TIPs to be consistent with the applicable SIP for each pollutant, and include transportation control measures that support mass transit and/or reduce vehicle usage. *See* 23 U.S.C. §§ 109(j), 134(g)(3) (2000).

100. Under previous federal transportation funding laws, state departments of transportation generally made funding and programming decisions. ISTEAs transferred control over most transportation funding to regionally focused MPOs. State DOTs have resisted this transfer of power and many still exercise de facto control of federal funding by threatening to withhold matching state funding. *See id.* § 134(b).

101. Under ISTEAs, mandated plans must cover sixteen planning "factors," including transit service, land use, and intermodal connections. These "factors" have been consolidated into seven broad "areas" under the 1998 reauthorization of ISTEAs, the Transportation Efficiency Act for the 21st Century (TEA-21). *See id.* § 134(f).

102. *See* 42 U.S.C. § 7506(c)(4)(B)(ii) (2000).

103. *See* 58 Fed. Reg. 62,188 (1993).

104. *See* 60 Fed. Reg. 40,098 (1995); 60 Fed. Reg. 57,179 (1995).

new requirements on transportation projects that had satisfied pre-existing requirements. Beginning with the 1993 conformity rules, individual road projects were "grandfathered" once they had received National Environmental Policy Act (NEPA) approval. The 1995 "grandfather" rule was challenged by a coalition of environmental groups, including EDF, but the D.C. Circuit deferred to EPA's interpretation.¹⁰⁵ The court's decision turned entirely on EPA's argument that the "grandfathering" regulations were only intended to smooth the transition into the new regulatory scheme, not subvert the substantive goals of the CAA. Then, in 1997, EPA issued a final set of amendments to its 1995 conformity regulations, codified at 40 C.F.R. Sections 93.100-93.128 (2000). EDF brought suit, and this time the court rejected the Agency's efforts to again accommodate uncooperative MPOs with a liberal reading of the conformity clause. The following section summarizes the court's decision.

III

SUMMARY OF THE DECISION: *EDF V. EPA*

In a 2-1 split the D.C. Circuit agreed with the petitioner, Environmental Defense Fund, that EPA's 1997 Final Rule regarding procedures and criteria for determining conformity of individual transportation projects violated the conformity requirements of the 1990 amendments to the CAA. Writing for the court, Judge Tatel agreed that Sections 93.121(a)(1) and 93.102(c)(1) of the Final Rule unlawfully permitted local and federal authorities to approve transportation projects in the absence of a currently conforming RTP and TIP, and that Sections 93.118(e)(1), 93.120(a)(2), and 93.124(b) unlawfully permitted conformity determinations to be based on emissions budgets in SIPs that EPA had not yet considered. Judge Williams filed a dissenting opinion.

Applying *Chevron's* two-step inquiry,¹⁰⁶ Judge Tatel determined that Congress had provided clear policy guidance on each of the challenged regulations and that EPA had ignored, misinterpreted, or evaded the intent of Congress. Because the statute was not "silent or ambiguous," the court did not apply

105. See *Environmental Defense Fund v. EPA*, 82 F.3d 451, 456 (D.C. Cir. 1996) (upholding various regulations as reasonable interpretations of the statute). *But see* *Sierra Club v. EPA*, 129 F.3d 137 (D.C. Cir. 1997) (rejecting a different set of provisions in the 1995 rule that allowed a twelve-month grace period for new nonattainment areas to comply with conformity).

106. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

the second step of the *Chevron* test to determine whether EPA's construction of the statute was reasonable.

A. EPA's Local and Federal "Grandfathering" Regulations

The court struck two separate "grandfathering" provisions: a more liberal regulation for "regionally significant"¹⁰⁷ projects funded *entirely* by local and state sources¹⁰⁸ (but administered by a federally funded MPO and included in a RTP) and a slightly less flexible rule for federally financed projects.¹⁰⁹ Section 93.121(a)(1) allowed MPOs to adopt or approve a locally funded, regionally significant transportation project if it "was included in the first three years of the most recently conforming RTP and TIP (or the conformity determination's regional emissions analyses), *even if conformity status is currently lapsed.*"¹¹⁰ Conformity "lapses" when more than three years pass without a new conformity determination by an MPO or DOT.¹¹¹ Under EPA's regulations, local officials were able to approve locally funded transportation projects as long as they had *once* appeared in a conforming RTP or TIP, even if at the time of final funding approval the RTP was no longer in conformity with the applicable SIP.¹¹²

The court's analysis hinges on its plain language

107. Predictably, the definition of "regionally significant" has become the focus of an intense political struggle between environmentalists and the road building industry. In the Atlanta region, a "regionally significant" project is a road project that adds at least one-mile lane to an arterial. In other EPA regions the standard is much broader, allowing many more state and locally funded projects to get built without triggering a conformity determination. Telephone interview with Bryan Hagar, Sierra Club, Georgia Chapter, Atlanta, GA (Aug. 3, 2000). A regionally significant project

means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.

40 C.F.R. § 93.101 (2000).

108. See 40 C.F.R. § 93.121(a)(1) (2000).

109. See *id.* § 93.102(c)(1).

110. *Id.* § 93.121(a)(1) (emphasis added).

111. See 42 U.S.C. § 7506(c)(4) (1999).

112. States must "provide for the revision of [SIPs, and by extension RTPs] . . . as may be necessary to take account of revisions of [NAAQS]," or "whenever the Administrator finds . . . that the [SIP or RTP] is substantially inadequate to attain the [NAAQS]." 42 U.S.C. § 7410(a)(2)(H) (1999).

interpretation of Section 7506(c)(2)(C)(i), which states that a project may only “conform” with an applicable SIP if it “comes from a conforming plan and program,” or, in the alternate, if its projected emissions, “when considered together with emissions projected for the conforming [RTPs and TIPs] within the nonattainment area, will not cause such [RTPs and TIPs] to exceed the emission reduction projections and schedules assigned to [them] in the applicable [SIP].”¹¹³ The court rejected EPA’s assertion that the requirement that a project “come from a conforming plan and program” was ambiguous.¹¹⁴ EPA argued that its interpretation—that projects could be approved *during a conformity lapse*, as long as they came from the first three years of a *once-conforming* RTP and TIP—was reasonable given the supposed ambiguity of the statute.¹¹⁵ Judge Tatel dismissed this assertion using *Chevron’s* first prong: “Giving these words their ordinary meaning, we interpret the phrase . . . — a phrase entirely in the present tense—to refer to projects that come from a *currently* conforming plan and program.”¹¹⁶

The court also emphasized that Section 7506(c)(2)(D) of the CAA already provided an alternative means of demonstrating project conformity in the event that a project did not “come from a conforming plan and program.”¹¹⁷ Accordingly, it would be “quite odd to read the word ‘conforming’ in section 7506(c)(2)(C) to mean something different from what it means in section 7506(c)(2)(D).”¹¹⁸ According to the Clean Air Conference Report, a project may only attain conformity status under Section 7506(c)(2)(D) if the RTP and TIP “are in conformity *at the time the project is reviewed*”¹¹⁹ for final funding approval. The court also noted EPA’s own admission—from the 1996 notice of proposed rulemaking—that projects considered under Section 7506(c)(2)(D) “cannot apply during a transportation lapse, because [the language] requires a demonstration that ‘conforming [RTPs] and TIPs’ would *still* conform.”¹²⁰

More importantly, the court noted that reading the wording “conforming” in the past tense would provide no assurance that

113. 42 U.S.C. § 7506(c)(2)(D) (1999).

114. *Environmental Defense Fund v. EPA*, 167 F.3d at 648.

115. *See id.*

116. *Id.* at 646.

117. *Id.* at 648.

118. *Id.*

119. *Id.* at 646 (emphasis added) (quoting CLEAN AIR CONFERENCE REPORT, 136 CONG. REC. 36, 108(1990)).

120. *Id.* at 646 (emphasis added) (quoting 61 Fed. Reg. 36,112, 36,120 (1996)).

any project approved would help eliminate, reduce, or prevent violations of NAAQS as required by Section 7506(c)(1).¹²¹ According to that provision, a “conforming” project, by definition, must contribute to “eliminating or reducing the severity and number of violations” of the NAAQS, achieve “expeditious attainment of such standards,” and not “(i) cause or contribute to any new violation of any standard . . . (ii) increase the frequency or severity of any existing violation . . . or (iii) delay timely attainment of any standard”¹²² EPA’s loose interpretation of “conforming” would therefore “eviscerate” the purpose and effectiveness of the conformity requirement.

Judge Tatel concluded by reviewing the legislative history of the 1990 conformity requirements, emphasizing that EPA’s interpretation would contradict Congress’ explicit desire to integrate transportation planning at the local and regional level with attainment of NAAQS at the state level.¹²³ The judge pointed out that “the language and history of the statute’s conformity requirements show that Congress intended transportation planning and air quality management to proceed in lock step.”¹²⁴ The court accurately noted that EPA’s grandfathering regulations “would invite local decisionmakers to approve transportation projects while deferring development of pollution control strategies during conformity lapses, thereby subverting Congress’ intent that the two processes . . . occur simultaneously.”¹²⁵

The court’s rejection of EPA’s grandfather rule for federally funded projects¹²⁶ proved the most controversial because it affected the largest source of transportation funding for most metropolitan regions.¹²⁷ The rule allowed projects that had completed the NEPA process and a conformity determination to proceed

toward implementation without further conformity

121. *Id.* at 646-47.

122. 42 U.S.C. § 7506(c)(1)(B) (1999).

123. *See Environmental Defense Fund v. EPA*, 167 F.3d at 649.

124. *Id.*

125. *Id.* at 648.

126. *See* 40 C.F.R. § 93.102(c)(1) (2000) (exempting projects that had completed the NEPA process and a conformity determination by DOT).

127. For example, ARC’s Jan. 2000 Draft RTP includes approximately \$37 billion in projects through 2025. The majority of funds come from federal sources (\$15.9 billion) followed by other sources such as tolls, fares, and sales taxes (\$14 billion). Local governments are projected to provide \$3.7 billion, while the State is projected to provide \$2.5 billion. ATLANTA REGIONAL COMMISSION, 2025 REGIONAL TRANSPORTATION PLAN 5-6 (Draft-Jan. 2000).

determinations unless more than three years have elapsed since the most recent major step (. . . start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans . . .) occurred.¹²⁸

The court struck down this provision under *Chevron's* first prong because, like the rule for locally funded projects, it allowed previously approved transportation projects to receive federal funding in the absence of a currently conforming RTP and TIP. The court agreed with EDF that this rule directly conflicted with Congress' clear intent in adding the 1990 conformity requirements, referring to its previous discussion of the local grandfather rule.¹²⁹ Judge Tatel rightly concluded that EPA's current grandfathering provision directly violates the Act's *express* provision prohibiting DOT from "approving, accepting or funding" federally funded¹³⁰ projects unless they "come from a [currently] conforming plan or program."¹³¹

B. The "Conformity Under an Unapproved Plan" Provisions

The court went on to strike down Sections 93.118(e)(1), 120(a)(2), and 124(b), which allowed RTP and TIP conformity to be based on motor vehicle emissions budgets in SIP revisions that a state had submitted to EPA but that EPA had not yet considered.¹³² More specifically, Section 93.120(a)(2) allowed MPOs to base conformity determinations for RTPs and TIPs on emission budgets from a disapproved SIP revision within 120 days following the rejection of the SIP.¹³³ Sections 93.118(e)(1) and 124(b) also permitted conformity determinations for RTPs and TIPs on emission budgets from a yet-to-be-approved SIP revision.¹³⁴

128. 40 C.F.R. § 93.102(c)(1) (2000) (emphasis added).

129. The court employed a hypothetical to prove its point: suppose an urban beltway project that had completed the NEPA process was included in a conforming RTP and TIP in 1993. The conformity status of the RTP lapses in 1996. In 1997, the MPO acquires a significant portion of the right-of-way. In 1999, three years after the region fell out of conformity, the MPO seeks funding from DOT to start bulldozing. Under EPA's grandfathering provision, DOT would be able to fund the beltway in the absence of any currently conforming RTP and TIP. See *Environmental Defense Fund v. EPA*, 167 F.3d at 649.

130. Although 42 U.S.C. § 7506(c)(2)(C) prohibits MPO or DOT approval of non-federally funded projects during a RTP and TIP conformity lapse, it nowhere prohibits implementation of locally funded projects as long as their approval occurred prior to the conformity lapse.

131. 42 U.S.C. § 7506(c)(2)(C) (1999).

132. *Environmental Defense Fund v. EPA*, 167 F.3d at 650-51.

133. 40 CFR § 93.120 (2000).

134. *Id.*

Applying the first step of the *Chevron* test, the court again rejected EPA's contention that the statute was silent as to how conformity should be determined when no approved SIP exists or when the approved SIP contains no adequate motor vehicle emission budget.¹³⁵ Judge Tatel pointed out that "[a]lthough the statute nowhere *explicitly* dictates how conformity should be determined under the circumstances EPA describes, any attempt by the agency to fill these gaps must satisfy section 7506(c)(1)(B)'s generally applicable conformity requirements."¹³⁶ Those requirements place an "affirmative responsibility" on federal agencies and MPOs to assure that RTPs and TIPs conforming to such unapproved or disapproved budgets will not "(i) cause or contribute to any new violation of any standard . . . (ii) increase the frequency or severity of any existing violation . . . or (iii) delay timely attainment of any standard."¹³⁷ The court noted that very little in EPA's regulations required MPOs or federal agencies to actually fulfill their affirmative and substantive responsibilities under the Act.¹³⁸ In fact, the regulations allowed MPOs or federal agencies to satisfy their *affirmative* responsibility with a "statement indicating mere ignorance of non-conformity."¹³⁹ Under the challenged regulations, MPOs could merely state that they "are not aware of any information" that emissions from the new motor vehicle emissions budgets in the unapproved or disapproved SIPs would violate Section 7506(c)(1)(B)'s generally applicable conformity requirements.¹⁴⁰ The court rightly remanded Sections 93.118(e)(1) and 120(a)(2) for further rulemaking to harmonize them with Section 7506(c)(1)(B)'s conformity requirements.¹⁴¹

The court struck down Section 93.124(b) completely because it permitted a SIP revision that allowed additional emissions not yet approved by the EPA to be used as the basis for conformity determination by a MPO.¹⁴² Noting that even EPA had stated that it did not believe that allowing a submitted but unapproved SIP to supersede a previously approved SIP was legal,¹⁴³ the court determined that EPA's exception was contrary to the substantive

135. *Environmental Defense Fund v. EPA*, 167 F.3d at 649-50.

136. *Id.* at 650 (emphasis added).

137. *Id.*

138. *See id.*

139. *Id.* at 651.

140. *Id.* at 650.

141. *See id.* at 651.

142. *See id.*

143. *See* 62 Fed. Reg. 43,783 (1997) (to be codified at 40 C.F.R. §§ 51, 93).

goals of the CAA.¹⁴⁴ The Act requires that all conformity determinations be based on a SIP “approved or promulgated under section 7410,”¹⁴⁵ not on a SIP that has bypassed the formal rulemaking process. Again, under *Chevron’s* first step, Congress “had spoken directly to the issue” and EPA’s regulations violated the plain language.

C. Judge William’s Dissent

Judge Williams’ dissent was based on the assertion that the phrase “comes from a conforming plan” is ambiguous and therefore open to reasonable interpretation by EPA.¹⁴⁶ The judge argued that “comes from X” can mean “has its origin in X” by recounting how “a Belfastter who 10 years from now says he ‘comes from a bleeding land’ will be understood— no matter how effective the recent peace accord.”¹⁴⁷

Unfortunately, Judge Williams’ preoccupation with semantic games distracted him from the clear, substantive objective of the 1990 amendments— that “transportation planning proceed in lockstep” with air quality goals.¹⁴⁸ After finding that all of the applicable language in the statute was sufficiently ambiguous, Judge Williams applied *Chevron’s* second prong and determined that all of EPA’s interpretations were reasonable, especially given “the Act’s overall purpose to promote a cooperative regime of integrated planning.”¹⁴⁹ Ironically, Judge Williams’ interpretation of the Act would have actually undermined the only real incentive (budgetary restrictions) for state DOTs and MPOs to truly “cooperate” with federal air quality goals.

Judge Williams’ opinion seems to have been motivated by an ideological hostility towards the substantive goals of the 1990 CAA conformity requirements,¹⁵⁰ namely an aversion to federal regulation of “local” affairs:

Of course when a congressional effort to micromanage local transportation planning in as much detail as this statute is

144. See *Environmental Defense Fund v. EPA*, 167 F.3d at 651.

145. 42 U.S.C. § 7506(c)(1) (1999).

146. *Environmental Defense Fund v. EPA*, 167 F.3d at 652.

147. *Id.*

148. *Id.* at 649.

149. *Id.* at 655.

150. Several law professors have studied the unfortunate political nature of the D.C. Circuit Court’s environmental law rulings. Ricki Revesz of the New York University School of Law recently conducted a statistical analysis of approximately 250 cases decided by the court between 1970 and 1994 and found that “[i]deology significantly influences judicial decision-making on the court (D.C. Circuit).” Richard Lazarus, *DC Circuit Gives Back with Different Hands*, ENVTL. F., Sept.-Oct. 1999, at 8.

followed by a judicial decision that the agency must put the states and localities in an even tighter straightjacket, one may feel that Congress asked for it. But one cannot say the same for the hapless citizens who must live with the results.¹⁵¹

IV

ANALYSIS AND POLICY IMPLICATIONS

The CAA Amendments of 1990 were designed to remedy the failures of the 1970 and 1977 versions of the CAA in order to achieve effective coordination between regional transportation planning and the attainment of air quality standards. The D.C. Circuit's opinion in *EDF v. EPA* is based on a reasonable interpretation of the plain language of the 1990 conformity provisions, supplemented by a thorough understanding and explanation of the history and intent of the CAA and the 1990 amendments. The court properly applied the two-step *Chevron* test and invalidated a series of EPA regulations that would have seriously undermined the financial incentive for MPOs to truly coordinate transportation planning and air quality goals.¹⁵²

In recent Congressional testimony, a top-level EPA administrator acknowledged that the court's interpretation had resulted in a better regulation:

We [the EPA] did not appeal the court's decision because we've developed a workable approach with DOT and the Department of Justice that minimizes the impact to areas as they implement the court's decision, and that is legally defensible. In addition, we believe that the court's decision is more protective of public health than our initial regulation.¹⁵³

The guidance that EPA developed with DOT in response to the court's decision only allows a project to be grandfathered if DOT makes a formal commitment to fund it (i.e., authorizes it for construction) when a conforming RTP and TIP exists.¹⁵⁴ The step authorizing construction comes after NEPA approval. Under the

151. *Environmental Defense Fund v. EPA*, 167 F.3d at 652.

152. See Alan L. Mitchell, *Transportation Planning and the Clean Air Act*, 25 ENVTL. L. 927, 943 (1995). The court's reasoning comports with past decisions regarding transportation conformity. A 1995 survey of circuit court decisions found that courts only grant EPA flexibility in implementing CAA provisions to the extent that such flexibility does not delay or prevent attainment of the CAA's substantive goals.

153. *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 14, 1999) (statement of Robert Perciasepe, Assistant Administrator for Office of Air and Radiation, U.S. EPA, available in 1999 WL 499260 (F.D.C.H.)).

154. See *id.*

new guidance, there is still a point where a project becomes "safe" from future conformity problems but only at a stage far enough along in the process to insure that MPOs and DOTs do not use early project approvals to get around the clean air requirements. By setting the grandfathering threshold at the point of final funding approval, the court's decision (implemented through the new guidance) eliminates the incentive to pre-approve projects at early design phases that are often years away from construction.¹⁵⁵

A. *Immediate Fiscal and Political Impacts of the Decision*

The court's decision and the ensuing changes in EPA's grandfathering provisions only affected those areas that could not demonstrate conformity. At the time of the court's decision, ten metro areas faced restrictions.¹⁵⁶ The court's remand of the rules allowing conformity determinations to be based on unapproved or disapproved SIPs had a much smaller impact, only affecting two metropolitan areas at the time of the decision.¹⁵⁷

Nevertheless, soon after the March decision, the Federal Highway Administration (FHWA) estimated that approximately 158 road projects around the country valued at about \$1.96 billion might not be approved for federal funding if the MPOs affected by the changes did not bring their long-range transportation and transportation improvement plans into full conformity.¹⁵⁸ The initial fiscal impact of the court's decision may have been exaggerated by state DOTs, however, to invite

155. See *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 14, 1999) (statement of Senator Joseph I. Lieberman, available in 1999 WL 499279 (F.D.C.H.)).

156. Historically, as many as 21 areas have been out of conformity at any given time. Lapses typically last six months or less, with the exception of Atlanta and Houston, where state DOTs have virtually ignored clean air goals (until recently). After the court decision on March 2, 1999, ten areas were in lapse. As of July 12, 1999, EPA estimated that there were seven. See *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 14, 1999) (statement of Kenneth R. Wykle, Administrator, Federal Highway Administration and Gordon J. Linton, Administrator, Federal Transit Administration, available in 1999 WL 499261 (F.D.C.H.)).

157. See *id.*

158. This included approximately 73 projects in the design phase valued at \$242 million and 59 projects undergoing right-of-way acquisition valued at \$289 million. It should also be noted that \$684 million worth of delayed projects were from the Atlanta area. Nevertheless, the FHWA expected all of the affected regions to re-establish conformity determinations by January 2000, with the exception of Atlanta. See *id.*

Congressional intervention to protect their traditional road-building focus and budgeting discretion.¹⁵⁹

B. The Funding Stick Seems to Work, but Some Regions Do Not Like It

MPOs and state governments that have implemented proactive (or even reactive) land use and transportation reforms are generally supportive of the D.C. court's decision.¹⁶⁰ Those regions with conventional, auto-centric, and poorly coordinated approaches to transportation planning generally opposed the court's decision.¹⁶¹ Bruce Katz, Director of the Brookings Institute's Center on Urban and Metropolitan Policy, argues that the Act's conformity provision has been instrumental in forcing communities to rethink conventional sprawl-inducing freeway expansion projects.¹⁶² In fact, a recent EPA survey of 15 nonattainment areas noted many positive changes spurred by the threat of losing federal dollars due to nonconformity.¹⁶³

In 1998, Los Angeles was able to stay in conformity with California's SIP by drafting a RTP that emphasized restructuring its transit system¹⁶⁴ and by encouraging denser, more

159. By late September, the Federal Highway Administration (FHWA) announced that it would suspend funds to Houston because the region's Metropolitan Planning Organization (MPO) had failed to re-certify its regional transportation plan in time to meet Texas' new state-level emission goals. Houston had fallen out of conformity before, but the D.C. Circuit's decision forced the FHWA to halt funding for road projects that had not already received final approval for construction. See Dan Feldstein, *Clean-air Snarl Delays Federal Funds for Roads*, HOUSTON CHRON., Sept. 11, 1999, at A1. By October, the Texas DOT had announced that 160 road expansion projects worth approximately \$4.4 billion could be suspended during 2000 due to the court's ruling. See Christopher Anderson, *Clean-air Rules Imperil Projects*, SAN ANTONIO EXPRESS-NEWS, Oct. 2, 1999, at B1.

160. See generally *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 14, 1999).

161. See *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 14, 1999) (statement of Jack L. Stephens, Exec. V-P for Customer Development, MARTA, and statement of Jacob Snow, General Manager of the Regional Transportation Commission of Clark County, Nevada).

162. See Mark Murray, *A Bumpy Ride for New Highways*, 31 NAT'L J. 1898 (1999).

163. David Goldberg, *supra* note 11, at 20 (Meg Patulski, an EPA air-quality specialist who helped write the regulations enforcing the conformity requirements in the 1990 CAA Amendments, surveyed 15 nonattaining regions in 1998).

164. The new RTP for Southern California includes proposals for a "smart" shuttle service that would respond to signals from a customer call-in box, truck toll roads, a privately funded, high-speed magnetic levitation train connecting airports, and toll roads that would be free for multi-occupant vehicles. SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS (SCAG), COMMUNITY LINK21, 1998 REGIONAL TRANSPORTATION PLAN (adopted Apr. 16, 1998) at I.16-I.40.

pedestrian-friendly land use patterns around key business centers and transit nodes.¹⁶⁵ In Denver, a conformity lapse that stopped road projects during an 18-month period in 1995-96 prompted local and state transportation officials to shift money from highway projects to a new light rail system.¹⁶⁶ In 1997, Charlotte, North Carolina, developed an integrated land use and transportation plan in response to a conformity lapse. The revised plan was overwhelmingly supported by voters, along with \$50 million in new annual funds for transit.¹⁶⁷ These three regional responses to conformity were successful because they all addressed tangible quality-of-life issues, like traffic congestion, in addition to air quality issues.

C. *Conformity Catalyzes Change: Atlanta and the GRTA*

The rise of the GRTA in response to Atlanta's sprawl-induced air quality and transportation crisis is beyond doubt the best example of "innovation through enforcement of conformity." The Atlanta case study is especially relevant on the national level because so many large metro regions are facing similar sprawl-induced air quality and transportation problems.¹⁶⁸

The Georgia General Assembly created GRTA in April 1999 at the urging of newly elected Governor Roy E. Barnes to combat air pollution, traffic congestion, and sprawling development in the metro Atlanta area. According to Jim Chapman, director of Georgians for Transportation Alternatives, "[a]ir quality has forced the regional planning process."¹⁶⁹ The key lesson from Atlanta, however, is that enforcing conformity *only* served as a catalyst—it did not dictate the final outcome.

Atlanta could have pursued a less ambitious plan, focusing primarily on cleaner fuels, cleaner engines, and strict emission-control systems to meet its 2003 NAAQS deadline.¹⁷⁰ It might

165. *Id.* at I.9-I.12, I.16-I.19 (despite the glowing rhetoric in the report in support of compact, pedestrian-friendly communities, however, the RTP leaves the implementation of "smart growth" land use planning entirely to local jurisdictions—a predictable outcome given that local governments have traditionally exercised exclusive control over municipal land use).

166. See generally Goldberg, *supra* note 11.

167. See *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 15, 1999) (statement of Robert Perciasepe, Assistant Administrator for Office of Air and Radiation, U.S. EPA, available in 1999 WL 499260 (F.D.C.H.))

168. For example, Denver, CO, Houston, TX, Phoenix, AZ, and St. Louis, MI.

169. Alan Ehrenhalt, *The Czar of Gridlock*, GOVERNING MAG., May, 1999, at 20.

170. EPA granted Atlanta an attainment extension from 1999 to 2003. In March 2000 the Georgia legislature approved a bill that would mandate annual vehicle

have tinkered with a few modest land use changes and institutional consolidations. In short, nothing as radical as the GRTA was required to meet conformity.¹⁷¹ In short, strict enforcement of conformity *alone* did not trigger Atlanta's experiment in regional government. Growing traffic congestion, a declining quality of life, and the perception of a deteriorating business climate were equally responsible for the birth of GRTA.

1. Atlanta's Explosive Sprawl

Like most American cities since 1945,¹⁷² most of the metropolitan population and employment growth in Atlanta has been in low-density suburbs where zoning keeps housing separated from jobs and shopping. Between 1990 and 1997, the urban land area of metro Atlanta expanded by 50 percent while the population only grew by 13 percent.¹⁷³ By the 1990s, metro Atlanta was believed to be growing by 50 acres a day, more land than any metropolitan region in history.¹⁷⁴ This land use pattern has dramatically increased the length of trips and undermined the effectiveness of traditional transit services in providing mobility.¹⁷⁵

The combination of more and longer trips has increased VMT in the region to the point where Atlantans "drive the equivalent of a journey to the sun each day (more than 100 million

inspection programs to help meet the region's NAAQS goals. ARC is relying on annual inspections to meet its NAAQS deadline. See Kelly Simmons, *Effort To Get Road Funds Driving Emissions Bill; State Working To Reclaim Federal Highway Monies Stymied By Clean Air Act*, ATLANTA J. & CONST., Mar. 19, 2000, at 4D.

171. Admittedly, the long-term effects of continued sprawl would likely cause Atlanta to fall out of conformity again, but short-term approaches would have been much easier from a political standpoint.

172. Although this fact might seem self-evident to many informed observers of American urbanism, for an excellent summary of the development of the auto-oriented suburb since 1945, see generally JANE HOLTZ KAY, *ASPHALT NATION* 221-45 (1997); see also PETER HALL, *CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN IN THE TWENTIETH CENTURY* 290-318 (1996).

173. See Brain Trelstad, *The Georgia Regional Transportation Authority: A Case Study of an Innovative Regional Planning Institution*, BERKELEY J. PLANNING, Spring 2000 (forthcoming) (manuscript at 5, on file with author).

174. See *Growing a New Atlanta: Taxpayers in the Atlanta suburbs are tapped for hundreds of millions of dollars a year to subsidize development that lowers their property value, pollutes the air and clogs their streets and highways*, ATLANTA J. & CONST. (Constitution Edition), June 10, 1997, at 26A (In the Atlanta area's 10 inner counties, 500 acres of green forest or farmland are sacrificed every week to parking lots, strip shopping centers, subdivisions, and office parks).

175. See *Growing a New Atlanta: Through laws that separate work, play, school and store, modern Atlanta has condemned its residents to more time behind the wheel, more traffic congestion and more frustration with the pace of daily life*, ATLANTA J. & CONST. (Constitution Edition), June 12, 1997, at 20A.

miles).¹⁷⁶ Today metro Atlantans average over 34 miles driven per person daily, the highest average in the nation.¹⁷⁷ Despite efforts to keep up by increasing road capacity at an annual rate faster than any other metro region in the United States,¹⁷⁸ the increase in VMT has overwhelmed capacity, and traffic congestion has continued to increase. From 1982-94, lane miles increased 6.8 percent annually, while VMT increased at the even greater rate of 8.2 percent, leading to greater congestion across the region.¹⁷⁹ Today, Atlanta has the second worst congestion problem of any southern city (Miami is still worse).¹⁸⁰

As the congestion and air quality worsened in the late 1990s, the region's quality of life evaluations began to decline along with its real estate ratings.¹⁸¹ Negative media attention also contributed to Atlanta's growing public image troubles.¹⁸² In a 1997 poll of Atlanta corporations, 43 percent viewed traffic as the greatest impediment to business.¹⁸³ Companies such as Hewlett-Packard were reconsidering plans to expand in the region.

Local business leaders, sensing political gridlock was part of the problem, decided to act. In late 1997, the Metro Atlanta Chamber of Commerce (the Chamber) announced that fighting gridlock, sprawl, and regional air quality was its number one priority.¹⁸⁴ Soon after, the Chamber commissioned the consulting firm of McKinsey and Company to prepare a comprehensive analysis of Atlanta's planning problems and to recommend a solution, called the Metropolitan Transportation Policy Initiative (MATI). MATI, in turn, proved instrumental in getting government to act.¹⁸⁵ The unprecedented attention from Atlanta's business community, combined with the fact that newly elected

176. METRO ATLANTA CHAMBER OF COMMERCE, *supra* note 37, at 4.

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*; *see also* Trelstad, *supra* note 173, at 7 (A Texas Transportation Institute study cited in the MATI report shows that traffic congestion costs the Atlanta region an estimated \$1.5 billion annually in lost time and wasted fuel).

181. *See* LEND LEASE REAL ESTATE INVESTMENTS & PRICE WATERHOUSE COOPERS, EMERGING TRENDS IN REAL ESTATE 28 (1999); *see also*, Ehrenhalt, *supra* note 169, at 22.

182. In 1998, *The Atlanta Journal and Constitution* ran a banner headline "SMOGLANTA" on the front page (1A) of its May 17, 1998, edition. *The Philadelphia Inquirer* proclaimed that "Atlanta's Lures Are Becoming One Big Liability," on its front page (Apr. 16, 1998, at 1A); *see also* Trelstad, *supra* note 173, at 10.

183. *See* Ehrenhalt, *supra* note 169, at 22.

184. *See id.*

185. For a comprehensive analysis of the entire MATI process, *see* Trelstad, *supra* note 173.

Governor Roy Barnes had campaigned on a smart-growth, anti-congestion platform, set the stage for significant political action.¹⁸⁶ When Senate Bill 57 finally passed the legislature on April 6, Georgia had created an agency with powers well beyond what was originally recommended in the MATI report.¹⁸⁷ GRTA would be a dramatic step anywhere in the country, but it is almost unbelievable in Georgia where property rights and local land use control are so strong that county commissioners “have occasionally been recalled just for advocating zoning.”¹⁸⁸ According to the Executive Director of Georgia’s Association of County Commissioners, “Zoning in a lot of these counties is right up there with communism.”¹⁸⁹

Until GRTA’s passage in April 1999, the Atlanta region— like most other metro regions in the United States— had a passive MPO, the Atlanta Regional Commission (ARC), that lacked both the political will and the legal authority to enforce the type of coordination necessary to achieve regional clean air goals, let alone tackle congestion.¹⁹⁰ Each county within the metro region developed its own transportation plan in consultation with Georgia DOT and sent their individual plans to ARC. ARC compiled the counties’ plans into one giant patchwork RTP.¹⁹¹ It then projected emissions from this “plan” and tinkered with programs like clean fuel and ride sharing to try to meet SIP emission budgets. Changes in infrastructure investment and land use were never on the table.

GRTA changed everything.

2. GRTA’s Institutional Design

Unlike ARC, GRTA was designed to fit comfortably around the regulatory framework of the 1990 conformity requirements. Accordingly, its jurisdiction includes any county wholly or partly within an ozone, carbon monoxide, or particulate matter nonattainment area.¹⁹² GRTA’s unique jurisdictional definition allows it to grow organically to include any new counties— even

186. The MATI report helped convince Governor Roy Barnes that “sprawl can be a pretty good political issue.” As his gubernatorial campaign progressed, he made traffic congestion and his support of a regional super-agency his number one priority. See Ehrenhalt, *supra* note 169, at 23.

187. S. Res. 57, 145th Leg. (Ga. 1999-00) (enacted).

188. See Ehrenhalt, *supra* note 169.

189. *Id.*

190. See Trelstad, *supra* note 173, at 117.

191. See *id.*

192. See GA. CODE ANN. § 50-32-10(a)(2)(A) (1999).

those not contiguous with the original Atlanta metro jurisdiction—that may, in the future, fall out of attainment with the NAAQS.¹⁹³ According to the Georgia EPD, it is likely that Atlanta's initial noncompliance area will soon be expanded to cover another eight counties in the immediate Atlanta region, the Macon, Columbus, and Augusta regions, and even three Georgia counties in the Chattanooga metro area.¹⁹⁴

GRTA is responsible for developing a comprehensive regional land use, transportation, and air quality plan. It has full authority to coordinate and assist MPOs to ensure that current plans support GRTA's broader regional goals, and it is empowered to resolve disputes between the state DOT and regional agencies,¹⁹⁵ approve or disapprove RTPs and TIPs,¹⁹⁶ and set targets for air quality improvements.¹⁹⁷ It has complete control over any state DOT project within its jurisdiction.¹⁹⁸

GRTA's general powers include the ability to plan, acquire, construct, and operate all public transportation systems (mass transit and highways)¹⁹⁹ and air quality control installations²⁰⁰ that fall within its jurisdiction. It may issue guaranteed revenue bonds up to \$1 billion to fulfill any of these responsibilities,²⁰¹ acquire any property "in furtherance of the public purpose of the authority,"²⁰² exercise the power of eminent domain,²⁰³ and compel local governments to pay their fair share to the costs of implementing its plans.²⁰⁴

193. GRTA's authority over the territory of any county continues until twenty years after such county has been redesignated by EPA as in attainment. See GA. CODE ANN. § 50-32-10(c) (1999).

194. See Leon Eplan, *Atlanta Aims Its Options*, PLANNING, Nov. 1999, at 14, 16.

195. See GA. CODE ANN. § 50-32-13(a) (1999).

196. See *id.* §§ 50-32-11(a)(38), 50-32-13(a)-13(b).

197. See *id.* § 50-32-13(c).

198. See *id.* § 50-32-16.

199. See *id.* § 50-32-11(a)(3). This includes the power to contract services or actually take control of any pre-existing service provider in GRTA's jurisdiction.

200. See *id.* § 50-32-11(a)(4).

201. See *id.* § 50-32-30 to 31.

202. *Id.* § 50-32-11(a)(6). This passage leaves open the possibility for joint development around transit stations and other exciting public-private approaches that most regional transit agencies do not have the authority to do.

203. See *id.* § 50-32-11(a)(33).

204. See *id.* § 50-32-30(3).

3. *GRTA's Unique Enforcement Powers*

The most impressive component of GRTA is its unprecedented degree of influence over local land use decisionmaking. The drafters of Senate Bill 57 wanted to ensure that GRTA would be able to implement a truly regional plan; thus, they armed GRTA with powerful fiscal weapons enabling it to encourage (or coerce) local cooperation. GRTA has the power to control or limit access to any state highway, county road, or municipal street system.²⁰⁵ If a local government insists on approving a large suburban development that is contrary to GRTA's regional planning goals, GRTA may simply refuse to provide access to the project. GRTA can also withhold "any state grant of any kind whatsoever except such grants as may be related directly to the physical and mental health, education, and police protection of its residents" if a local government "fails or refuses to plan, coordinate, and implement" regional transportation projects and plans.²⁰⁶ The authority may restore eligibility for funding when GRTA is satisfied that a local government is cooperating.

GRTA also has the authority to review and approve a "development of regional impact" (DRI) if it requires any state or federal funds for transportation services or access to state roads.²⁰⁷ The county commission or city council affected by a negative decision must garner a three-fourths majority to override GRTA.²⁰⁸ GRTA also replaces the long-dormant Governor's Development Council,²⁰⁹ which had extensive oversight over the entire state's economic development policy, including some land use planning components. Full implementation of GRTA's new land use and fiscal powers may collide head on with Georgia's constitutional provision for home rule.²¹⁰ Nevertheless, the Act declares that GRTA's powers are to be "liberally construed" to advance the purposes of coordinated regional planning.²¹¹

205. *See id.* § 50-32-11(a)(33).

206. *Id.* § 50-32-53(a).

207. *Id.* § 50-32-14.

208. *See id.*

209. *See* S. Res. 57 § 5, 145th Leg. (Ga. 1999) (enacted).

210. GA. CONST. of 1976, art. IX, § 2, para. I-III (2000).

211. GA. CODE ANN. § 50-32-70 (1999).

4. *The Ferrari of Regional Government, But No Roadmap Included*²¹²

The greatest challenge facing GRTA will be building an overarching regional vision against which individual projects and plans can be measured. Without an inspiring vision, it will be very difficult for GRTA to build long-term political support for change—a regional consensus around how Atlanta can grow strategically in the next twenty to fifty years. A recent “smart growth” summit at Emory University revealed great discrepancies about the meaning of the term, and even wider differences about how to implement it in the Atlanta area.²¹³ Now that GRTA has the power to make dramatic planning proposals a reality, it remains to be seen how it will use these powers.

Initially, GRTA officials have emphasized the agency’s role as a partner in the transportation planning process and downplayed its land use powers. ARC’s approval of a final three-year TIP and 25-year RTP²¹⁴ in May 2000 forced GRTA’s hand, however. As the three-year TIP and the 25-year RTP neared completion at ARC, U.S. DOT asked for some guarantee that ARC or GRTA would link money earmarked for local governments to counties’ acceptance of mass transit and policies that encourage denser, transit-supportive development.²¹⁵ All ARC jurisdictions with projects in the TIP were asked to submit letters of intent to cooperate by June 1.²¹⁶ But as of June 15, 2000, only four of the 13 metro counties had agreed to coordinate land use: Cherokee, Clayton, DeKalb, and Paulding.²¹⁷

Subsequently, on June 15, 2000, GRTA passed a resolution committing to use its significant power over the transportation-fund purse to require implementation of the land use

212. See Lucy Soto, *A Vision and A Plan Needed, New GRTA Members Believe*, ATLANTA J. & CONST., June 14, 1999, at 4E (compares GRTA to “having a souped up Ferrari but no road map”).

213. See Eplan, *supra* note 194.

214. The new TIP includes \$1.9 billion in transportation improvements throughout 13 metro Atlanta counties, part of a \$36 billion RTP that is supposed to reduce metro Atlanta’s motor vehicle emissions to a level within the NAAQS by 2003. The current RTP plans on accommodating much future growth with extensive transit-oriented development. See *GRTA must make sure plan will clean our air*, ATLANTA J. & CONST., May 2, 2000, at 12A.

215. See Kelly Simmons, *GRTA gets tough with counties*, ATLANTA J. & CONST., June 15, 2000, at 1A.

216. See *id.*

217. See *id.*

components of the plan,²¹⁸ penalizing local jurisdictions that are unwilling to implement the type of higher density, mixed-use, transit-oriented development that will allow federal and state transportation money to be used for maximum regional benefit.²¹⁹

Two weeks prior to GRTA's announcement, a Republican co-sponsor²²⁰ of GRTA's enabling statute actually suggested that linking transportation funding to local land use planning exceeded GRTA's powers despite the agency's clear authority to do so. On May 19, Congressman John Linder (R-Ga.) introduced an amendment to a House transportation bill barring federal officials from requiring state or local governments to alter land

218. The ARC Board, in May 1999, updated its 1997 Regional Development Plan (RDP) to include 14 newly revised policies intended to serve as a guide for future regional growth. The plan was incorporated into the RTP. See ARC. TRANSPORTATION SOLUTIONS FOR A NEW CENTURY: THE 2025 REGIONAL TRANSPORTATION PLAN 3-56, 3-58 (Apr. 2000). The adopted RDP policies are presented in detail in a separate ARC document titled, *A Framework for the Future—ARC's Regional Development Plan* (Oct. 1999). The adopted policies are as follows:

Policy 1 - Encourage new development to be more clustered in portions of the region where such opportunities exist.

Policy 2 - Strengthen and enhance the residential and mixed-use character of the Central Business District and City and Town Centers.

Policy 3 - Strengthen and enhance the residential and mixed-use character of existing and emerging Activity Centers.

Policy 4 - Encourage mixed use redevelopment of corridors where public services are currently available.

Policy 5 - Encourage Transit Oriented Development.

Policy 6 - Support the preservation of stable single-family neighborhoods.

Policy 7 - Encourage focused infill and redevelopment where acceptable to communities.

Policy 8 - Encourage mixed-use development.

Policy 9 - Encourage Traditional Neighborhood Developments.

Policy 10 - Protect environmentally sensitive areas.

Policy 11 - Align local policy and regulation to support these policies.

Policy 12 - Support growth management through local and state institutional arrangements.

Policy 13 - Encourage the utilization of Best Development Practices.

Policy 14 - Create an on-going regional Land Use Coordinating Committee.

219. The Chairwoman of the Cherokee County Commission has already predicted potential political fallout for local politicians as GRTA's transportation and land use mandates mature from theory to reality. "It's going to require a cost in political capital. It remains to be seen if political leaders across this region have the will to do this." See John McCosh, *GRTA Plan Oversteps, Some Say*, ATLANTA J. & CONST., May 3, 2000, at 1B.

220. State Sen. Charlie Tanksley (R-Marietta).

use policies to get federal transportation money.²²¹ Linder said *federal* officials were forcing counties and cities in Atlanta to “build more apartments, put houses closer together, and build rail lines into downtown districts. . . . If they don’t, they’ll take away our highway funds.”²²² Linder added that U.S. DOT’s request was “unacceptable,” and stated that “Washington does not know best how our neighborhoods should look.”²²³ By summer 2000, the GRTA board will begin reviewing large-scale development proposals to ensure that they do not conflict with regional planning goals.²²⁴ These decisions will also demonstrate GRTA’s willingness to affect change in the way metro Atlanta counties and cities make decisions about transportation and growth.

D. Flashback to the 1970 Clean Air Act

GRTA clearly demonstrates that conformity is beginning to challenge traditional notions of state and local power over transportation and land use planning by breaching the “Great Wall”²²⁵ separating transportation planners and air quality agencies. The first assaults on this irrational division began with the 1970 CAA. For example, the Senate Committee on Public Works initially recommended that:

Land use policies must be developed to prevent location of facilities [that] are not compatible with implementation of national standards; [and]

Construction of urban highways and freeways may be required to take second place to rapid and mass transit and other public transportation systems. Central city use of motor vehicles may have to be restricted.²²⁶

Shep Melnick, who has written extensively on the CAA, asserts that the real motivation for inserting land use and transportation controls in the 1970 CAA was to deal with non-air quality problems—suburban sprawl and a lack of well-funded

221. See Kelly Simmons, *Metro gets bill for roads; \$644 million due for transportation plan before feds reopen tap for paving, transit*, ATLANTA J. & CONST., May 20, 2000, at 1A.

222. *Id.*

223. *Id.* Linder later withdrew the amendment, saying that he wanted more time to talk to other lawmakers about it. See *id.*

224. See Kelly Simmons, *GRTA May Put Teeth In Road Plan*, ATLANTA J. & CONST., May 2, 2000, at 1F.

225. An expression used by Robert E. Yuhnke, Senior Attorney at the Environmental Defense Fund, to describe the institutional culture dividing EPA and the DOT. See Yuhnke, *supra* note 64, at 252.

226. S. REP. 91-1196 (1970), reprinted in DWYER, *supra* note 75, at 4-43.

mass transit;²²⁷ GRTA seems to support his theory. Congress failed to implement the Senate Committee's vision through direct federal mandates (in the form of TCPs), but the vision might be realized by conformity-driven innovation instead. Perhaps the spirit of the TCP lives on in the body of conformity, and the language of the 1970 Senate Committee Report survives in TEA-21.²²⁸

Nevertheless, EPA has rarely invoked its authority under the CAA; in the limited cases where EPA has invoked its CAA authority, it has typically done so for prudential, not constitutional reasons. In the past, when EPA did exercise this authority over resistant states, it was almost always successful.²²⁹ Conversely, whenever the EPA has "blinked" it has generally lost ground and clean air standards have slipped.²³⁰

The Agency's decision to enforce or bend the rules has almost always been a political one. Given that the Supreme Court has upheld federal statutes requiring state legislatures to raise the minimum drinking age to twenty-one as a condition for receiving federal highway funding,²³¹ it seems highly unlikely that anyone will attempt to overturn the 1990 conformity provisions on constitutional grounds. There seems to be a general consensus among legal scholars that the Court's current

227. See SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 310-11 (1983).

228. "The Committee realizes that changes or restrictions in transportation systems may impose severe hardship on municipalities and States, and it urges that agencies of the Federal government make available any relevant program assistance to the States and regions to meet these obligations. The highway program, various housing and urban development programs and other sources of assistance should be examined in this connection." S. Rep. 91-1196, *supra* note 226.

229. The California legislature enacted an Inspection and Maintenance (I & M) program soon after the Ninth Circuit upheld EPA's authority to cut off \$850 million in federal highway and sewage treatment funds. See *Pacific Legal Found. v. Costle*, 627 F.2d 917 (9th Cir. 1980). The same year, EPA informed many other states that it would cut federal funds unless they implemented I & M programs in their SIPs. See *Approval and Promulgation of Air Quality Implementation Plans; State of New Mexico, Removal of Federal Assistance Limitations*, 53 Fed. Reg. 26,607, 26,608 (1988) (to be codified at 40 C.F.R. pt. 52) (detailing EPA's use of economic sanctions to compel adoption of an acceptable I & M program).

230. When California refused to enact stricter I & M programs in 1994, EPA backed down and let California adopt a program that did not meet its stated requirements. Other states soon followed suit, and after the November 1994 mid-term elections, EPA was in no position to fight back. See DWYER, *supra* note 75, at 4-118.

231. See *South Dakota v. Dole*, 483 U.S. 203, 206-12 (1987) (upholding a provision in the Surface Transportation Act requiring the Secretary of Transportation to withhold 10 percent of federal highway funds from states that did not adopt a minimum drinking age of 21).

interpretation of the Spending Clause leaves few if any limits on Congress' power to coerce the States.²³² The only restraint on EPA, therefore, is political.

Unlike the court decisions of the early 1970s²³³ that "greatly enhanced the bureaucratic position of . . . politically naïve and technically ignorant attorneys within EPA,"²³⁴ the court's decision in *EDF v. EPA* empowers an agency that is arguably wiser and more politically savvy. Unlike the discredited Transportation Control Programs (TCPs) of yesteryear, EPA's new power over the purse strings puts it in both a constitutionally secure and a (relatively) politically insulated position.²³⁵ Conformity provides EPA with an "independent test" to determine whether federal dollars will flow to any given attainment area. History suggests that indirect influence over local transportation and land use planning via funding decisions at the federal level is preferable to mandating specific measures and penalizing states if they do not comply. One might even argue that this approach parallels the recent trend in encouraging the trading of "emission credits" to reduce point-source air pollution under the 1990 Amendments.²³⁶ In a sense, EPA has applied a "bubble concept" to metropolitan regions. Instead of mandating specific measures, EPA encourages MPOs to experiment within the emission targets set by the SIP.

E. *Is Conformity Encouraging Planning-By-Litigation?*

Some critics have argued that the court's decision will trigger a landslide of litigation, disrupting any gains in integrated planning advanced by the conformity requirements by shutting down whole regions as MPOs scramble to bring their lax plans

232. For an annotated summary of the arguments see DWYER, *supra* note 75, at 4-15.

233. See *Natural Resources Defense Council v. EPA*, 475 F.2d 968 (D.C. Cir. 1973).

234. MELNICK, *supra* note 227, at 302-03.

235. "TCPs displaced the traditional local authority over land use planning, thereby threatening local political power. Worse still, EPA's TCPs often were done ineptly, partly because of the enormous technical difficulties in devising a TCP, and partly because EPA personnel had no experience in land use planning." DWYER, *supra* note 75, § 4, at 122-23.

236. 42 U.S.C. § 7651 *et seq.* (2000).

into conformity under the new ruling.²³⁷ They point to a string of recent lawsuits as evidence.²³⁸

The highway lobby, conservative members of Congress, and many construction unions contend that conformity-based lawsuits like *EDF v. EPA* contradict the intent of the billions of dollars that Congress allocated for highway improvements under ISTEA in 1991 and TEA-21 in 1998.²³⁹ They misconstrue the purpose of that statute, however. ISTEA, now TEA-21, actually encourages linking transportation investment to air quality and land use goals. The drafters of the original ISTEA legislation even flirted with the idea of *mandating* coordinated land use and transportation planning but in the end decided not to cross the line from encouragement to requirement.²⁴⁰ TEA-21 clearly states that:

237. See generally Murray, *supra* note 162, at 1898 (summarizing the arguments of the Senator Bond (R-MO), the road building industry and highway engineers that the D.C. Circuit's holding is counterproductive).

238. In Missouri, the Sierra Club sued the EPA in November 1998, contending that the agency failed to sanction St. Louis even though the city is not meeting its air quality standards. The St. Louis MPO risks losing an estimated \$229 million in federal highway funds. The lawsuit is still pending. See Murray, *supra* note 162, at 1898. In Washington, D.C., a coalition of environmental groups won a conformity suit against the federal transportation department over a proposal to build a \$1.8 billion, 12-lane, two-bridge system to replace the congested Woodrow Wilson Bridge because its emission estimates were based on a smaller proposal. The district court ordered that the transportation improvement program be updated to reflect the true size of the project. See *City of Alexandria v. Slater*, 46 F. Supp.2d 35 (D.D.C. 1999), *rev'd*, 339 U.S. App. D.C. 115 (1999), *cert. denied*, __ S. Ct. __ (Oct. 2, 2000).

239. See Murray, *supra* note 162.

240. Under ISTEA, MPOs had to consider the "likely effect of transportation policy decisions on land use and development and the consistency of transportation plans and programs within the provisions of all applicable short- and long-term land use and development plans," among other factors. See 49 U.S.C. § 5303(b)(4). As of June 9, 1998, TEA-21 (Pub. L. No. 105-178, 112 Stat. 341, 372 (1998)) replaced this language with a "simplified" list of factors for MPOs to consider when developing TIPs and RTPs. A considerable amount of planning nuance was lost as a result. Nevertheless, 49 U.S.C. § 5303 still encourages the inclusion and coordination of regional land use and development within the TIP and RTP process. As discussed earlier, the transportation/land use linkage is especially crucial in areas like Atlanta that fail to meet the NAAQS.

RTPs in serious, severe, or extreme ozone nonattainment areas and in serious carbon monoxide areas must "quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts." 42 C.F.R. § 93.106(a)(i); see also *id.* § 93.122(b)(ii), (iii) (Regional emissions analysis in serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas must, at a minimum, be made using network-based travel models that take into account "[l]and use, population, employment." In addition, "[s]cenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable.")

To the extent practicable, the Secretary of Transportation shall ensure that [federal transportation funds] . . . are used to support balanced and comprehensive transportation planning that considers the relationships among land use and all transportation modes.²⁴¹

Road building advocates also allege that conformity suits are motivated by a radical fringe of environmental groups intent on limiting access to the private automobile.²⁴² Yet the last twenty years demonstrate that the central failure of the CAA has been its inability to slow the rapid growth of single-occupant vehicle use in American cities despite amazing improvements in emission-control technology.²⁴³

F. *The Threat of Legislative Intervention*

With so much money at stake, several Republican members of Congress have threatened to override the court's strict interpretation of conformity. On July 14, 1999, Senator Kit Bond (R-MO) introduced legislation²⁴⁴ to the Senate Environment and Public Works Committee to codify EPA's original "grandfathering" rule into law.²⁴⁵ Representative James Talent (R-MO) has introduced a companion bill in the House.²⁴⁶ In hearings before the Senate Committee, the Clinton Administration refused to

241. 49 U.S.C. § 5303(h) (2000) (emphasis added) (this subsection is entitled "Balanced and comprehensive planning").

242. According to Pete Ruane, president and CEO of the American Road & Transportation Builders Association (ARTBA), "It's trying to force behavior and eliminate our choices as we see fit." Murray, *supra* note 162. Incidentally, ARTBA also filed an *amicus curae* opinion in *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (reviving a contorted version of the non-delegation doctrine to remand new ozone and particulate standards because EPA articulated no "intelligible principle" to channel its delegated legislative powers).

243. "More than 119 million Americans still live in air quality nonattainment areas. While the recent past has been marked with success, future reductions from on-road mobile sources will be more labored. Reductions have become more difficult and much more expensive to achieve as standards have been made more stringent. The dwindling benefits of complete fleet turnover, coupled with the steady growth in vehicle-miles traveled, represent clear challenges for technology." Michael Koontz, *Clean Air and Transportation: The Facts May Surprise You*, PUBLIC ROADS, July 1, 1998, at 42.

244. S. 1053, 106th Cong., 2d Sess. (2000), co-sponsored by Senators John Ashcroft (R-MO); Pat Roberts (R-KS); John Warner (R-VA); Paul Cloverdale (R-GA); Phil Gramm (R-TX); and Jesse Helms (R-NC), among other Republican notables.

245. In his press release, Bond claims that the court's decision is "unacceptable because it delays vitally important projects that are needed in areas across the country—projects that will save lives and reduce congestion." U.S. Senator Kit Bond (R-MO), Congressional Press Release, "Bond Outlines EPA 'Grandfathering' Fix At EPW Hearing" (July 15, 1999).

246. H. R. 1876, 106th Cong., 2d Sess. (2000).

support Senator Bond's bill. Construction unions, the road industry, several metropolitan planning organizations, and a host of conservative Republicans lent their support to the bill. Planners from the Atlanta region have opposed the bill, while MPOs from sprawling Sunbelt boomtowns like Las Vegas have supported the bill.²⁴⁷ The committee approved the bill September 29, 1999, though it was only reported for floor consideration on February 2, 2000.²⁴⁸ Floor action is unlikely unless there is Democratic support.²⁴⁹

In response to the Bond-Talent bills, Senator Max Cleland (D-GA) and Representative John Lewis (D-GA) introduced legislation that would codify the court's ruling but allow regions that face temporary lapses in conformity to move forward with safety and transit projects that reduce VMT—such as building light rail systems and buying buses fueled by natural gas.²⁵⁰ Environmental groups such as the Environmental Defense Fund, the Sierra Club, Georgians for Transportation Alternatives, and Friends of the Earth support the Cleland-Lewis bills.

CONCLUSION

Atlanta's inability to conform its auto-dependent transportation system to its air quality goals and the ensuing public debate over growth in the region has produced a fundamental legal and political shift in state and local government.²⁵¹ In many respects, conformity was a catalyst, but so was generalized frustration with increasing auto congestion and declining quality of life. The Georgia legislature deserves

247. See *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 14, 1999) (statement of Jack L. Stephens, Jr., Exec. V-P for Customer Development, MARTA, and testimony of Jacob Snow, General Manager of the Regional Transportation Commission of Clark County, Nevada).

248. Senate Legislative Calendar, General Orders, Calendar No. 430, 106th Cong., 2d Sess. (2000).

249. The eight minority members of the Senate Environment and Public Works Committee, including the senior Democrat, Montana's Max Baucus, object to parts of the proposed legislation. See *Clean Air: Democrats oppose 'conformity' bill*, ENGINEERING NEWS-RECORD, Feb. 14, 2000, at 11.

250. See Rebecca Carr, *Democrats' New Bill Proposes to Toughen Sanctions For Smog*, ATLANTA J. & CONST. (Home Edition), Feb. 27, 2000, at 10A.

251. "In short, Congress' intent expressed through the Clean Air Act, the federal agencies' willingness to impose sanctions and the federal court's willingness to uphold the law, have significantly changed the dynamics of decision making within the Atlanta region." *Transportation Project Conformity to the Clean Air Act: Hearings on S. 1053 Before the Senate Comm. on Envtl. and Pub. Works*, 106th Cong. (July 14, 1999) (statement of Jack L. Stephens, Jr., Executive VP for Customer Development, Metro Atlanta Rapid Transit Authority, Atlanta, GA).

credit for taking a chance and breaking with tradition. Georgia has finally created an agency with enough power to coordinate land use, transportation, and air quality planning on a regional scale.

Of course, GRTA already has its share of political detractors.²⁵² According to a staff member at the Atlanta Regional Business Council, "local elected officials are wildly nervous. [GRTA] flies in the face of home rule, property rights and an absolute dependence on the single-occupancy vehicle. Until recently, anything that messed with that was dead on arrival."²⁵³

As of this writing, GRTA is facing its first real conformity crisis. On April 28, 2000, a coalition of environmental groups²⁵⁴ filed a federal lawsuit charging that the vehicle emission model used in ARC's proposed RTP and TIP is based on flawed data.²⁵⁵ The lawsuit also charges that EPA acted illegally when it extended Atlanta's 1999 conformity deadline to 2003.²⁵⁶ If a federal judge rules in favor of the coalition, Atlanta's dirty air status could be bumped from its current "serious" category to

252. A recent editorial in *The Atlanta Journal and Constitution* provides an excellent example of anti-GRTA rhetoric:

[The GRTA board has] the power to deny curb cuts in your neighborhood and when they talk in ways that suggest a consensus is developing on dictating land use to local governments or "they" will withhold public money, well, brothers and sisters, this is a serious misallocation of governmental authority.

Everybody's a helping "partner" or a state or federal "they," a giant bogeyman in the attic who frightens the public into doing things that somebody wants. But nobody challenges "them" and there's no public arena where "they" can be challenged, because none is elected.

And yet these are the people who decide my quality of life and how my elected officials are to spend my tax dollars. Brother, the train's headed badly off track.

Jim Wooten, *Untouchables' Agendas Steer GRTA Actions*, ATLANTA J. & CONST., May 7, 2000, at 5C.

253. Ehrenhalt, *supra* note 169, at 20.

254. The Southern Environmental Law Center filed the suit against EPA in U.S. district court on behalf of the Sierra Club, Georgians for Transportation Alternatives, the Southern Organizing Committee for Economic and Social Justice, and the Georgia Coalition for a People's Agenda. The same coalition blocked the approval of the 61 grandfathered road projects in 1998.

255. In March, the DOT expressed concerns about whether the average highway speeds used in the model reflect reality; most of the data are 10 years old. Environmental officials also question whether the assumed mix of vehicle types and ages is inaccurate because it, too, is from 1990, well before the rise of the SUV. See Charles Seabrook, *Metro Air Plan Faces Roadblock*, ATLANTA J. & CONST., Apr. 29, 2000, at 1E.

256. See *id.*

“severe”— placing even greater funding limitations on the Atlanta region.

Perhaps, in the end, GRTA will prove politically unpalatable. But even if Georgia's experiment fails, the experiences of Denver, Los Angeles, and Charlotte lend further support to the argument that conformity, when fully enforced, helps stimulate state, regional, and local innovation. If the federal courts follow the D.C. Circuit's lead in *EDF v. EPA*, other metro regions may, in turn, follow Atlanta's lead. The alternative is more delays, vehicle miles, and dirty air.

