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Nevada Environmental Coalition, Inc.

December 2, 2003 (Corrected Copy)

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Re: Comments re: FY Regional Transportation Plan ("RTP") 2004-2025 and Transportation Improvement Program ("TIP") FY 2004-2006.

Dear Gentlepeople:

This letter constitutes the comments of Nevada Environmental Coalition, Inc. ("NEC") and Robert W. Hall ("Hall") as an individual in response to the Regional Transportation Commission's (RTC's) Public Notice requiring a response by **December 2, 2003**.

Robert W. Hall is a citizen of Nevada. He is a resident of Clark County and the Las Vegas Valley PM_{10} (particle matter ten microns or less) and CO (carbon monoxide) serious non-attainment areas. Robert W. Hall is also the president of the Nevada Environmental Coalition, Inc. (NEC).

STATUTES AND REGULATIONS:

The RTP/TIP comments submitted by the NEC and Hall dated December 11, 2000, January 7, 2002, February 14, 2002, August 3, 2002, December 20, 2002, April 10, 2003 and August 11, 2003 are adopted herein by reference and made a part hereof for all purposes. The Regional Transportation Plan ("RTP") for Fiscal Years 2004-2025 and Transportation Improvement Program ("TIP") for Fiscal Years FY 2004-2006 is adopted herein by reference.

This comment and notice letter includes the following statutes and regulations in support:

(1) Administrative Procedure Act, **5 U.S.C. §500,** et seq.

(2) The Clean Air Act, **42 U.S.C. §§ 7401-7671q, as amended**, **Clean Air Act § 101,** et seq.

(3) The National Environmental Policy Act of 1969 as amended (NEPA), **42 USC 4321,** et seq.,

(4) Counsel on Environmental Quality (CEQ), **40 CFR Parts 1500-1508**,

(5) Title 23, Code of Federal Regulations, Part 450, and Title 49 Code of Federal Regulations, Part 613; **Title 23**, Highways, Chapter I, Federal Highway Administration, Department of Transportation, **Part 771**, Environmental Impact and Related Procedures, **23 CFR 771,** et seq.,

(6) **40 CFR Parts 51 and 93** (where Part 51 is cited, the cite also refers to the applicable, parallel Part 93 cites),

(7) **62 FR 43780,** et seq., August 15, 1997,

(8) **58 FR 62188,** et seq., November 24, 1993,

(9) **23 USC 134, 49 USC 1607, 23 CFR 450,** et seq.

(10) **31 USC 3729,** et seq**., False Claims.**

(11) **18 USC 1001,** et seq.**, False Statements.**

(12) **27 CFR 450.300 – 450.336, 23 CFR 770 and 40 CFR**, et seq.

(13) The current, applicable, EPA approved Nevada/Clark County SIP that was not vacated and remanded to the EPA by an appeals court.

(14) The current, applicable, EPA approved Nevada/Clark County SIP that was not rescinded by Clark County prior to approval or disapproval.

(15) The current, applicable, EPA approved Nevada/Clark County SIP that is not in a SIP lapse.

(16) Common tort law which includes but is not limited to misrepresentation, i.e., fraud.

(17) The opinion and mandate of the United States Court of Appeals, District of Columbia Circuit in EDF v. EPA, **167 F.3d 641**, March 2, 1999.

GENERAL COMMENTS

This comment document addresses the Proposed FY 2004-2025 Regional Transportation Plan ("RTP") and Transportation Improvement Plan ("TIP"), the FY 2004-200**6**. The Regional Transportation Plan ("RTP") is a long range transportation plan covering a 20+ year time span. The first three years of the RTP constitute the Transportation Improvement Plan ("RTP"). The Regional Transportation Commission of Southern Nevada ("RTC") is a regional government organization comprised of elected officials appointed from each of the local governments within Clark County. The RTC directs the expenditure of funds generated from the Federal Transit Administration ("FTA"), the Federal Highway Trust Fund as well as funding from other local sources. The RTC is the designated Metropolitan Planning Organization ("MPO") in Southern Nevada. The MPO is responsible for complying with our nation's environmental laws. The two most important environmental laws for our purpose are the National Environmental Policy Act ("NEPA") and the Clean Air Act ("CAA"). The federal Administrative Procedures Act ("APA") is important regarding due process and public oversight.

COMMENTS RE: MISLEADING STATEMENTS

Along with the very specific comments in our earlier RTP/TIP comment documents, the current RTP/TIP should not be approved for the following reasons.

1. There is no evidence of Federal Highway Administration ("FHWA") or Department of Interior ("DOI") compliance with the National Environmental Protection Act ("NEPA"), the Clean Air Act ("CAA") or the federal Administrative Procedures Act ("APA") in the RTP/TIP since the Acts were signed into law.

2. The only finally EPA approved SIP for Clark County is dated 1979/81. Clark County has not had an EPA, finally approved PM10, CO or new source SIP submittal finally approved since that time. The only EPA approved SIP is from 1979/81. The SIP is so old it does not mention PM10 since PM10 was not in the Clean Air Act in 1979/81. The SIP has long since lapsed. The 1999 PM10 SIP submittal was vacated and remanded in 2001 by the Ninth Circuit Court of Appeals.

There is no evidence and no legal basis for any certification of compliance or conformity to the SIP.

3. Clark County Nevada agencies[1] have certified compliance and conformity with the statutes and regulations cited herein in a conspiracy to obtain Federal Highway funding since at least 1981, without legally sufficient support for the certifications.

4. The misleading methods used by Clark County agencies to claim compliance and conformity include but are not limited to using misleading data that cannot be reasonably replicated, the use of a "shadow" set of regulations that the EPA has not approved, the use of local offset or emissions reduction credits that are not only not EPA approved, the basis for their existence is misleading, the hiring of personnel in key positions who were formerly consultants to some of the worst air pollution sources in Nevada, and simple expediency of ignoring the 1979/81 EPA approved SIP.

5. The certification signed by a Nevada licensed attorney claims to conform to the "intent" of the State Implementation Plan with naming the plan is a thoroughly misleading certification. Either the plan conforms to the SIP or it does not.

DISCUSSION

NEPA requires that a federal agency prepare a detailed Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). RTC's own analyses demonstrate that the RTP/TIP describe a group of projects that constitute a major Federal action that will have a substantial negative effect on air quality in the Las Vegas Valley. The RTP/TIP fails to cite any legally sufficient NEPA compliance as the basis for approval of the RTP/TIP.

RTC's projects are cumulatively contributing to the Las Vegas Valley's air pollution problems. There is no citation to a FHWA environmental document that attempts to quantify the cumulative emissions from potential projects. NEPA requires that an agency consider cumulative impacts of an action and of foreseeable related actions. See 40 C.F.R. §§ 1508.7, 1508.27(b)(7). Without FHWA compliance, the RTC cannot move ahead. The FHWA has failed and refused to consider the cumulative impacts of all of the RTC projects in the valley which include but are not limited to construction air pollution.

Once the FHWA has an obligation to prepare an EIS, the scope of its analysis of environmental consequences in that EIS must be appropriate to the action in question. NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. See Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984).

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[1] Including the RTC.

Kern v. United States BLM, 284 F.3d 1062, 1072 (9th Cir. 2002). See Appendix. The regulations define "cumulative impact" as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. 1075. 40 C.F.R. § 1508.25(a).

In determining the significance of a proposed FHWA action the agency must consider

> Whether the action is related to other actions with individually insignificant but cumulatively significant impact on the environment. Significance exists if it is reasonable to anticipate cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 C.F.R. 1508.27(b)(7). See also *Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001).

The RTC and its benefactor federal agency the FHWA are caught in a web of their own making. The RTC with FHWA knowledge and consent, has evaded NEPA compliance with the use of "little piece" EAs. When they parsed their duty to produce an environmental impact statement ("EIS"), they knew that they could not lawfully get away with only EA cumulative impact discussion so they proceeded anyway.

"If the cumulative impact of a given project and other planned projects is significant, an appellant can not simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project…"; *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998).

284 F.3d at 1076.

> The Council on Environmental Quality noted in a recent report that "in a typical year, 45,000 EAs are prepared compared to 450 EISs. … Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully." Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act at 4, Jan. 1997, also available at http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm (last visited Feb. 26, 2002).

284 F.3d at 1076.

> We have previously indicated, in cases similar to this one, that cumulative impact analysis is appropriate at the EA level. In Hall v. Norton, … Plaintiff had alleged

> in his complaint that the EA had failed to consider cumulative impacts … the EA did not attempt to quantify cumulative emissions from potential development on these lands. NEPA requires that an agency consider cumulative impacts of an action and the foreseeable related actions." Hall v. Norton, 263 F.3d 969 at 978. We remanded to the district court for consideration of the plaintiff's cumulative impact argument.

284 F.3d at 1076-1077.

40 C.F.R. § 1506.1 Limitations on actions during NEPA process. See, Appendix. §1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. …

In the interim, the FHWA and the RTC are going ahead as though all of the above were accomplished according to law. That is misleading. The FHWA and the RTC are involved in air pollution projects and environmental health impacts in a chain of causation that starts with their "little piece" EAs.

Even while funding project after project, The agencies have not included a 40 C.F.R. § 1506.3(d) statement specifying that the adequacy of the non-existent environmental impact statement ("EIS") is subject to judicial remand action from the Ninth Circuit Court of Appeals.

There is no evidence of publication in the Federal Register ("FR") of a NEPA EIS. There is no evidence that the FHWA has waited 90 days for a draft EIS or 30 days for a final EIS before making decisions on valley highway projects as required by 40 C.F.R. § 1506.10.

As the Ninth Circuit has explained,

> The goal of NEPA is two-fold: (1) to ensure the agency will have detailed information on significant environmental impacts when it makes its decisions; and (2) to guarantee that this information will be available to a larger audience. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

In the process of evading our nation's environmental laws, the FHWA and its RTC client have not complied with 40 C.F.R. §§ 1502.13, 1502.14, 1502.15 or 1502.16. Evading our laws has the advantage of eliminating the necessity of both agencies dealing with all of the environmental statutory and regulatory restrictions Congress has placed on Federal agency actions.

To the extent that the agencies are able to continue to evade federal environmental laws, there is absolutely no incentive to ever comply with them. By definition, that is against public policy.

The agencies have not produced and cannot produce a lawful NEPA document. The dust that comes from bulldozing all of the highway projects listed in the RTP/TIP and the carbon monoxide that comes from construction equipment and later an influx of residents is not a part of any NEPA environmental document. Both increase the non-attainment area air pollutants in violation of NEPA and the 1979 SIP. In the alternative, the agencies cannot prove they will make the air cleaner by completing all of the projects listed in the RTP/TIP.

Dust coming from development and construction related activities is estimated by Clark County to comprise 62% of the dust (PM10) air pollution problem in the valley.

Clark County published a 1993 "Latest Emission Inventory in the Valley" on May 2, 1994 listing 19,000 tons per year of PM10 dust. A March 2001 PM10 State Implementation Plan Draft included a 1998 Annual Nonattainment Area PM10 Emissions Inventory of 333,132 tons per year. In five years, the increase in PM10 tons per year is 314,132 or a 17 times increase over the 1993 tonnage.

Dust (PM10) coming from development and construction (runaway growth) amount to approximately 206,542 tons per year. This is the information the FHWA and RTC are loathe to include in any EIS. This is the information that a hapless public is denied.

THE PUBLIC INTEREST FAVORS A NEPA PROCESS.

A few months ago, the Centers for Disease Control ("CDC"") reported a national survey that included the Las Vegas Valley. The CDC found that 14% of those over eighteen that were surveyed in Las Vegas reported having pulmonary disease. Las Vegas has long been listed as having one of the nation's highest incidences of childhood asthma.

The continuum before the FHWA and RTC is that of feeding runaway growth vs. public health and safety. The RTP/TIP highlights the dilemma valley resident's face. Those who are already here are forced, without their informed consent, to participate in a grand medical experiment where the FHWA and RTC, along with development and construction interests, are in control of the pulmonary health of more than one million people. The tail is wagging the dog. It is not the FHWA's or the RTC's destiny to experiment with more than a million people to see how much dust enters the bloodstream through their lungs. It is not the FHWA's or the RTC's destiny to experiment with the amount of dust that it takes to incapacitate or terminate the lives of valley humans. The FHWA and its RTC client are required by law to produce the NEPA document necessary to deal with that issues before there is risk to the public and Hall.

General Conformity

The RTP/TIP documents do not address the applicability of the general conformity criteria in § 176(c)(1)(A) and (B) of the Clean Air Act. The RTP/TIP may not lawfully be found to conform because these statutory criteria have not been addressed in the proposed conformity determination that is the subject of this comment document. The substantive criteria that are not met by the RTP/TIP will not result in significantly greater emissions than the total emissions that can be emitted and meet the 1-hour NAAQS in the Las Vegas Valley non-attainment area. The CAA requires that the conformity determination for the RTP/TIP is not consistent with law, and must be withdrawn in order to make findings required by the Act.

Section 176(c)(1) declares that "[n]o MPO ... shall give its approval to any project, program or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. Paragraph (c)(1) also declares that "[n]o department, agency, or instrumentality of the federal government shall engage in, support in any way, or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan...."

Section 176(c)(1) provides a definition that -- [c]onformity to an implementation plan means-- (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and the number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not--

(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 emissions reductions or other milestones in any area.

Section 176(c)(2) provides more specific criteria for the approval of transportation plans, program and projects. This paragraph for explicitly declares that --

No Federal agency may approve, accept of fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this chapter. In particular--

(A) No transportation plan or transportation improvement program may be adopted by a metropolitan planning organization ... , or be found in conformity by a metropolitan planning organization until a final determination has been made that emissions expected from implementation plans and programs are consistent with estimates of emissions reductions contained in the applicable implementation plan, **and that the plan or program will conform to the requirements of paragraph (1)(B). [Emphasis added.]**

This statutory test for plan and TIP approval require both that emissions expected from implementation of the plan and TIP will be consistent with the estimates of emissions reductions in the applicable implementation plan **AND** the statutory tests in § 176(c)(1)(B) be met. The estimates of emissions reductions in the applicable implementation plan are what EPA has dubbed the "the motor vehicle emission budget." 40 CFR § 93.101.

The Act does not contemplate, nor does it allow discretion for an MPO or any Federal agency to substitute a motor vehicle emission budget test for the statutory conformity tests. The language of the Act specifically requires that the MPO determine that "the plan or program will conform to the requirements if (1) (B)" as a condition for making a conformity determination. Similarly, the statutory criteria in (1) (B) are clearly applicable to the approval, acceptance and funding of a transportation plan and TIP by any Federal agency, including the U.S. Department of Transportation.

This unambiguous requirement of the statutory text is confirmed by the legislative history. In his report of the Conference committee bill to the floor of the Senate, Senator Baucus, chairman of the Clean Air Conference, explained that "[t]he general criteria for conformity review of any activity requiring federal action, approval or funding in section 175(c)(1)(A) and (B) apply to transportation plans, programs and projects as well." 134 Cong. Rec. S 16973 (October 27, 1990).

EPA HAS CONSISTENTLY CONSTRUED THE ACT TO REQUIRE THAT THE STATUTORY CONFORMFITY CRITERIA BE MET.

This is also the reading that EPA has consistently given to this language of the Act since its enactment. Beginning with the “Interim Conformity Guidance” issued June 11, 1991, EPA concluded that “transportation plans must meet the requirements set forth in §176(c)(1) and §176(c)(2)(A)….” In its proposed 1993 conformity rule, EPA reaffirmed its initial reading of the applicability of the § 176(c)(1) tests by concluding that “[b]ecause the definition of conformity in CAA section 176(c)(1)(B) refers to an activity’s impact on the NAAQS, EPA would require

conformity determinations to include analyses of local … and regional [air quality].” 58 Fed. Reg. 3776 (January 11, 1993). Again, in the 1993 final rule, EPA confirmed its view that “[I]n addition to adding specific provisions regarding the conformity of transportation actions, the Clean Air Act Amendments of 1990 expand the scope and content of the conformity provisions by defining conformity to an implementation plan….” 58 Fed. Reg. 62,189-190 (November 24, 1993).

In its 1997 re-promulgation of the conformity rules, EPA specifically addressed the relationship between the MVEB test and the general statutory tests. In the preamble to the final rule, EPA stated the presumption that the statutory tests would be satisfied if a plan and TIP met motor vehicle emission budgets that were derived from plans that provide for attainment or maintenance:

EPA believes that if motor vehicle emissions are less than or equal to the most recent motor vehicle emissions budgets in the SIP that was approved as meeting attainment or maintenance requirements, then it can be stated that motor vehicles are not “causing or contributing” to violations, as required by the Clean Air Act.

62 Fed.Reg. 43788, col 3. However, clearly implied by this presumption is the converse: that MVEBs not derived from a SIP that meet the attainment or maintenance requirements of the Act may not be presumed to meet the statutory tests prohibiting new violations, more frequent or more severe violations, or delay in timely attainment of the NAAQS.

EPA’s presumption is sound for the period up to the year through which the SIP demonstration of attainment with the NAAQS is performed, because a SIP that meets attainment or maintenance requirements will have accounted for all expected sources of emissions and demonstrated that the emission reductions in the plan are sufficient to prevent new or more frequent violations of the NAAQS. In other words, a SIP that meets the statutory requirements to “provide for attainment of the [NAAQS],” §172(c)(1)[2], by the deadline specified in the relevant section of Part D for that pollutant and that metropolitan area, or to “provide for the maintenance of the [NAAQS] … for at least 10 years” as required by §175a(a)[3], will also include modeling analyses that demonstrate motor vehicle emissions at the level of the emissions budget in the SIP will meet the (1)(B) conformity tests for the years covered by the SIP. Accordingly, a transportation plan that meets the motor vehicle emission budget in a complete attainment or maintenance SIP will presumptively meet the § 176(c)(1)(B) tests as well, for the same time period addressed by the SIP.

An RTP/TIP cannot meet that test if the document is simply numbers on paper that cannot be replicated. The RTP/TIP must be credible. RTP/TIP data must be presented according to generally accepted engineering standards that include but are not limited to references to sources and all of the assumptions used to derive the data.

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[2] 42 U.S.C. §7502(c)(1).

[3] 42 U.S.C. §7505a(a).

EPA's READING OF THE ACT REQUIRES THE RTC/MPO TO MAKE EXPRESS FINDINGS BASED ON THE STATUTORY CRITERIA.

The Las Vegas Valley non-attainment area that has not yet adopted a SIP that was approved as meeting attainment or maintenance requirements. While there are federally approved MVEBs for PM10 or CO in the Las Vegas Valley that are based on submitted but unapproved SIPs, there is no legally sufficient SIP supporting the budgets. The approval of the MVEB budgets is temporary pending final approval of submitted PM10 and CO SIPs. Submitted SIPs have no lawful status whatsoever until they are finally approved. They must then survive appeal. There is no federally approved NOx MVEB.

The instant, proposed RTP and TIP do not meet the requirements of the 1990 amendments to the Clean Air Act. Emission budgets attached to 1979 SIPs do not reflect the full extent of emission reductions needed for attainment of the NAAQS.

Since the Hydrographic Basin 212 area (as opposed to a smaller, artificial area) lacks motor vehicle emission budgets that are consistent with attainment with its 1979 SIP, there is lawful determination of the extent of emission reductions needed to attain the NAAQS, there is no rational basis for a presumption that the §176(c)(1)(B) tests will be met if the RTP and TIP meet the motor vehicle emission budget in a 1979 SIP. EPA conceded as much in its 1997 Final Rule: "Clean Air Act section 176(c)[(1)(B)] requires that projects must not worsen violations or delay attainment, and there is no basis to make this claim if the SIP has been disapproved.[4] Additional transportation projects may worsen existing violations." <u>Transportation Conformity Rule Amendments - Response to Comments Document: Final Rule</u> (EPA, June 23, 1997), 35. A 1979 SIP cannot deliver on that requirement.

In the case of the RTP and TIP, EPA's presumption is not available because the MVEB is not derived from a SIP that was approved as meeting attainment or maintenance requirements. In December 1999, EPA specifically rejected a MVEB based on the attainment plan as not adequate for transportation conformity purposes. Given this record, the RTC/MPO **must make an independent determination that approval of the plan and TIP will meet the statutory conformity tests**. This has not been done. Therefore, the Department of Transportation must not approve the instant RTP/TIP. The RTC must be required to make the determinations of conformity with the statutory tests required by the Act.

The RTC must make such determinations only after releasing a proposal **to allow the public an opportunity to comment on the methodology used for such determinations**.

SIP COMPLIANCE

Pursuant to the 1977 Amendment to the Act, the USEPA designated Las Vegas as a Group I area for Total Suspended Particulates (TSP, now PM_{10}) "non-attainment area" for PM_{10} and CO. That

[4] Or we might add, if a SIP was found inadequate or was withdrawn by Clark County to prevent a disapproval as the County has in this instance.

designation continues to this day pursuant to **§ 107 of the CAA**, **42 U.S.C. §7407(d)(1)(C)(i), and 40 C.F.R. §81.303 (1995)**. See, **August 7, 1987**, Federal Register, "Rules and Regulations," 52 FR 29383. A PM_{10} or CO non-attainment area is one that does not meet primary National Ambient Air Quality Standards (NAAQS) for PM_{10} or CO, respectively. 40 C.F.R. § 81. See, The **November 6, 1991** Federal Register noticed "Designations and Classifications for Initial PM_{10} Non-attainment areas: 40 CFR Part 81," 56 FR 56694.

The 1977 Amendments to the Act required the State of Nevada (state) to submit PM_{10} and CO control plans for Las Vegas to the USEPA for approval and disapproval. This plan - referred to in the CAA as a state implementation plan (SIP) - was to provide for attainment of the PM_{10} and CO as expeditiously as practicable, and no later than the end of 1982. The SIP also had to meet other specific requirements set out in the CAA, and in USEPA rules and guidelines. **See 40 C.F.R. 52.1470 and 81.329**.

Nevada submitted the required SIP and the SIP was approved by the USEPA in 1979. The SIP was amended (**46 FR 21766**) on **April 14,** 1981, and again (**47 FR 27069**) on **June 23, 19**82. There is no finally approved Nevada SIP for the twenty-one years since 1979. Submitted 1999 amendments were set aside by the Ninth Circuit Court of Appeals and the EPA did not ask for reconsideration of that decision.

Clean Air Act Amendments (CAAA) were signed into law by President Bush on November 15, 1990. Pursuant to the 1990 Amendments to the Act, the Las Vegas Valley was classified by operation of law as **Moderate** PM_{10} and CO non-attainment areas on **November 15, 1990**. 42 U.S.C. § 7512(a)(1).

On **November 5, 1991** Clark County Commissioners approved a PM_{10} SIP for the Las Vegas Valley. This SIP provided for the adoption and implementation of RACM (RACT) or reasonably available control technology. That SIP was prepared in accordance with the requirements 1990 CAAA, but was unable to demonstrate attainment of PM_{10} national standards by the mandated attainment date of December 1994. This SIP was not approved by the USEPA.

On **November 15, 1991**, pursuant to Section 189(a) of the 1990 CAAA, "moderate" non-attainment areas were required to submit to the USEPA a PM_{10} State Implementation Plan (SIP) which provided for the adoption and implementation of reasonably available control technology (RACT).

Pursuant to the 1990 Amendments of the Act, **42 U.S.C. § 7512(a)(1),** Las Vegas on **February 8, 1993** was reclassified from Moderate PM_{10} Non-attainment to Serious PM_{10} Non-attainment. See, Reclassification of Moderate PM10 Non-attainment Areas to Serious Areas, Final Rule**, January 8, 1993, 58 FR 53334-3342**.

An amendment to the CO State Implementation Plan (SIP) was submitted to the EPA in **October of 1995**. See also, Clean Air Act Reclassification; Nevada-Clark County Non-attainment Area; Carbon Monoxide, Proposed Rule**, August 12, 1996, Federal Register, Volume 61, #156, 41759-41764**.

The continuing failure to reach attainment and the reclassification to “serious” introduced new requirements for the affected areas. First, regulations requiring the use of more rigorous controls than RACM (RACT) had to be adopted and submitted to the USEPA as a SIP revision. The increased control measures were required to include best available control measures (BACM) for mobile and area sources of PM_{10} and the application of best available control technology (BACT) to stationery sources. The BACM (BACT) controls were required to be implemented for mobile and stationary sources no later than **February 8, 1997**.

The Las Vegas Valley was federally designated as a serious non-attainment area for carbon monoxide (CO)(Federal Register, **June 16, 1997**).

Clark County failed to meet that deadline. The USEPA did not receive the Clark County PM_{10} plan until **August 25, 1997**. The **August 25, 1997** PM10 plan was so deficient it could not be approved by the EPA by law.

The Las Vegas area was originally scheduled to come into CO attainment by December 1996 and failed to do so. The USEPA has granted a one-year extension for CO attainment. Clark County was required to attain and maintain the CO NAAQS as expeditiously as practicable but no later than **December 31, 1997**. The standards were not reached by December 1997, and the area was reclassified again as a serious non-attainment area.

The **August 25, 1997** PM_{10} SIP attainment demonstration was not approved within the required eighteen month time limit of **January 24, 1999**. A request for a five-year extension of the time to reach attainment was not granted. The attainment demonstration was found inadequate on **November 16, 1999**.

The carbon monoxide attainment demonstration was found inadequate on **May 5, 1999**. The carbon monoxide attainment demonstration was found inadequate on **January 4, 2000**. When Clark missed the February 8, 1997 deadline, a conformity lapse occurred. Clark County has never had a CAA 1990 amendments conformity determination approved by the EPA.

The agencies responsible for submitting a working SIP that could lawfully be approved by the EPA either knew or should have known that they were misrepresenting in their NEPA and CAA documents, and were evading the law. The Clark County Commission affirmed that view when they adopted a resolution on December 5, 2000 requesting that the state withdraw all of the PM10 plans the County had previously submitted.

SIPs must include "enforceable emission limitations and other control measures, means, or techniques…, as well as schedules and timetables for compliance, as may be necessary or appropriate" to meet the NAAQS. Id. **§ 7410(a)(2)(A)**. "[A]fter reasonable notice and public hearings," each state must submit a SIP with such pollution control strategies to EPA. Id. **§ 7410(a)(1)**. EPA typically approves SIPs pursuant to notice-and-comment rule making.

It is not possible to look at any document the RTC or any other Clark County or State of Nevada has produced that answers the following question regarding SIP and NEPA compliance and conformity. 1. How much air pollution in the Las Vegas Valley is too much? 2. Do the projects listed in an RTP/TIP or in any other Clark County local, state or federal agency air pollution

document result in Clark County exceeding the National Ambient Air Quality Standards (“NAAQS”) or not? 3. Where, when and precisely how did the projects listed the RTP/TIP or any other local, state or federal Clark County, air pollution document ever become a part of a past or present NEPA compliant document including but not limited to a cumulative impact determination? 4. Does the RTP/TIP or any other local, state or federal Clark County air pollution document describe local, state or federal air pollution actions in Hydrographic Area 212 or some other smaller area? 5. Is the RTP/TIP or any other local, state or federal air pollution document facially misleading regarding its premise and the credibility and replicability of the data presented?

The petitioners allege that the instant RTP/TIP and its ancillary documents fail on all counts. Collectively and severally, the document is misleading and it is interposed for an improper purpose.

ENVIRONMENTAL DEFENSE FUND v. ENVIRONMENTAL PROTECTION AGENCY, 167 F.3d 641, [DC Cir. 1999]

The following is from the on-point appeals court decision noted above. It is presented as supporting legal argument. This information should be read in conjunction with all other recent and applicable appeals court decisions.

Because Congress "offered little guidance" on the 1977 conformity requirement, and because federal agencies "largely ... ignored" it, **Clean Air Conference Report, 136 Cong. Rec. 36,103, 36,105-06 (1990),** Congress amended the Act again in 1990 to expand the content and scope of this requirement. **See Pub. L. No. 101-549, tit. I, sec. 101(f), 110(4), § 176(c)**, **104 Stat. 2409, 2470 (1990)** (codified at **42 U.S.C. § 7506(c)**). The focus of this case, the 1990 amendments, do two things. First, they establish general criteria for determining whether a transportation activity conforms to a SIP:

(1) Conformity to an implementation plan means--

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not--

(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 mile-stones in any area.

42 U.S.C. § 7506(c)(1). Heads of federal agencies have "an affirmative responsibility" to assure conformity of any federally assisted or approved activity to an applicable SIP. Id. Second, the

1990 amendments integrate the attainment and maintenance of air quality standards with the specific transportation planning process prescribed by the Urban Mass Transportation Act.

As the Clean Air Conference Report put it, "[t]he purpose of the new 'conformity' requirement is to ensure that the transportation systems choices made by the community and incorporated into the regional transportation plan required by [federal transportation statutes] are consistent with achieving the allowable emission targets for each pollutant assigned to mobile sources in the SIP." **136 Cong. Rec. at 36,106 col.2**.

Under the Urban Mass Transportation Act, the governor of each state, in agreement with local officials, must designate a metropolitan planning organization (known as an "MPO") for each urban area with more than 50,000 people. See **49 U.S.C.A. § 5303(c)(1)**. The MPO plans for the transportation needs of that area. It develops a long-range transportation plan (referred to in the statute as a "plan") which specifies the facilities, services, financing techniques, and management policies that will comprise the area's transportation system over a 20-year period, see id. **§ 5303(f)**, as well as a short-term transportation improvement program (referred to in the statute as a "program" and in the regulations as a "TIP") which identifies and prioritizes the specific transportation projects to be carried out over the next three years, see id. **§ 5304(b)**.

The heart of the Clean Air Act's 1990 conformity requirements consists of the following restrictions on approval and funding of transportation plans, programs, and projects:

(2) Any transportation plan or program developed pursuant to **Title 23 or the Urban Mass Transportation Act** shall implement the transportation provisions of any applicable implementation plan … applicable to all or part of the area covered by such transportation plan or program. No Federal agency may approve, accept or fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this chapter. In particular—

(A) No transportation plan or transportation improvement program may be adopted by a [MPO], or be found to be in conformity by a [MPO] until a final determination has been made that emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan…;

….

(B) a transportation project may be adopted or approved by a [MPO] or any recipient of funds designated under **Title 23 or the Urban Mass Transportation Act**, or found in conformity by a [MPO] or approved, accepted, or funded by the Department of Transportation <u>only</u> if it meets either the requirements of subparagraph (D) or the following requirements (emphasis added)—

(I) such a project comes from a conforming plan and program;

….

(D) Any project not referred to in subparagraph (C) shall be treated as conforming to the applicable implementation plan **only** if it is demonstrated that the projected emissions from such project, **when considered together with emissions projected for the conforming transportation plans and programs within the nonattainment area**, do not cause such plans and programs to exceed the emission reduction projections and schedules assigned to such plans and programs in the applicable implementation plan. (Emphasis added.)

42 U.S.C. § 7506(c) (2). Previously and according to the Agency, these provisions apply only to "nonattainment" areas (i.e., areas that have not met an air quality standard for a particular pollutant) and to "maintenance" areas (i.e., former nonattainment areas that have met the appropriate standard). See **40 C.F.R. §§ 93.101, 93.102(b) (1998)**.

In addition to specifying general conformity criteria and imposing restrictions on regional transportation planning, the 1990 amendments establish conformity criteria that apply to transportation plans, programs, and projects prior to Agency approval of a submitted SIP. See **42 U.S.C. § 7506(c)(3)**. The amended Act also authorizes EPA to promulgate criteria and procedures for determining conformity, provided that "in no case shall [conformity] determinations for transportation plans and programs be less frequent than every three years." Id. **§ 7506(c)(4)(B)(ii)**.

EPA first issued criteria and procedures for making conformity determinations in 1993. **See 58 Fed. Reg. 62,188 (1993)**. It then amended those procedures in a series of rulemakings. See **60 Fed. Reg. 40,098 (1995)**; **60 Fed. Reg. 57,179 (1995)**. In recent years, the United State Court of Appeals for the District of Columbia Circuit has heard two challenges to these amended rules. **See Sierra Club v. EPA, 129 F.3d 137 (D.C. Cir. 1997)** (invalidating one-year exemption from statutory conformity requirements for transportation activities in nonattainment areas), **Environmental Defense Fund, Inc. v. EPA, 82 F.3d 451 (D.C. Cir. 1996)** (upholding various regulations as reasonable interpretations of the statute).

The problem in the Las Vegas Valley starts at the top of the regulatory pyramid, not at the bottom. Simply stated, the FHWA, NDOT and the RTC have failed to look at the big statutory picture when it comes to NEPA and the CAA. The following appeal decision discussion frames the federal agency legal issue in the Las Vegas Valley and is a major part of this complaint notice.

In the March 2, 1999 case, petitioner Environmental Defense Fund argued that various provisions of EPA's most recent Final Rule, see **62 Fed. Reg. 43,780 (1997)** (codified at **40 C.F.R. §§ 93.100-93.128**), violate the conformity requirements set forth in the 1990 amendments to the Clean Air Act. Specifically, the petitioner contended: (1) that section **93.121(a)(1)** of the regulations unlawfully permits local authorities to approve transportation projects in the absence of a currently conforming transportation plan and program, (2) that section **93.102(c)(1)** suffers from the same defect with respect to federal funding of transportation projects, and (3) that sections **93.118(e)(1)**, **93.120(a)(2)**, and **93.124(b)** unlawfully require or permit conformity determinations to be based on emissions budgets in SIPs that EPA has disapproved or not yet approved.

Applying Chevron's two-step inquiry, the appeals court took up each claim in turn. The court began by asking, "whether Congress has directly spoken to the precise question at issue." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., **467 U.S. 837, 842 (1984)**. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. However, if "the statute is silent or ambiguous with respect to the specific issue," we must defer to the Agency's construction of the statute as long as it is reasonable. Id. at 843.

The appeals court started with EDF's challenge to section **93.121(a)(1)** of the regulations, which provides that an MPO or other recipient of federal funds may adopt or approve a regionally significant transportation project if "[t]he project was included in the first three years of the most recently conforming transportation plan and TIP (or the conformity determination's regional emissions analyses), even if conformity status is currently lapsed." **40 C.F.R. § 93.121(a)(1)**. Conformity status of a transportation plan or program lapses when more than three years pass without a new conformity determination by an MPO or the Department of Transportation. See **42 U.S.C. § 7506(c)(4)**; **40 C.F.R. § 93.104(b)(3)**, **(c)(3)**. Under section **93.121(a)(1)**, local officials may approve a transportation project as long as it once appeared in a conforming plan and program, even if the plan and program no longer conforms at the time of project approval. By authorizing this result, petitioner argues, section **93.121(a)(1)** violates the Clean Air Act's requirement that projects "come from a conforming plan and program." **42 U.S.C. § 7506(c)(2)(C)**. The appeals court agreed.

At the outset, the appeals court thought it important to make clear that the dispute over the legality **of section 93.121(a)(1)** related only to approval of non-federally funded projects. The Agency's rule makes clear that local transportation projects receiving federal funds must satisfy a more stringent conformity requirement than section **93.121(a)(1)**. Federally funded projects may not proceed unless there is "a currently conforming transportation plan and currently conforming TIP at the time of project approval." **40 C.F.R. § 93.114**.

In other words, during a plan or program conformity lapse, an MPO may not find a federally funded project to be in conformity, and therefore that project may not go forward. The question is whether non-federally funded projects--defined as "projects which are funded or approved by a recipient of federal funds ... but which do not rely at all on any [federal] funding or approvals," **62 Fed. Reg. at 43,788**--may attain conformity status in the absence of a currently conforming plan and program.

The appeals court began the analysis with the text of the Clean Air Act. Under section **7506(c)(2)(C)**, an MPO may find a local transportation project to conform with an applicable SIP only if the project meets one of two requirements. Either it must "come from a conforming plan and program," id. § **7506(c)(2)(C)(i)**, or its "projected emissions … , when considered together with emissions projected for the conforming transportation plans and programs within the nonattainment area, [must] not cause such plans and programs to exceed the emission reduction projections and schedules assigned to such plans and programs in the applicable [SIP]," (emphasis added) id. **§ 7506(c)(2)(D)**.

Claiming that the requirement that a project "come from a conforming plan and program" is ambiguous, EPA insisted that it has reasonably construed this requirement to permit project approval during a conformity lapse, as long as the project comes from the first three years of a once-conforming plan and program. This approach, EPA argued, strikes the proper balance between protecting air quality and avoiding disruption to the transportation planning process. According to petitioner, the statutory text leaves no ambiguity. A project that "comes from a conforming plan and program," means a project that comes from a currently conforming plan and program. Therefore, EDF argued, the statute prohibits approval of any projects, federally funded or not, during a conformity lapse.

Giving these words their ordinary meaning, the appeals court interpreted the phrase "comes from a conforming plan and program"--a phrase entirely in the present tense--to refer to projects that come from a currently conforming plan and program. But even were it was possible to read the phrase, as EPA did, to refer to projects that come from a previously conforming plan and program, the appeals court found this interpretation was foreclosed by Congress's use of the terms "conforming plan and program" in section **7506(c)(2)(D)**, by the general conformity criteria of section **7506(c)(1)**, and by the legislative history of the conformity requirements.

Section **7506(c)(2)(D)** states that a project not included in a conforming plan and program may be found to conform only if its projected emissions "when considered together with emissions projected for the conforming transportation plans and programs within the nonattainment area," do not exceed the SIP emissions budget. **42 U.S.C. § 7506(c)(2)(D)**. This provision enables a project to attain conformity status "only if the regional plans and programs are in conformity at the time the project is reviewed." **Clean Air Conference Report, 136 Cong. Rec. at 36,108 col.1**. Indeed, in its 1996 notice of proposed rulemaking, which led to the Final Rule challenged here, EPA acknowledged that

[t]he option provided in **section [7506](c)(2)(D)** for new projects that were not previously included in a transportation plan/TIP or supporting regional emissions analysis to demonstrate conformity cannot apply during a transportation plan/TIP conformity lapse, because it requires a demonstration that "conforming transportation plans and TIPs" would still conform when the emissions of the new project are considered. Without a conforming transportation plan and TIP in place, this cannot be demonstrated.

61 Fed. Reg. 36,112, 36,120 col.2 (1996). The appeals court thus had no doubt that the word "conforming" in **section 7506(c)(2)(D)** means presently conforming. Since **section 7506(c)(2)(D)** provides an alternative means of demonstrating project conformity when a project does not "come from a conforming plan and program," the appeals court noted that 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)**.

Moreover, the appeals court noted that were they to read the word "conforming" the way EPA suggested, then there would be no assurance that projects approved under section **7506(c)(2)(C)** would help eliminate, reduce, or prevent violations of national ambient air quality standards, as required by **section 7506(c)(1)**. According to that provision, a "conforming" transportation project is one that will contribute to "eliminating or reducing the severity and number of

violations of the [NAAQS] and achieving expeditious attainment of such standards," **42 U.S.C. § 7506(c)(1)(A)**, and that "will not--(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," id. **§ 7506(c)(1)(B)**.

Even a dissenting opinion nevertheless conceded that **section 7506(c)(2)(A)** expressly incorporates the requirements of **section 7506(c)(1)(B)** and makes them applicable to projects approved under **section 7506(c)(2)**. Absent a currently conforming plan and program, there is no certainty that a regionally significant transportation project will satisfy any of the **section 7506(c)(1)(B)** conformity criteria. The court of appeals found that EPA's interpretation of **section 7506(c)(2)(C)** thus eviscerates the requirements of section **7506(c)(1)(B)** and therefore also the requirements of section **7506(c)(2)(A)**, creating an untenable inconsistency not only between **section 7506(c)(1)** and **section 7506(c)(2)**, but also within **section 7506(c)(2)** itself. **42 U.S.C. § 7506(c)(1)(A), (c)(1)(B)(iii)**. The appeals court found that "We think that petitioner has adequately challenged EPA's regulation under **section 7506(c)(1)**."

The appeals court found that the legislative history of the 1990 conformity requirements provides one final reason why the court thought that the phrase "conforming plan and program" refers to currently conforming plans and programs. Congress imposed new conformity requirements in order to integrate transportation planning at the local level with attainment and maintenance of air quality standards at the state level. See **Clean Air Conference Report, 136 Cong. Rec. at 13,106 col.1** (noting that the statute "will require transportation planning agencies to view their task as the development of a transportation system that meets ... both mobility needs and air quality objectives").

By requiring plans and programs to conform to applicable SIPs at the time of project approval, Congress sought to ensure that "transportation plans and programs [would] serve as part of the pollution control strategy for the metropolitan area." Id. To be sure, plans and programs could also serve this pollution control function, as EPA explains, by "account[ing] for and offset[ing] if necessary the emissions of any non-federal projects that are implemented during a conformity lapse." **62 Fed. Reg. at 43,790 col.1**.

The appeals court noted that approach would invite local decision-makers to approve transportation projects while deferring development of pollution control strategies during conformity lapses, thereby subverting Congress's intent that the two processes--transportation planning and pollution control--occur simultaneously. See **136 Cong. Rec. at 36,107 col.2** (regional planning process should identify "the comprehensive transportation system for a metropolitan area" in the context of a "comprehensive consideration of alternatives ... and careful analysis of options that can contribute toward achieving the air quality objectives of the Clean Air Act").

The Conference Report also describes section **7506(c)(2)(D)** as an "exception"--indeed, it is the only exception--to the general rule of **section 7506(c)(2)(C)**. Id. at 36,108 col.1. Under **section 7506(c)(2)(D)**, an excluded project may go forward only if its expected emissions, together with the expected emissions from currently conforming plans and programs, do not exceed the

emissions ceilings in the applicable SIP. As we indicated earlier, both Congress and EPA interpret the word "conforming" in this provision to mean currently conforming. See supra at 9. **Section 7506(c)(2)(D)** thus shows that Congress wanted no transportation projects to proceed without assurance that they would not undermine attainment or maintenance of current air quality standards.

Directly contravening this mandate, the Agency's rule allowed local officials to approve transportation projects included in plans and programs that previously conformed but presently do not. See **40 C.F.R. § 93.121(a)(1)**. Because the conformity status of such projects bears no relation to current air quality attainment or maintenance goals, their approval carries no guarantee that their emissions will neither violate current standards nor contribute to existing violations. Indeed, in the preamble to the 1997 Final Rule, EPA admits--without qualification and contrary to its position in this case—"projects cannot be approved if the plan and TIP have lapsed." **62 Fed. Reg. at 43,797, cols. 1-2**.

EPA offered two additional justifications for its interpretation of **section 7506(c)(2)(C)**. Neither survived scrutiny. First, the Agency pointed out that under a regulation effective since 1995, a certain category of transportation projects called transportation control measures ("TCMs") might proceed even in the absence of a currently conforming plan and program. See **40 C.F.R. § 93.114(b)**. According to the Agency, this exemption shows that **section 7506(c)(2)(C)** of the statute requires no currently conforming plan and program at the time of project approval. The court of appeals saw no reason to extend the exemption for TCMs to ordinary transportation projects, since the former reduce pollution, see id. **§ 93.101**, while the latter add to it. The court of appeals noted that TCMs are "specifically identified and committed to in the applicable implementation plan," id, and exempted from the requirements of **section 7506(c)(2)(C)** because, as the Agency explained in the preamble to the 1995 rule, "[b]y definition, a TCM in an approved SIP conforms to the SIP because it is contained in the SIP." **60 Fed. Reg. at 57,180 col. 2**. This rationale was found to have no applicability to non-TCM projects because such projects never appear in SIPs. See id. At 57, 180 col.3.

Second, the Agency argued that although the statute requires plan and program conformity determinations at least once every three years, see **42 U.S.C. 7506(c)(4)(B)(ii)**, the statute contained no such requirement for project conformity determinations. Inferring from this that Congress intended project conformity to be determined not more than once, EPA maintains that a project included in a previously conforming plan and program retains its conformity status, even if conformity of that plan and program eventually lapses. The appeals court disagreed. The appeals court found that although the statute suggested that Congress did not intend project conformity determinations to occur every three years, it does not follow that Congress intended project conformity determinations to occur only once. Based on the appeals court analysis above, they read the statute to require non-federally funded projects to follow the three-year conformity determination schedule applicable to transportation plans and programs up to the point of MPO approval. After MPO approval, non-federally funded projects need undergo no further conformity determinations.

In sum, 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. By

allowing local approval of transportation projects in the absence of currently conforming plans and programs, the Agency's regulation undermines **section 7506(c)(2)(C)**'s criteria for demonstrating conformity of regionally significant transportation projects to state-level air quality standards. Finding clear congressional intent and thus no need to proceed to Chevron's second step, the appeals court held that **section 93.121(a)(1)** of the regulations violated the Clean Air Act.

The appeals court also dealt with a challenge to **section 93.102(c)(1)** of the regulations, which provided that

> [p]rojects subject to that subpart for which the NEPA process and a conformity determination have been completed by DOT may proceed toward implementation without further conformity determinations unless more than three years have elapsed since the most recent major step (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred.

40 C.F.R. § 93.102(c)(1). Known as the "grandfather" rule, this section reflects the Agency's view that "there should only be one point in the transportation planning process at which a project-level conformity determination is necessary." **62 Fed. Reg. at 43,783 col. 2**. According to the complaint before the appeals court, this regulation, like the one discussed above, violated section **7506(c)(2)(C)** of the statute because it allowed transportation projects to receive federal funding in the absence of a currently conforming plan and program. Again, the appeals court agreed with the petitioner.

To understand how the "grandfather" rule works, the appeals court considered the following hypothetical: In 1993, an MPO approved and adopted a regional highway project--for example, an urban beltway. At the time, the beltway was included in both a conforming plan and a conforming program. Three years later, in 1996, the conformity status of the plan and program lapsed. In 1997, the MPO acquired a significant portion of the right-of-way for the beltway. Today, ready to start building, the MPO sought funding from the Department of Transportation.

EPA's "grandfather" rule allowed DOT to fund the beltway, since a "major step"--acquisition of right-of-way--occurred within the past three years. But **section 7506(c)(2)(C)**'s conformity requirement expressly prohibits DOT from "approv[ing], accept[ing], or fund[ing]" the beltway unless it "comes from a conforming plan and program." This meant that no transportation project could receive federal funds in the absence of a currently conforming plan and program. See supra Part II. Therefore, to the extent that **section 93.102(a)(1)** of the regulations allowed projects to receive federal funds during plan and program conformity lapses, it violates the Clean Air Act.

Defending its "grandfather" rule, EPA cited Environmental Defense Fund, Inc. v. EPA, supra. But that case sustained the "grandfather" rule only as a transition measure "to avoid immediate 'retroactive' implementation of the new [1990] conformity requirement which would impose a substantial and unforeseen burden on federal projects that had already satisfied existing federal requirements [i.e., NEPA review]." **82 F.3d at 456**. Nothing in that decision supported what the Agency has done here--forever exempting a project from further conformity determinations

where the project's most recent conformity determination occurred more than three years ago and where a "major step" occurred within the past three years.

While invalidating **section 93.102(a)(1)** with respect to federally funded projects, the appeals court noted that the statute does not preclude the "grandfather" clause from applying to non-federally funded projects. Although **section 7506(c)(2)(C)** of the statute prohibits MPO or DOT approval of non-federally funded projects during a plan and program conformity lapse, it nowhere prohibits implementation of such projects as long as their approval occurred prior to the conformity lapse.

The appeals court finally turned to petitioner's challenge to those sections of the regulations that permit or require plan, program, and project conformity to be based on motor vehicle emissions budgets in SIP revisions that a state has submitted to EPA, but that EPA has not yet approved or has disapproved. See **40 C.F.R. §§ 93.118(e)(1)**, **93.120(a)(2), 93.124(b)**. Under these regulations, if EPA disapproves a submitted SIP revision without a "protective finding"--i.e., a determination that the submission "contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the [relevant statutory] emissions reductions requirements," id. **§ 93.101**--then "[d]uring the first 120 days following [such] disapproval... transportation plan, TIP, and project conformity determinations shall be made using the motor vehicle emissions budget(s) in the disapproved control strategy implementation plan." Id. **§ 93.120(a)(2)**.

Emissions budgets contained in a submitted SIP revision also guide conformity determinations when EPA makes no finding within 45 days of submission regarding the adequacy of the budgets. See id. **§ 93.118(e)(1)**; see also id. **§ 93.124(b)** (allowing conformity to be based on submitted but not-yet-approved SIP revisions). Submitted budgets, however, do not supersede emissions budgets in an approved SIP for the years covered by the SIP. See id. **§ 93.118(e)(1)**.

Conceding that the Clean Air Act generally requires conformity to be evaluated against approved SIPs, the Agency argued that these regulations represent reasonable responses to statutory silence as to how conformity should be determined when no approved SIP exists or when the approved SIP contains no adequate motor vehicle emissions budget. The appeals court disagreed. Although 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. Where EPA disapproves a SIP revision without a protective finding, i.e., without determining that it contains adequate measures to reduce emissions to statutorily required levels, see **40 C.F.R. § 93.120(a)(2)**, or where EPA fails to determine the adequacy of motor vehicle emissions budgets in a SIP revision within 45 days of submission, see id. § **93.118(e)(1)**, there is no reason to believe that transportation plans and programs conforming to the submitted budgets "will not--(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...." **42 U.S.C. § 7506(c)(1)(B)**.

Indeed, nothing in the regulations requires MPOs to show that an area's projected emissions would be lower if plans and programs conforming to a submitted budget were implemented than

if they were not. See **62 Fed. Reg. at 43,781 col.2** (noting that submitted budgets replaced "build/no-build test" as measure of conformity under Final Rule). Even if it were true that **section 93.118(e)** gives states an incentive to file emissions budgets conforming to law, the regulation would still violate the statute by allowing conformity determinations to take effect where federal agencies and MPOs have not discharged their "affirmative responsibility" to provide an "assurance of conformity." **42 U.S.C. § 7506(c)(1)**.

To be sure, **section 93.118(e)(6)** of the regulations provides that "the MPO and DOT's conformity determinations [based on unapproved or disapproved SIPs] will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget" would violate **section 7506(c)(1)(B)**'s conformity criteria. But how can an MPO or DOT satisfy its "affirmative responsibility" to provide an "assurance of conformity" through a "deemed" statement indicating mere ignorance of non-conformity? For these reasons, the appeals court grant petitioner's request to remand **sections 93.118(e)(1)** and **93.120(a)(2)** to EPA for further rulemaking to harmonize these regulations with **section 7506(c)(1)**'s conformity requirements.

Section 93.124(b) is also inconsistent with the Clean Air Act, but for a different reason. That provision reads:

If an applicable implementation plan submitted before November 24, 1993, demonstrates that emissions from all sources will be less than the total emissions that would be consistent with attainment and quantifies that "safety margin," the State may submit an implementation plan revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such [a SIP] revision ... may be used for the purposes of transportation conformity before it is approved by EPA.

Id. **§ 93.124(b)**. Unlike **sections 93.118(e)(1) and 93.120(a)(2)**, which apply when there is no applicable SIP or no SIP with an applicable emissions budget, **section 93.124(b)** applies when there is an applicable SIP--i.e. it does not purport to fill a statutory gap. While it may be true that plans and programs conforming to a SIP revision under **section 93.124(b)** "will not cause, worsen, or prolong violations of air quality standards," the statute nevertheless requires conformity determinations to be based on a SIP "approved or promulgated under section 7410 of this title" where such a SIP exists. **42 U.S.C. § 7506(c)(1)**. See also id. **§ 7506(c)(2)** (requiring transportation plans, programs, and projects "to conform to any applicable implementation plan in effect under this chapter"). Indeed, EPA itself has said that it "does not believe that it is legal to allow a submitted SIP to supersede an approved SIP for years addressed by the approved SIP**." 62 Fed. Reg. at 43,783 col.3**. See also **40 C.F.R. § 93.118(e)(1)**. Because section 93.124(b) would allow a submitted but unapproved SIP revision to supersede an approved SIP, it violates the Clean Air Act.

Whatever the Agency's policy goals, the appeals court made it clear that its job is and was to interpret the statute. In the March 2, 1999 appeals court decision, the appeals court held that the statute imposes an elaborate array of requirements that, according to the dissent in the decision, amount to "a congressional effort to micromanage local transportation planning." Id. at 1. **The**

appeals court made it clear that if this legislative scheme is too onerous, it is up to Congress to provide relief, not the appeals court. (Emphasis added.)

The appeals court granted the petition for review and held that **sections 93.121(a)(1) and 93.102(c)(1)** of EPA's regulations are unlawful because they depart from the criteria for demonstrating project conformity established in **section 7506(c)(2)(C) of the Clean Air Act**. In addition, the appeals court remanded **sections 93.118(e)(1)** and **93.120(a)(2)** of the regulations for the Agency to align these regulations with the general conformity criteria of **section 7506(c)(1)(B)**. Finally, the appeals court held that section 93.124(b) of the regulations violates **section 7506(c)(1)-(2)** of the Act by allowing a submitted SIP revision to supersede an approved or applicable SIP.

In summary, the Environmental Protection Agency issued the Final Rule pursuant to the 1990 amendments to the Clean Air Act in 1997. That statute prohibits a metropolitan planning organization from approving and the Department of Transportation from funding any transportation project unless it comes from a regional transportation plan and program that conforms to applicable state-level air quality standards. Because the challenged "conformity" and "grandfather" regulations allow both local approval and federal funding of transportation projects that satisfy neither this requirement nor the single exception the statute allows, the appeals court held that these regulatory provisions violate the Clean Air Act. In addition, the appeals court remanded the regulations which allowed conformity to be based on emissions budgets unapproved or disapproved by EPA for further proceedings to harmonize those regulations with the statute's general conformity requirements. Finally, the appeals court held that the regulation, which allows conformity to be based on revised budgets that include “safety margin” emissions, violates the statute's requirement that conformity be evaluated against approved or applicable air quality standards.

ALLEGATIONS

Clark County, its RTC, the FHWA and the EPA have continued to fund and permit highway projects in the Las Vegas Valley non-attainment area knowing there is no NEPA document supporting successive RTC RTP/TIPs, there is no evidence of a prior NEPA process, and there is no evidence of a state conformity SIP. The agencies proceeded despite having full knowledge that there is no evidence of NEPA compliance.

The EPA and the FHWA fund and regulate the RTC and the Nevada Department of Transportation despite the fact that Clark County has no final, EPA compliance with the 1990 amendments to the Clean Air Act, no finally approved 1990 amendment state SIP, no pollution specific SIPS and no conformity determinations. Clark County has never complied with the transportation and general conformity requirements of the Clean Air Act in the valley, serious non-attainment area. All of these agencies know that.

The EPA, FHWA and RTC have successfully, thus far, ignored all NEPA requirements and the Clean Air Act in promulgating plans it knows are not a part of and are not in conformance with a final, EPA approved SIP. Despite that, the pending RTP/TIP unlawfully claims compliance with a submitted, but unapproved SIP that it knows is legally insufficient.

There cannot be transportation or general conformity by definition since the RTC cannot answer the question about the requirement for a 1990 amendments EPA approved SIP first. The above-named agencies have routinely failed and/or refused to name the only EPA approved SIP in Nevada SIP and conformity determination claims they rely upon. That is misrepresentation. No matter what the RTC says or does, there is no legally sufficient SIP.

The FHWA may not lawfully support and fund Clark County's Regional Transportation Plan (RTP) and the Clark County Transportation Improvement Program (TIP) projects pursuant to current federal statutes, particularly NEPA statutes, without being in serious violation of federal statutes itself. See, **40 CFR Part 27, Program Fraud Civil Remedies**.

Where agencies do not identify the applicable, finally approved, 1990 amendments SIP relied upon, the activity must not lawfully move forward until they do. A business person would go to jail for promulgating a stunt like this. There is nothing in any local, state or federal employee's job description that protects any federal employee who knowingly and willfully makes misleading statements to the public and to federal agencies in a quest for funds that enhance the employee's longevity, salary and benefits.

42 U.S.C. § 7418(a) states,

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any non-governmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any record keeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

The U.S. Environmental Protection Agency, by and through is Director and its Region IX, and the U.S. Department of Transportation (DOT) by and through its Secretary and its Federal Highway Administration (FHWA) division, have acted arbitrarily and capriciously in failing to comply with and perform the non-discretionary duties as further complained of herein. That non-discretionary failure unlawfully delays adoption of measures required of federal agencies by the CAA to administer its programs in such as way as to reduce NAAQS air pollution, and in this instance PM_{10} and CO air pollution in the Las Vegas Valley of Clark County, Nevada. As a result, Plaintiff and the other citizens of the Las Vegas Valley non-attainment area are deprived of the health, welfare, and procedural protections guaranteed to them under NEPA and the CAA.

For the reasons cited herein, EPA's and DOT's failure to comply with the statutory obligation to comply with the current, valid federal statutes where there is no NEPA compliance, Nevada State Implementation Plan or conformity determinations. The EPA and the DOT have failed and/or refused to timely perform the non-discretionary duties complained of herein that adversely affect the Commenter/Plaintiff and deprive him of health, welfare, and procedural protections to which he is entitled under the CAA. The relief the proposed Plaintiff intends to seek would redress these injuries.

The issues herein involve RTC/EPA/DOT/FHWA activities in Clark County Nevada which have contributed to Clark County's failure to reach and/or refusal to reach any attainment deadline for the Las Vegas Valley non-attainment area with respect to the national primary ambient air quality standards (NAAQS) for PM_{10} and CO, by the dates which attainment could have been achieved as expeditiously as practicable, but no later than 5 years, or any other lawful attainment date, from the date such area was designated non-attainment. **42 U.S.C. 7407(d)**. The date the Las Vegas Valley was first designated as non-attainment for PM_{10} was August 7, 1987.

SUMMARY

We have described a legally serious series and ongoing violations of federal environmental laws. We have described local, state and federal scofflaw agencies in general and the RTC in particular that have ignored our nation's environmental laws with impunity. If a commercial source of air pollution had acted in the same way, that source would likely be facing serious financial penalties and even more serious proceedings against those responsible. Public employees are not immune from being held responsible under the conditions we have described herein. All public employees have a responsibility to turn over allegations of serious violations of the law to local, state and federal law enforcement agencies. These comments constitute a legal notice to the RTC in particular that the petitioners believe the agency is operating well outside the law.

Respectfully submitted,

/s/ Robert W. Hall_____________
Robert W. Hall, as an individual
and as Chairman, Nevada Environmental
Coalition, Inc. (NEC)

NEC