

THE AMENDMENTS TO REFORM TRANSPORTATION PLANNING IN THE CLEAN AIR ACT AMENDMENTS OF 1990

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Since 1970, the Clean Air Act has required states to develop plans for attainment of the National Ambient Air Quality Standards (NAAQS) that would include reductions in emissions from vehicles already on the road.¹ The Act anticipated that, in the fifteen to twenty most polluted cities, emission reductions achieved by the federal tailpipe standards for new vehicles would fall short of achieving the emission reductions needed from all vehicles to comply with the NAAQS for ozone (O₃) and carbon monoxide (CO).² The states were expected to make up the shortfall by controlling emissions from existing vehicles through a combination of inspection and maintenance programs to keep cars as clean as they were designed to be,³ and transportation control measures to reduce the number of miles travelled in nonattainment areas each day.⁴ Yet, the changes in metropolitan transportation systems needed to achieve significant reductions in vehicle emissions, beyond those expected from tighter tailpipe standards, have failed to occur. This is due to the lack of clearly defined requirements, institutional confusion between

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1. 42 U.S.C. § 7410 (1988).

2. See S. REP. NO. 1196, 91st Cong., 2d Sess. 13 (1970), *reprinted in* 1 COMM. ON PUB. WORKS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS, 1970, at 413 (1974).

3. See SENATE CONSIDERATION OF THE REP. OF THE CONF. COMM. (Dec. 18, 1970), *reprinted in* 1 COMM. ON PUB. WORKS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS, 1970, at 132 (1974).

4. See SENATE CONSIDERATION OF THE REP. OF THE CONF. COMM. (Dec. 18, 1970), *reprinted in* 1 COMM. ON PUB. WORKS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS, 1970, at 137, 147-48 (1974); S. REP. NO. 1196, at 2, *reprinted in* 1 COMM. ON PUB. WORKS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS, 1970, at 402 (1974).

state air quality and metropolitan transportation planning agencies, the lack of funding to support transportation alternatives to single-occupant vehicle use, and the lack of any federal response to inaction by the states. The failure to reduce in-use emissions from existing vehicles is the single most important reason why cities failed to attain the national air quality standards for O₃ and CO levels.

The 1990 Amendments to the Clean Air Act,⁵ enacted in the closing days of the 101st Congress,⁶ include reforms designed to remedy the Act's initial failure to significantly affect transportation planning at the metropolitan level. Most importantly, the Amendments reform transportation planning by establishing air quality criteria for the development and approval of metropolitan transportation plans. The Amendments also clarify the transportation requirements for state air quality plans, shift federal highway funding sanctions to encourage federal investment in alternatives that reduce vehicle use, and mandate employer-based transportation programs in some O₃ nonattainment areas to reduce commuting in single-occupant vehicles.

During the last twelve to twenty years, vehicle use in most cities has doubled. The growth of vehicle miles traveled (VMT) is continuing at 3.5 percent to 6 percent per year in most cities. These rates of VMT growth will cause vehicle use to double again in the next twelve to twenty years and will therefore reverse the emission reductions achieved from the replacement of older, dirtier vehicles with newer, cleaner ones. The new tailpipe standards for hydrocarbons, included in the proposed 1990 Clean Air Act Amendments will do little more than offset the emission increases from VMT growth in the next two decades; the new standards for nitrogen oxides (NO_x) will not even keep abreast of emission increases attributable to VMT

5. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C.A. § 7401-7671q (Supp. 1991)).

6. The bill passed the House on October 26, the Senate on October 27, 1990, and was enacted into law by the President on November 15, 1990. The provisions relevant to this article are contained in various sections of 42 U.S.C.A. ch. 85 (Supp. 1991), including the general planning provisions for state implementation plans in amended § 7410; specific provisions for ozone and carbon monoxide nonattainment areas in amended pt. D; new requirements for the conformity of regional transportation plans, programs and projects in amended § 7576(c); modified guidance for the identification and implementation of transportation control measures in amended § 7408(f); revised criteria triggering EPA's obligation to promulgate federal implementation plans under § 7410(c); and the authority to impose sanctions required by amended § 7576(a).

growth.⁷ Thus, healthful air quality in our cities will be achieved only if the noncommercial use of automobiles is dramatically changed.

I. HISTORY OF TRANSPORTATION CONTROLS UNDER THE CLEAN AIR ACT

Metropolitan areas are required by federal transportation law to develop comprehensive regional transportation plans that provide for a "continuing, cooperative, and comprehensive" region-wide approach to transportation-infrastructure planning and development.⁸ This "3-C process" is designed to ensure that metropolitan areas, which are often fragmented into tens or hundreds of local and county governments, agree on a region-wide program to meet transportation needs. Regional plans must be approved by the "metropolitan planning organization" (MPO) before transportation projects can be approved for federal funding.⁹ Projects not included in a regional plan are not eligible for federal funding.¹⁰

During the 1960s, the federal transportation planning requirement stimulated the formation of regional councils in every metropolitan area. In most areas, these regional umbrella agencies provided the only coordinated, region-wide planning to meet the numerous metropolitan needs beyond transportation planning: sewage and industrial waste discharge plans, drainage plans, and balanced housing development. These needs and

7. Tailpipe standards for NO_x for new vehicles will be reduced approximately 50% over the first 10-year life of the vehicle. Assuming that recent vehicle replacement rates continue, about 90% of existing vehicles will be replaced in 12 years, or about 7.6% of the vehicle fleet per year. If these vehicles are 50% cleaner than the replaced vehicle population, total fleet NO_x emissions would decrease about 3.8% per year in the absence of VMT growth. Yet, if VMT in a metropolitan air shed grows faster than 3.8% a year, total NO_x emissions in the air shed will increase. An area with 5% VMT growth will experience emission growth greater than 1% a year during the 12 years when 90% of the fleet is being replaced, and 5% a year after the pre-amendment vehicles have been replaced. Thus, from now to 2010, total tailpipe NO_x emissions in an area with 5% VMT growth would increase almost 25% unless other measures are taken.

The hydrocarbon emission standards will be reduced by about 30-40%. Hydrocarbon emissions from tailpipes should decrease only in areas where VMT growth is less than 3% per year. Thus, overall emissions reductions will not likely occur in most cities and will fall substantially short of the large reductions needed to attain the NAAQS in the most serious, severe, and extreme O₃ nonattainment areas.

8. 23 U.S.C. § 134(a) (1988); 23 C.F.R. pts. 450, 770 (1991).

9. 23 C.F.R. § 770.9.

10. 23 U.S.C. § 105(a).

others transcended the ability of smaller, general purpose governments.

Congress' first effort to link the development of transportation programs with air quality required that highway projects be "consistent" with air quality plans adopted by the states under the Clean Air Act.¹¹ This provision was implemented through regulations promulgated by the Department of Transportation (DOT) in 1974,¹² followed by agency guidance issued jointly by DOT and the Environmental Protection Agency (EPA) in April, 1975. The regulations and guidance required a review of both individual highway projects and regional transportation plans for their impact on ambient air quality. Projects and regional plans were deemed inconsistent with the Act if they prevented or delayed attainment of NAAQS, or interfered with maintenance of standards already attained. In practice, however, these criteria were never rigorously applied. As far as can be determined, DOT never required MPOs to conduct an air quality review of regional transportation plans in accordance with the guidance. Individual highway projects may have been reviewed for "consistency" under the National Environmental Policy Act (NEPA), but no NEPA review included a comprehensive analysis of individual projects as part of a regional transportation system.¹³ As a result, the "consistency" requirement was never implemented to review the impact of region-wide transportation systems, and no requirements were established to hold MPOs or other transportation agencies accountable for the air quality consequences of the transportation choices made for metropolitan areas.

As a practical matter, few states had direct control over transportation planning at the metropolitan level. MPOs, other local bodies, and state highway departments controlled the general course of regional transportation development. State participation was most typically represented, via the planning and development of the interstate system and other regional arterial highways, by state highway or transportation departments.

11. Section 136(b) of the Federal Aid Highway Act, requires the Secretary of Transportation, after consultation with the Administrator of EPA, to assure that highways constructed in the federal-aid system are consistent with the state implementation plans. Pub. L. No. 91-605, § 136(b), 84 Stat. 1713, 1734 (1970) (codified as amended at 23 U.S.C. § 109(j) (1988)).

12. See 23 C.F.R. pt. 770 (first promulgated in 1974).

13. See *Atlanta Coalition v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1345 (5th Cir. 1979).

None of the state or regional transportation agencies shared any responsibility for the development or implementation of the transportation control measures needed to implement air quality standards. Further, a nearly impregnable wall separated the transportation decisionmakers from the state health or environmental agencies, which were typically assigned responsibility for the development of state air quality plans. As a result, virtually none of the state air plans submitted by the initial 1971 statutory deadline for attainment of air quality standards for transportation-related pollutants, contained transportation control measures. By administrative fiat, EPA gave the states an additional two years to submit transportation control plans.¹⁴ EPA's deadline extension was reversed by the D.C. Circuit in 1973; the court ordered EPA to begin promulgating federal plans for states that had not submitted timely transportation control plans.¹⁵

By 1974, EPA had issued plans for Boston, the D.C. metropolitan area, and several California cities, including the infamous fuel-rationing plan it issued for Los Angeles.¹⁶ EPA also issued an indirect source permit regulation requiring the review of large mobile source-dependent facilities, such as shopping malls, stadia, and airports in every nonattainment area nationwide.¹⁷ The EPA initiatives were met by a political backlash against the threat of federal control over local community development. Congress reacted with an immediate funding moratorium that barred EPA implementation of parking and fuel rationing strategies; the states reacted by challenging EPA's transportation control measures in court. A batch of state challenges to federal implementation plans decided in the Ninth, Fourth, and D.C. Circuits during 1975 were accepted for review by the Supreme Court.¹⁸ These cases were ultimately dismissed on the ground that they had been made moot by the 1977 Amendments to the Clean Air Act.¹⁹

14. 37 Fed. Reg. 10,842 (1972).

15. *Natural Resources Defense Council v. EPA*, 475 F.2d 968, 972 (D.C. Cir. 1973).

16. 38 Fed. Reg. 31,232, 31,237 (1973).

17. 40 C.F.R. § 52.22 (1991); 38 Fed. Reg. 29,893, 29,895 (1973) (codified at 40 C.F.R. § 52.22 1991).

18. See, *District of Columbia v. Train*, 521 F.2d 971 (D.D.C. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, *EPA v. Brown*, 431 U.S. 99 (1977).

19. See *EPA v. Brown*, 431 U.S. at 99-104.

The 1977 Amendments significantly restricted the transportation control measures available to EPA in federal implementation plans. Federal programs for indirect source review were barred,²⁰ and federally promulgated parking surcharge regulations were voided upon enactment.²¹ Section 110(c)(4) empowered the states to suspend the provisions of state implementation plans (SIPs), including federally promulgated plans, that rationed gas, required technology retrofits on older vehicles, or reduced the supply of on-street parking, provided the state agreed to adopt a plan revision which implemented the requirements of section 110(a)(2)(I).²² Together, these amendments effectively repealed most of the initiatives undertaken by EPA to limit vehicle use. The political message was clear: if the states failed to adopt transportation controls, federal mandates were not a politically viable remedy.

By the time the 1977 Amendments were under consideration, Congress recognized that metropolitan transportation planning had not responded to the need for effective alternatives to the single-occupant vehicle, an important factor in the failure to achieve the necessary reductions in vehicle use.²³ The obligation to develop SIPs under the 1970 Clean Air Act was imposed exclusively upon the states.²⁴ Local government was given no direct role and was not required to integrate transportation planning with the development of state air quality plans. Limitations on direct federal intervention required other measures to encourage effective state action.

As an alternative to direct federal intervention, Congress added sanctions and a requirement that regional transportation plans conform to state implementation plans, which must conform to the Clean Air Act. The 1977 Amendments empowered EPA to use the power of the federal purse to encourage state adoption of measures needed to control in-use vehicle emis-

20. 42 U.S.C. § 7410(a)(5)(A)(ii).

21. *Id.* § 7410(c)(2)(B).

22. *Id.* § 7410(c)(4), *repealed by* Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2470; *see* H.R. CONF. REP. NO. 564, 95th Cong., 1st Sess. 126-28 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1506-08; S. Rep. No. 127, 95th Cong., 1st Sess., 14-15 (1977), *reprinted in* 3 COMM. ON PUB. WORKS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS, 1977, at 1388-89 (1978); *see also* S. REP. NO. 717, 94th Cong., 2d Sess. 30-32 (1976) (unenacted), *reprinted in* 6 COMM. ON PUB. WORKS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS, 1977, at 4731-33 (1978).

23. 122 CONG. REC. 23,768 (1976); H.R. REP. NO. 294, 95th Cong., 1st Sess. 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1134.

24. 42 U.S.C. § 7410.

sions.²⁵ Section 176(a) directed EPA to cut off "any grants under Title 23" (i.e., highway funding) "in any air quality control region . . . (3) where the Administrator finds . . . that the Governor has not submitted an implementation plan . . . , or that reasonable efforts toward submitting such an implementation plan are not being made" ²⁶

Although the provision proved potent when used, it was rarely employed by EPA. During the Carter Administration, EPA decided to limit the use of highway funding sanctions to cases involving the failure of states to develop inspection and maintenance (I&M) programs for the control of in-use vehicle emissions. The adoption of an I&M program was an express pre-condition for an implementation plan extending the attainment deadline beyond 1982.²⁷ The failure to establish such a program was a clear cut violation of the Act on which the Agency could safely rely for the imposition of sanctions.²⁸ Colorado and California were two of the states that refused to establish I&M programs. After EPA published sanction proposals for both states, the desired effect was achieved: I&M programs were quickly enacted by both state legislatures.

EPA, however, chose not to exercise its sanction authority in other situations. For example, many states, such as Denver, Chicago, Los Angeles, and Phoenix, never completed SIPs that provided for attainment of vehicle-related O₃ or CO ambient air quality standards. In each case, the SIP deficiencies included the failure to adopt transportation control measures to reduce in-use vehicle emissions. The failure to adopt transportation control measures was just as clear cut a violation of the Act as the failure to adopt I&M programs. Section 110(a)(3)(D) required that "any applicable implementation plan for which an attainment date later than December 31, 1982, is provided pursuant to section 172(a)(2) shall be revised . . . to include the comprehensive measures and requirements referred to in subsection (c)(5)(B)." Subsection (c)(5)(B) required that plans

be revised to include comprehensive measures to . . . : (i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as practica-

25. S. REP. NO. 717, at 29, reprinted in 6 COMM. ON PUB. WORKS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS, 1977, at 4730 (1978).

26. 42 U.S.C. § 7506(a) (repealed).

27. *Id.* § 7502(b)(11)(B) (repealed).

28. *Id.* §§ 7410(a)(2)(G) (amended), 7502(b)(11)(B) (amended).

ble; and (ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards.²⁹

Yet, despite the clear statutory mandate to adopt such measures, EPA never exercised its sanction authority to require compliance with this provision. As a result of EPA's limited authority to promulgate federal control measures and the Agency's opposition to any effort to promulgate federal implementation plans, the requirement for transportation control measures in the 1977 Act was only superficially observed by many of the most polluted cities around the United States.

With the 1990 Amendments, Congress is experimenting once again with requirements aimed at promoting the regional transportation policies needed to achieve emission reductions from mobile sources. The 1990 Clean Air Act Amendments include five general initiatives to reduce vehicle emissions: 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) explicit requirements for transportation control measures, and 5) new linkage between regional transportation plans and the attainment of ambient air quality standards.³⁰

II. "CONFORMITY" AMENDMENT

Potentially, the most far-reaching of the 1990 Amendments is the provision linking the design and approval of regional transportation plans developed by MPOs to the emission reductions required for mobile sources. For the first time, Congress has established substantive air quality objectives for transportation plans, and linked federal funding for transportation projects to the adoption of regional transportation plans that "conform" to the emission reduction targets contained in the air quality implementation plan.

The Amendments add extensive new requirements to the existing language of section 176(c), which does not allow federal agencies to fund or approve any "activity" unless it conforms to a state plan under the Act. The most significant addition to the "conformity" requirement is the establishment of quantitative

29. *Id.* § 7410(c)(5)(B).

30. *Id.* § 7410(c)(2)(A) (repealed).

mobile source emission targets for the review and approval of regional transportation plans adopted by metropolitan planning organizations. New section 176(c)(2)(A) adds a test for the conformity of regional transportation plans and transportation improvement programs by requiring that they be "consistent with necessary emissions reductions contained in the applicable implementation plan." The Senate committee report explains that state implementation plans must set a cap on emissions from mobile sources in each nonattainment area and must require regional transportation plans to achieve the levels of vehicle use needed to meet such emission cap.

Even with the cleaner vehicles required by the Amendments, it is expected that this provision would require VMT to be reduced substantially compared to expected levels in 2010.³¹ In Los Angeles, for example, attainment of the O₃ NAAQS will require that VMT increase only twenty-five percent by 2010 to 300 million miles per day (mi/d) compared to the projected sixty-seven percent increase of 390 million mi/d. In Denver, attainment will require VMT, in 2010, to be limited to about 50 million mi/d instead of a projected 60 million mi/d. These estimates do not necessarily require reductions in VMT below current levels, but will require major changes in the pattern of vehicle use in the future. A twenty-five percent increase in VMT in Los Angeles represents a rate of VMT growth slower than the expected increase in population, with per capita VMT dropping from about 20 mi/d today to about 16.6 mi/d by 2010. The Denver target of 50 million mi/d requires cutting the rate of VMT growth by one-third. Such a change in VMT growth would reduce the rate from nearly double population growth, to a rate only thirty percent above population growth.

Achieving such relatively large changes in vehicle use would require a major shift in regional transportation planning away from accommodation of single-occupant vehicles toward providing less polluting personal mobility services. This shift would force planners to focus on a system approach to the design of transportation facilities and programs. This approach would place an emphasis on integrating all alternatives to single-occupant vehicle use: high capacity transit; more efficient regional and local public transportation services; carpool and vanpool programs; safe, off-street right of way for bicycle travel;

31. These levels are based on vehicle emissions and current rates of VMT growth.

and incentive/disincentive programs aimed at increasing average vehicle occupancy.

One of the key provisions of the conformity Amendment is the requirement that regional transportation plans not "delay timely attainment of any standard or any required interim emission reductions or other milestones in any area."³² This provision links the emissions from vehicles to the annual emission reduction targets required to demonstrate "reasonable further progress" prior to the attainment deadline. Section 182(b)(2) (ozone nonattainment plans) and 187(a)(7) (carbon monoxide nonattainment plans) set annual percentage emission reduction requirements to be checked every three years, so that emission reduction requirements are not backloaded in the ten or fifteen year periods allowed for attainment of standards.³³ The portion of overall emission reductions in a nonattainment area allocated annually to mobile sources will have to be met by a combination of the transportation control measures in the SIP, along with the projects and programs adopted in the regional transportation plan.

To pass conformity review, transportation plans and programs will have to demonstrate that they will contribute their share to the annual percentage reduction in emissions in the nonattainment area. If the emission reduction targets for mobile sources are not met, then revisions to the implementation plan for the area are required. If the emission reductions required from mobile sources are changed to make up the shortfall from any three-year review period, transportation plans will no longer be in conformity and new highway projects will not be allowed to proceed until the plan is modified to achieve the necessary reduction in vehicle emissions. To ensure that the linkage between implementation plan and transportation plan is retained, transportation plans also must be reviewed for conformity at least once every three years.

III. IMPLEMENTATION ISSUES

Many issues will no doubt emerge once the agencies begin to implement these new transportation planning requirements. It is clear from the outset, however, that trade-offs between strategies will be made in the development of SIPs. One of the

32. 42 U.S.C.A. § 7506(c)(1)(B)(iii) (Supp. 1991).

33. *See Id.* §§ 7511a(b)(2), 7512a(a)(7).

first tasks in the development of strategies will be the setting of the emission targets for mobile sources. This will require an initial cut between the emission reductions assigned to stationary versus mobile sources. Next, the strategies available to reduce mobile source emissions will be evaluated to determine the amount of reduction to be achieved from upgraded I&M programs, alternative fuels, and transportation control measures. The emission reductions not achieved from other strategies will have to be accounted for in the design of the regional transportation plan.

Other provisions of the Amendments require revised air quality plans if triennial emission reduction targets are not met, and provide sanctions for the failure to implement plans on time or submit revisions when due. These provisions create an incentive for every potentially regulated emitter to support effective implementation of a transportation program that complies with the Act. At the front end, stationary sources will no doubt attempt to load emission reduction obligations onto the regional transportation plan. However, if those reductions are not met in the transportation sector, the triennial review requirement will force air quality planning agencies to revisit the stationary/mobile source split. Industry will face increasing emission control burdens if it appears that reductions from the transportation sector are not likely to be achieved. Stationary sources seeking assurances that their control obligations have been determined and will not be tightened, have a stake in making sure that the obligations placed on the transportation sector are achievable.

IV. TRANSPORTATION CONTROL MEASURES

The 1990 Amendments also continue to place reliance on the adoption and implementation of "transportation control measures" (TCMs). A number of TCMs are identified in amended section 108(f)(1), including: expanded public transit, high-occupancy vehicle lanes, employer based transportation management plans, trip reduction ordinances, programs to provide high occupancy, ride share services, limitations of metropolitan areas to pedestrian or nonmotorized vehicle use, provisions for secure bicycle storage and bicycle lanes, and the construction of paths exclusively for the use of pedestrians and nonmotorized vehicles.³⁴ Section 108(f)(1)(A) requires EPA to

34. *Id.* 42 U.S.C.A. § 7408(f)(1)(A).

develop guidance regarding "the emission reduction potential of transportation control measures." Specific provisions, which govern the development of O₃ and CO SIPs, also require the states to "consider measures specified in section 108(f), and choose from among and implement such measures as necessary to demonstrate attainment" In addition, the general requirements for SIPs in section 172(c)(1) demand "the implementation of all reasonably available control measures as expeditiously as practicable" ³⁵

EPA interpreted similar language in the 1977 Amendments to require adoption of all available measures by a state. However, if the state

demonstrates (a) that reasonable further progress and attainment of the NAAQS are assured, and (b) that application of all reasonably available control measures would not result in attainment any faster, then a plan with less than all reasonably available control measures may be approved. ³⁶

A citizen challenge to the failure of a state to adopt "all reasonably available control measures" was recently reviewed by the Ninth Circuit Court of Appeals in *Delaney v. EPA*. ³⁷ Arizona failed to adopt a number of control measures that, according to an analysis prepared for the metropolitan transportation planning agency in Phoenix, would have accelerated attainment by at least two years if all reasonably available measures identified in the study had been adopted. Despite the failure to include all reasonably available measures, EPA approved the SIP revision. The Ninth Circuit reversed EPA's approval of the plan on the ground that Arizona had failed to make any showing that the measures were not reasonably available within the meaning of EPA's 1979 SIP guidance. ³⁸

An EPA guidance document explicitly provides that each of the eighteen measures listed in 42 U.S.C. § 7408 is presumed reasonably available; a state can reject one of these measures only by showing that the measure either would not advance attainment, would cause substantial widespread and long-term adverse impact, or would take too long to implement. ³⁹

Thus, the *Delaney* decision gives significantly greater weight to

35. *Id.* § 7502(c)(1).

36. 44 Fed. Reg. 20,375 (1979).

37. 898 F.2d 687, 688 (9th Cir. 1990).

38. 44 Fed. Reg. at 20,372.

39. *Delaney*, 898 F.2d at 692.

the statutory requirement of "all reasonably available control measures."

EPA's guidance and the Ninth Circuit's application of the guidance in the Arizona SIP case was expressly ratified by the Senate sponsors of the 1990 Clean Air Act Amendments. In reporting the conference bill to the Senate, Senator Baucus, chairman of the Clean Air Act conference, explained,

The sponsors believe that EPA's initial (1979) guidance for the application of the 1977 law's requirement to adopt "all reasonably available control measures" in each area was sound. The Ninth Circuit recently reviewed and correctly applied EPA's guidance. The bill (§§ 108(f), 172(c)(1)) retains the general planning approach of the 1977 law and ratifies EPA's guidance as recently construed by the Ninth Circuit in the case involving the Arizona State Implementation Plan. *Delaney v. EPA* 898 F.2d 687 (1990).⁴⁰

Congressional ratification of the Ninth Circuit decision should provide support for effective implementation, by EPA and the states, of the transportation control measures required under the Act.

V. TRANSPORTATION FUNDING

If the new Amendments are faithfully implemented, alternative transportation systems to the single-occupant vehicle will begin to change transportation investment priorities. Programs will need to emphasize shifts to ride-share services and other forms of public transportation. Most federal transportation funding is dedicated exclusively to highways.⁴¹ As long as metropolitan areas remain locked into spending federal matching dollars on highways, communities will be induced to build projects for which federal funding is available, instead of choosing to invest state and local resources in alternatives that would result in the loss of federal matching funds.

The Senate bill offered a solution to this dilemma for regional transportation planners, but it was rejected in conference. Section 176(b)(2)(B)(iv) would have created authority for governors to transfer any funds available to a nonattainment

40. 136 CONG. REC. S16,971 (daily ed. Oct. 27, 1990).

41. The Highway Trust Fund diverts billions of dollars into a road building program that has aggravated urban air pollution. See Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1, 7 (1973).

area under Title 23 (mostly highway project funding) to alternative transportation projects, or programs designed to reduce single occupant vehicle use or mobile source emissions.⁴² Permissible alternatives listed in the bill included transit, high occupant vehicle lanes, park-and-ride facilities, alternative fuel conversion programs, accident response programs, and other alternatives approved by EPA and DOT. This provision would have given states the flexibility to shift federal resources to implementing alternatives to highway projects in those areas where pollution controls are most urgently needed.

Though section 176(b)(2)(B)(iv) was rejected from the Clean Air Amendments, it is not dead. Representative Mineta, chairman of the House Surface Transportation Subcommittee, has expressed support for increased flexibility for state and local decision makers to use federal highway funding for alternative transportation projects and programs. The success of the new Clean Air Act's emphasis on alternatives to the single-occupant vehicle may ultimately turn on whether the federal transportation investment policy is also modified to make alternatives politically and financially affordable. This was a major issue during the reauthorization of the Surface Transportation Act,⁴³ which expired in September 1991. The opportunity remains to reform federal transportation funding by following the lead of the Clean Air Act in emphasizing the projects and programs that achieve substantial reductions in vehicle use as central elements of urban clean air programs.

VI. CONCLUSION

The Clean Air Act Amendments of 1990 are designed to remedy the failures of the 1970 and 1977 Acts: to achieve effective coordination between regional transportation planning and the attainment of air quality standards. For the first time, transportation planning agencies will be given direct responsibility for achieving levels of vehicle use needed to reduce emissions. The "Great Wall" separating transportation planners and air quality agencies will be breached. In its place, the law will link the development of transportation programs directly to the success of regional air quality plans. If transportation programs are not

42. See S. REP. NO. 228, 101st Cong., 2d Sess. 25-26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3411-12.

43. 23 U.S.C. § 101; *see discussion supra* in author's bibliography.

successful in achieving the emission reductions required from mobile sources, new highway projects or other facilities that promote single-occupant use will not be able to proceed. EPA will no longer bear the political burden of having to impose sanctions if transportation plans are not implemented or do not work. Conformity review of transportation plans and programs will become an independent test of whether federal transportation dollars will flow to nonattainment areas.

If the Senate funding amendment is later added to the Surface Transportation Act Reauthorization, the bill will also give states and cities the funding flexibility needed to develop transportation alternatives that give people the option to leave their cars at home. Without this added resource base, it is not at all clear that state and local governments will have the capacity to invest in meaningful alternatives.

We have learned from the last twenty years that the central failure of the Clean Air Act has been its inability to slow the rapid growth of single-occupant vehicle use in American cities. It is also clear that urban air quality will not attain healthful levels in the future unless this trend can be changed. Congress has learned that the federal government cannot supply the answers. State and local governments must develop solutions that are consistent with regional plans for transportation and economic development. Air quality agencies are not capable of controlling the transportation planning process from the outside; instead, transportation planners must be held accountable for the air quality consequences of the plans they design. Further, a metro-wide system approach to transportation development must replace the fragmented project-by-project approach to transportation planning. The new approach embodied in the 1990 Clean Air Act Amendments should begin a new era in metropolitan transportation planning. The Amendments will not only provide a safe and healthy air supply for 150 million Americans who wait for the promise of the Clean Air Act to be fulfilled, but will also reduce our dependence on foreign oil and limit the greenhouse effect of carbon dioxide emissions from mobile sources in the United States.

