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THE MESHING OF NEW YORK CITY'S TRANSPORTATION
PLANS AND CLEAN AIR ACT REQUIREMENTS
FOLLOWING SEPTEMBER 11, 2001

I. INTRODUCTION

On Tuesday, September 11, 2001, the world was shaken by the ghastly attacks on the Twin Towers of the World Trade Center in New York City.¹ The skyscraper targets stood as prominent symbols of American culture, buildings of American invention that expressed to the world our nation's will to soar above the earth.² "The terrorists recognized those skyscrapers as the cathedrals of our age and aimed at their heart."³ The specter of terrorism has since become alarmingly real.⁴ President Bush reassured the nation on the evening of September 11th that the United States cannot be frightened into chaos and retreat.⁵ The destruction of the World Trade Center cannot weaken the very foundation of America.⁶ While the horrific loss of life and the war on terrorism are the most important aspects following September 11th, the environmental impact continuing to unfold is a significant reality of the attacks.⁷ "The destruction of the World Trade Center probably had greater short-term environmental impacts than anything else that has ever happened in New York City; the long-term effects remain to be seen."⁸

1. See Kevin Matthews, *World Trade Center Destroyed*, ARCHITECTURE WEEK, Sept. 12, 2001, at <http://www.architectureweek.com/2001/0912/today.html> (explaining horror and disbelief resulting from attacks).

2. See *id.*

3. *Id.* (illustrating that structural vulnerability of World Trade Center became more clear on September 11, 2001).

4. *Id.*

5. See President George W. Bush, *Statement by the President in his Address to the Nation*, at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (presenting President's remarks to nation at 8:30 P.M. EDT on Sept. 11, 2001).

6. See Time.com, *Day of Infamy: Special Report* (Sept. 12, 2001), at <http://www.time.com/time/nation/article/0,8599,174502,00.html> (explaining various accounts and facts after terrorist attacks).

7. See Michael B. Gerrard, *Environmental Law Implications of the World Trade Center Disaster*, Environmental Law in New York, Dec. 2001, available at <http://www.nycosh.org/gerrardarticle.html> (Berle, Kass & Case Newsletter) (describing emergency response authorities and immediate impacts of attack: air pollution, demolition and removal, emergency provisions, and repair and reconstruction).

8. *Id.*

Since September 11th, air quality has been a constant concern for people who frequent downtown Manhattan.⁹ In addition to the health concerns of residents, many governmental entities, such as the New York City Fire Department, the New York City Police Department, and the Port Authority of New York and New Jersey, experienced crippling effects due to the attacks.¹⁰ The New York Metropolitan Transportation Council (NYMTC), once located on the eighty-second floor in Tower One of the World Trade Center, is responsible for planning transportation activities for the New York metropolitan area.¹¹ Its World Trade Center Offices housed vital data, which included the city's transportation plans that purported to comply with the State of New York's air quality plans.¹²

This Comment will discuss the background of section 176(c)(2) of the Clean Air Act (CAA) and the methods for achiev-

9. See Jacquelyn Cefola et al., *Rebuilding Lower Manhattan: A Clean Air Initiative* (Jan. 11, 2002) [hereinafter Briefing Paper] (raising concerns that dangerous dust has not been sufficiently cleaned from area). The Environmental Protection Agency [hereinafter EPA] and other federal agencies have collected air, dust, water, river sediments, and drinking water samples from the area surrounding the site of the World Trade Center Towers since September 11. *Id.*; see also *United States Environmental Protection Agency: EPA Response to September 11, Benchmarks, Standards and Guidelines Established to Protect Public Health*, Jan. 30, 2002, at <http://www.epa.gov/wtc/activities.htm>. These samples have been examined for pollutants in an effort to protect public health. *See id.* A variety of benchmarks, guidelines and standards could be used for examining the samples. *See id.* For example, asbestos in the air is being monitored by the standard established in the Asbestos Hazard Emergency Response Act. *See id.* If dust contains one percent of asbestos, it is considered to be an "asbestos-containing material." *See id.* However, even if the samples are labeled "asbestos-containing material" generally, the level would not be high enough to pose a significant threat to the community. *See id.* In addition to dust samples, drinking water has been examined for PCBs, asbestos, metals, and bacteria. *See id.* No contaminants have been detected above the standards set by federal Maximum Containment Levels for drinking water. *See id.*

10. *See* The City of New York, *Daily WTC Update*, at http://www.nyc.gov/html/wtc_other/site_update_daily.html (Mar. 19, 2002). As of March 19, 2002 at 2:00pm, there were 794 confirmed recoveries, 603 civilians, and 191 uniformed (FDNY/NYPD/PAPD/OTHER). *See A Nation Challenged*, N.Y. TIMES, Feb. 6, 2002, at A10 (indicating that 2,844 individuals dead or missing at World Trade Center, and 147 dead aboard hijacked planes that flew into World Trade Center Towers).

11. *See* Richard Perez-Pena, *Pataki Seeks U.S. Waiver on Air Quality*, N.Y. TIMES, Jan. 2, 2002, at B1.

12. *See id.* (stating that three staff members have perished and records and computers were destroyed when tower collapsed). The New York Metropolitan Transportation Council [hereinafter NYMTC] is the Metropolitan Planning Organization [hereinafter MPO] for the region made up of Nassau, Putnam, Suffolk, Rockland, and Westchester Counties, and the city of New York. *See* New York Metropolitan Transportation Council, *What is NYMTC?*, at <http://www.nymtc.org/whatis.html>. The New York regional council is responsible for analyzing and deciding transportation issues. *See id.*

ing transportation conformity.¹³ The background will also address New York's current transportation conformity concerns, while using Atlanta, Georgia to demonstrate how a metropolitan region achieves conformity.¹⁴ Our analysis describes H.R. 3880, a Bill proposed in the House of Representatives on March 6, 2002 and signed into law on October 1, 2002 as Public Law 107-230.¹⁵ H.R. 3880 proposed to waive section 176(c)(2) of CAA as a result of the terrorist attacks on the World Trade Center and the destruction of the NYMTC.¹⁶ Through a joint effort of multiple governmental agencies, various environmental groups and the State of New York, H.R. 3880 was designed to alleviate concerns regarding the breadth of the proposed waiver.¹⁷

Our analysis will consider the concerns of environmental groups as well as examine Environmental Protection Agency's (EPA) apprehensions regarding H.R. 3880.¹⁸ Our Comment will describe the development of this Bill and the significant changes that were made to address the concerns of those opposed.¹⁹ To conclude, this Comment will suggest the likely influence of Public Law 107-230 on the CAA and its recent enactment.²⁰

II. BACKGROUND

A. Transportation Conformity and the Clean Air Act

The CAA, initially enacted by Congress in 1955, and significantly amended in 1977 and 1990, serves as the principal federal statute regulating air quality.²¹ In 1977, "Congress added the conformity requirement to the Clean Air Act in an effort to deal with

13. For discussion of Clean Air Act [hereinafter CAA] §176(c)(2), see *infra* notes 21-49 and accompanying text.

14. For a discussion of New York's and Atlanta's current ability to conform, see *infra* notes 50-84 and accompanying text.

15. H.R. 3880, 107th Cong. §§ 1, 2 (2002) (enacted).

16. See *id.* For a discussion of the introduction of H.R. 3880, which was recently signed into law as Public Law 107-239, see *infra* notes 85-97 and accompanying text.

17. H.R. 3880, 107th Cong. §§ 1, 2 (2002) (enacted) (listing goal and numerous sponsors behind Bill).

18. For a discussion of environmental groups' and EPA's suggestions regarding H.R. 3880, see *infra* notes 98-147 and accompanying text.

19. For a discussion of the development of and changes made to H.R. 3880, see *infra* notes 148-70 and accompanying text.

20. For a discussion of the enactment and impact of Public Law 107-239, see *infra* notes 171-88 and accompanying text.

21. See Major Susan M. Fall, *Clean Air Act General Conformity Determinations and the Air Force*, 41 A.F. L. REV. 83, 86-89 (1997) (describing how CAA comprises many titles setting forth requirements for pollutant emissions); see also Michael Yarne, *Land Use Law: Clean Air Act- Urban Development: Conformity as Catalyst: Environmental*

transportation-generated air pollution as a cause for air quality nonattainment.”²²

The 1990 CAA amendments strengthened air pollution controls and provided more extensive requirements for states to conform to CAA.²³ Section 176 of CAA details the two new programs established by the 1990 amendments: general conformity and transportation conformity.²⁴ The 1990 CAA amendments to section 176(c)(2) address the achievement of transportation conformity.²⁵ Transportation conformity governs transportation plans, programs and other projects funded or approved by the Department of Transportation (DOT) by either the Federal Highway Administration or the Federal Transit Administration.²⁶ Since EPA has the authority to write regulations for conformity with DOT’s concurrence, several pertinent regulations were drafted by both the DOT and EPA relating to transportation conformity.²⁷

Defense Fund v. Environmental Protection Agency, 27 ECOLOGY L.Q. 841, 851 (2000) (stating minor amendments were made in 1963, 1967, and 1970).

22. Fall, *supra* note 21, at 85 (explaining term “conformity” was vague and other problems associated with 1977 amendments including ineffectiveness of reducing pollutants and public was becoming more aware and sensitive to environmental issues). The 1990 amendments to the conformity provision significantly strengthened the conformity provisions and increased their importance. James F. Cumberland, Jr., *EPA’s August 1997 Final Rule Regarding Transportation Conformity*, 4 ENVTL. LAW. 509, 510 (1998).

23. See Fall, *supra* note 21, at 87 (defining “conformity” to include plan or project required to conform to State Implementation Conformant Plans).

24. See *id.* (recognizing similarities but distinguishing programs by their focus).

25. 42 U.S.C. § 7506(c)(2) (2001). The first sentence and accompanying text defines “conformity” as it relates to an implementation plan, however, nearly all of the remaining text in section 176(c) exclusively relates to transportation conformity. James T. Lang, *Clean Air Act Section 176 General Conformity Program*, 2 ENVTL. LAW. 353, 359 (1996). Section 176(c)(2) contains the transportation conformity provisions, while subsection (c)(3) provides criteria for determining compliance of transportation plans, programs and projects to improve air quality in nonattainment areas. See Cumberland, *supra* note 22, at 512-13. Section 176(c)(4) sets forth minimum requirements requiring each state to file a State Implementation Plan [hereinafter SIP] with EPA. See *id.* Lastly, section 176(c)(5) provides the applicable provisions of general and transportation conformity that apply to nonattainment areas. See *id.* Congress added these provisions to combat the emissions from vehicles due to the number of cars on the road and the number of miles traveled. See *id.*

26. See *id.* (discussing application of general conformity program to nonattainment areas in all other federal actions).

27. See 40 C.F.R. § 51 (1999) (addressing “EPA’s Requirements for Preparation, Adoption, and Submittal of Implementation Plans”); see also 40 C.F.R. § 93 (1999) (detailing EPA’s method for “Determining Conformity of Federal Actions to State or Federal Implementation Plans”); 23 C.F.R. § 450 (1999) (stating Federal Highway Administration’s “Planning Assistance and Standards”). 40 C.F.R. § 51 and § 93 contain the information that is referred to as the “transportation conformity rule.” See Environmental Protection Agency, *Transportation Conformity*

Transportation conformity is achieved through a quantitative test, "where the emissions projected from a metropolitan area's transportation plan and transportation improvement program must be at or below the emissions level established for motor vehicle sources in the State Implementation Plan (SIP)."²⁸ The transportation conformity requirement ensures that federal funding is approved and granted to transportation activities consistent with clean air goals.²⁹ Conformity also helps to prevent unpredictable increases in vehicle emissions that undermine the maintenance of clean air.³⁰ In addition, the amendments to the 1990 CAA required EPA to prescribe National Ambient Air Quality Standards (NAAQS) to protect public health and welfare.³¹

Under CAA all states must meet the NAAQS and adopt a SIP, which includes "enforceable emission limitations and other control measures, means, or techniques . . . as well as schedules and timetables for compliance."³² If EPA elects to alter any of the NAAQS or finds a SIP insufficient to attain the NAAQS, then the states must revise their air quality plans.³³

Although EPA must establish the conformity rules, state and local transportation agencies, such as Metropolitan Planning Organizations (MPOs), state DOTs and the United States DOT, ensure that transportation plans conform with acceptable emission limits or "budgets" outlined in the SIPs.³⁴ The CAA states that transporta-

Rule Amendments: Flexibility and Streamlining, at <http://epa.gov/fedgrstr/EPA-AIR/1997/August/Day-15/a20968.htm> (Aug. 15, 1997).

28. Telephone Interview with Angela Spickard and Laura Berry, EPA Office of Transportation Air Quality, (Conformity Team) (Aug. 9, 2002) [hereinafter EPA Interview II] (emphasizing EPA's certainty regarding conformity lapse).

29. *Id.* (describing EPA's final rules for transportation conformity issued Nov. 15, 1993).

30. *See* Fall, *supra* note 21, at 88 (stating codified rules in part 51, sub-part T, of Code of Federal Regulations).

31. *Id.* at 83; *see also* Yarne, *supra* note 21, at 845 (discussing seven "criteria pollutants": ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, lead, coarse suspended particles under ten microns in diameter, and fine suspended particles under 2.5 microns in diameter).

32. Yarne, *supra* note 21, at 851 (citing 42 U.S.C. § 7410(a)(2)(A) (2001) to explain requirements known as "emissions budgets"). The National Ambient Air Quality Standards are designed to protect against pollutants found to cause respiratory and cardiopulmonary problems, headaches, reduced learning ability, and premature mortality. *See id.* at 845. In addition, acid rain, reduced agricultural yields, harm to vegetation, building material damages, and decreased visibility result from these pollutants. *See id.*

33. *See id.* at 851 (describing EPA may impose federal implementation plan if state fails after two years to submit adequate SIP).

34. U.S. Department of Transportation, Federal Highway Administration, *Transportation Conformity: A Basic Guide for State and Local Officials, Part One: The Basics of Transportation Conformity* [hereinafter *Basic Guide*], available at <http://www>.

tion plans, programs and projects cannot violate federal determined air quality standards; increase the severity of an existing violation in that area; or delay attainment of any standard for that particular area.³⁵ In addition to the transportation conforming requirements, the U.S. DOT issues further requirements for transportation plans, programs and projects that are stated in title 23 U.S.C. § 134 and the Urban Mass Transportation Act.³⁶ Further, in 1991 the Intermodal Surface Transportation Act, amended in 1998 by the Transportation Equity Act for the 21st Century (TEA-21), authorized highway, transit and other transportation programs for a six-year period.³⁷

Title 23 U.S.C. § 134 requires the governor of each state, aided by local officials, to designate a MPO when an urban area consists of more than fifty thousand people.³⁸ The MPOs outline long-range transportation investments.³⁹ Under the Urban Mass Transportation Act, the MPO develops a transportation improvement program (TIP), which displays a multi-year prioritized list of transportation projects to be funded or approved by the Federal Highway Administration or the Federal Transit Authority.⁴⁰ The TIP includes projects from the long-range transportation plan that will be carried out in a three-year period if the TIP is approved.⁴¹

fhwa.dot.gov/////environment/conformity/basic2gd.htm (stating that CAA amendments of 1990 and EPA's transportation conformity regulation issued in November 1993 provide guidelines for transportation officials); *see also* 40 C.F.R. §§ 51, 93 (Nov. 24, 1993, as amended in Aug. 1985, Nov. 1995, and Aug. 1997).

35. 42 U.S.C. § 7506(c)(1)(B) (2001) (detailing restrictions of implementation plans).

36. *See Basic Guide, supra* note 34 (outlining conformity process); *see also* 23 U.S.C. § 134 (2001) (stating statutory authority behind metropolitan planning conducted by United States Department of Transportation [hereinafter DOT]); 49 U.S.C. §§ 5301-38 (2001) (discussing transportation conformity).

37. *See* United States Department of Transportation, *TEA-21- Transportation Equity Act for the 21st Century: A Summary- An Overview*, at <http://www.fhwa.dot.gov/tea21/sumover.htm> (July 14, 1998) (summarizing TEA-21 as was signed into law on June 9, 1998, PL 105-178). The Act improves current programs and addresses safety and environmental challenges while maintaining flexible and efficient transportation. *See id.*

38. *See* 23 U.S.C. § 134(b)(1) (2001) (explaining that designation of MPO can be done either by agreement between governor and local government or in accordance with procedures established by state or local law).

39. *See id.* § 134(a)(3) (providing development and operation transportation systems and facilities that will function to form metropolitan areas transportation system).

40. *See Basic Guide, supra* note 34 (explaining Transportation Implementation Plan [hereinafter TIP]); *see also* 49 U.S.C. § 5304(b) (listing contents that TIP must include).

41. *See id.* § 5304(b)(1) (requiring projects to be carried out in three-year period).

When the transportation plan is completed, the MPO must then make a formal conformity determination, demonstrating that its projected emission levels are less than or equal to the motor vehicle emissions budgets contained in the SIP before passing the plan to the U.S. DOT for final approval.⁴² For the TIP to be approved, "it must be consistent with the conforming transportation plan, and the TIP must be found to conform to the SIP. Specifically, the transportation plan and TIP must result in emissions consistent with those allowed in the SIP."⁴³ To monitor conformity in a specific area, the CAA requires conformity determinations to be made at least every three years if the TIP, the transportation plan or a project is changed.⁴⁴

If the TIP, transportation plan or project fails to meet conformity requirements, then the plan must be modified to conform or the SIP must be amended.⁴⁵ A conformity lapse occurs when an area is unable to make a conformity determination by a given conformity deadline (e.g. the CAA three-year requirement).⁴⁶ During this period, new transit projects and highway projects may halt until an acceptable TIP and transportation plan is developed.⁴⁷ The Federal Highway Authority and the Federal Transit Authority, however, may approve projects exempt from the conformity process (e.g. safety projects) and may also exempt transportation control measures included in approved SIPs.⁴⁸ In addition, "[o]nly those projects which have received approval of PS&E (plan specifications and estimates), and transit projects that have received a full funding grant agreement (FFGA), or equivalent approvals, prior to conformity lapse may proceed during a conformity lapse."⁴⁹

42. See *Basic Guide*, *supra* note 34 (explaining MPO's role in conformity determinations).

43. *Id.* (stating quintessential elements of achieving transportation conformity).

44. See *id.* (discussing potential SIP revisions *may* lead to early determination review).

45. See *id.* (explaining modification would offset expected emissions).

46. See 49 U.S.C. § 5305(e)(1) (2001) (stating that Secretary will assure and certify MPO is carrying out responsibilities and complying with applicable laws).

47. See Letter from Christine Whitman, EPA Administrator, to W.J. "Billy" Tauzin, Chairman House Committee on Energy and Commerce (Nov. 6, 2001) [hereinafter Whitman Letter] (stating during conformity lapse only limited transportation projects can proceed).

48. See *id.* (adding during this period, New York is limited in their ability to implement transportation projects to service New York City); see also *Basic Guide*, *supra* note 34.

49. Whitman Letter, *supra* note 47 (stating that addition of design and right-of-way acquisition projects cannot be funded by federal aid during conformity lapse). Projects that do not receive federal funds are affected during a conformity

B. Can New York Conform?

As a consequence of the September 11th terrorist attacks, New York State Governor George Pataki's administration requested that Congress waive the federal transportation conformity requirements for New York's transportation plans, programs and projects for the next four years.⁵⁰ Specifically, the Pataki administration proposed legislation granting a section 176(c) waiver of CAA requirements applicable to transportation projects, programs, and plans for the ten counties, and seven towns of another eleventh county, within the larger New York City severe zone nonattainment area.⁵¹ According to the Pataki administration, this waiver was necessary to meet certain transportation conformity requirements and metropolitan transportation planning requirements under the CAA.⁵²

Given the condition of New York City, the Pataki administration felt it would be impossible for NYMTC to comply with the transportation conformity regulations.⁵³ The Pataki administration further believed it would be unable to submit an acceptable transportation plan by the October 2002 deadline for conformity determination.⁵⁴ Prior to Public Law 170-230, NYMTC would have needed an updated plan in place by October 1, 2002, to meet the three-year CAA conformity requirement and DOT's planning regu-

lapse if agencies regularly receive funding in their programs, unless there has been prior approval for funding before the lapse. *See id.*

50. *See* Perez-Pena, *supra* note 11 (detailing reasoning behind waiver requests and likelihood of success).

51. H.R. 3880, 107th Cong. §§ 1,2 (2002) (listing included counties). H.R. 3880 includes section 1: Clean Air Transportation Conformity; Temporary waiver for New York Areas and section 2: Metropolitan Planning Requirements; Temporary Waiver for New York Areas. *Id.* H.R. 3880 includes, Section 1 (a) Temporary Waiver that states:

notwithstanding any other provision of law, until September 30, 2005, the provisions of section 176(c) of the Clean Air Act, and regulations promulgated thereunder, shall not apply to transportation projects, programs, and plans for the counties of New York, Queens, Kings, Bronx, Richmond, Nassau, Suffolk, West Chester, Rockland, Putnam, or to the towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick, and Woodbury in Orange County, New York. The preceding sentence shall not apply to the regulations under section 176 (c)(4)(B)(i) of such Act relating to Federal and State interagency consultation procedures.

Id.

52. *See* Perez-Pena, *supra* note 11 (explaining support for strong belief in necessity of approval of waiver).

53. *See* EPA Interview II, *supra* note 28 (fearing impossibility of meeting deadline).

54. *Id.* (believing present plan to be unacceptable because not sufficiently thorough).

lation that requires a new transportation plan every three years.⁵⁵ Consequently, the administration requested a waiver granting them additional time and flexibility to conform to these requirements.⁵⁶ Without the proposed waiver, the probable conformity lapse could have prevented completion of several new NYMTC projects.⁵⁷

In order for NYMTC to have a fiscally controlled and conforming plan and TIP in place by September 30, 2005, they would have had to begin the transportation planning process prior to September 2004.⁵⁸ "Historically and under normal circumstances, NYMTC has needed at least one year to adopt major program amendments, and at least two years to adopt a new TIP or plan. According to the draft legislation, projects unrelated to the recovery efforts would also be exempt from the conformity process."⁵⁹

Alarmed environmentalists felt that the blanket waiver was overbroad and unnecessary.⁶⁰ For example, Environmental Defense suggested either a more targeted waiver or an administrative solution to the problem.⁶¹ They feared that a blanket waiver would set a dangerous precedent, which could have been viewed as undermining the CAA.⁶² For example, in the event of a future catastrophe, the fear was that metropolitan areas would have relied on H.R. 3880 to request a similar waiver to prevent a lapse in conformity.⁶³

55. *Id.* (finding that Public Law 170-230 forces request of waiver).

56. *See* Letter from Environmental Defense to Hillary Clinton, Senator of New York (Dec. 13, 2001) [hereinafter Clinton Letter] (offering their condolences to families who suffered loss resulting from tragedy and asking to curtail waiver).

57. *See* Telephone Interview with Angela Spickard and Laura Berry, EPA Office of Transportation Air Quality, (Conformity Team) (Mar. 12, 2002) [hereinafter EPA Interview] (emphasizing EPA's certainty regarding conformity lapse). During a conformity lapse, however, any transportation infrastructure destroyed by the terrorist attacks could be rebuilt to the same specifications and capacity as existed prior to September 11th; these projects are exempt from the conformity process. *Id.*

58. *See* Letter from Jeffrey R. Holmstead, Assistant Administrator for the Office of Air and Radiation, U.S. EPA, to the Hon. Joseph H. Boardman, Commissioner of New York State Department of Transportation and the Hon. Erin M. Crotty, Commissioner of New York State Department of Environmental Conservation (Nov. 14, 2001) [hereinafter EPA Letter] (expressing EPA's support of H.R. 3880).

59. *Id.* (adding current federal conformity regulation that considers rebuilding of destroyed or damaged projects as exempt).

60. *See* Clinton Letter, *supra* note 56 (outlining committee's proposal).

61. *See id.* (providing suggestions for more limited approach in combating problem).

62. *See* Perez-Pena, *supra* note 11 (expressing discontent with possibility that waiver would be applied to projects having nothing to do with terrorist attacks).

63. *See id.*

New York did not believe an administrative grant of time was realistic or possible without amending the law given the condition of the NYMTC.⁶⁴ Critics of H.R. 3880 asserted that the State was improperly using the destruction of NYMTC's capabilities as a means to carry out the waiver and as the basis for New York's inability to demonstrate conformity.⁶⁵

C. Atlanta: Illustration of Transportation Conformity

Atlanta, Georgia has the second worst traffic congestion problem of any southern city.⁶⁶ In the 1990's the Atlanta metropolitan urban area experienced more growth than any metropolitan region in history.⁶⁷ The growth of the land use pattern significantly increased duration of trips and diminished effectiveness of transit services.⁶⁸ "The combination of more and longer trips has increased vehicle miles traveled (VMT) in the region to the point where Atlantans 'drive the equivalent of a journey to the sun each day (more than one hundred million miles).'"⁶⁹

In 1996, metro Atlanta's MPO was advised that it would lose billions of dollars in federal transportation funds when their current TIP concluded in 1997.⁷⁰ This loss was attributed to Atlanta's failure to develop a new TIP that conformed to the state air quality plan's targets.⁷¹ The DOT granted Atlanta an extension to implement a conforming TIP until December 1998.⁷² In January of 1998,

64. See Telephone Interview with Andrew Darrell, Regional Director, Environmental Defense (Feb. 5, 2002) [hereinafter Environmental Defense Interview] (explaining two possible routes to resolve problem and concluding two alternatives not necessarily in conflict with one another).

65. See *id.* (describing three lives lost on eighty-sixth floor and complex computer models run by outside consultants). Consultants, using identical computers and programs, have rescued data from the computers lost in the World Trade Center. See *id.*

66. See Yarne, *supra* note 21, at 870 (stating pollution in Atlanta is second only to Miami). Reports show traffic congestion cost the Atlanta region an estimated \$1.5 billion annually in lost time and wasted fuel. *Id.* at 870 n.180.

67. See *id.* at 869 (attributing growth to metropolitan and employment expansion).

68. See *id.* (elaborating time Atlanta residents spend behind wheel and in traffic causing frustration with daily routine of life). Metro Atlantans average daily over thirty-four miles of driving, the highest in the nation. See *id.* at 870.

69. *Id.* at 869-70 (describing Vehicle Miles Travel increase and how it is resulting in higher increase of traffic congestion).

70. See *id.* at 844 (explaining Atlanta was given extensions but still unable to conform).

71. See Yarne, *supra* note 21, at 844 (stating Dec. 1997 deadline given to Atlanta).

72. See EPA Interview, *supra* note 57 (describing Atlanta's TIP was extended from Aug. 1997 until Dec. 1997).

Atlanta's transportation plan and three-year conformity determination were due.⁷³ At that point, Atlanta was still unable to meet the conformity requirements and entered a conformity lapse.⁷⁴

In response, Georgia transportation officials attempted to grandfather over fifty road construction projects before the transportation program lapsed.⁷⁵ A coalition of environmental and transportation activists challenged the last-minute expansion approvals and "accused the state and federal DOT of intentionally misusing EPA's grandfathering rules to approve projects which would further erode Atlanta's deteriorating air quality."⁷⁶

While this lawsuit developed, the United States Court of Appeals for the D.C. Circuit Court was in the process of deciding *Environmental Defense Fund v. Environmental Protection Agency (EDF)*.⁷⁷ The *EDF* court determined that "EPA had loosely interpreted the conformity requirement and generously read a 'grandfather' provision into the language of the Act, thus exempting some transportation projects from later review."⁷⁸ In essence, absent court intervention, EPA's grandfather provision in the conformity regulation would have allowed the approval and funding of transportation projects, provided that the projects had previously appeared in a conforming Regional Transportation Plan, regardless of whether fi-

73. *See id.*

74. *See id.* (stating DOT's metropolitan planning regulations allow extensions in extenuating circumstances).

75. *See Yarne, supra* note 21, at 844 (stating that number of projects attempted to be grandfathered exceeded number of attempts by any region situated comparably to Atlanta); *see also* EPA Interview, *supra* note 57. During TIP extension, an MPO could complete the National Environmental Policy Act of 1969 [hereinafter NEPA] process for many transportation projects. *See* EPA Interview, *supra* note 57. When conformity lapsed, projects were grandfathered because of pre-approved NEPA determinations. *Id.* NEPA sets forth national environmental policy, created the Council on Environmental Quality, and creates environmental impact statements. *See* United States Department of Transportation, *NEPA: Project Development Process*, at <http://www.fhwa.dot.gov/environment/000000001.htm>. Federal Agencies must interpret and administer laws in accordance with NEPA. *Id.* A "grandfather clause" is defined as a clause that exempts a class of persons due to circumstances applying before the cause takes effect. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 987 (3d ed. 1976).

76. Yarne, *supra* note 21, at 844 (challenging sixty-one last-minute road approvals which totaled over \$700 million).

77. 167 F.3d 641, 643 (D.C. Cir. 1999) (holding that EPA violated conformity requirements of 1990 CAA). Both the EPA and DOT had to provide guidance for the conformity rule. *See id.*

78. Yarne, *supra* note 21, at 843 (summarizing holding of *Environmental Defense Fund v. Environmental Protection Agency* [hereinafter *EDF*]). Regardless of NEPA approval, projects could not be advanced if the region did not have a conforming transportation plan and TIP in place. *See* Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity, 67 Fed. Reg. 5882 (Feb. 7, 2002).

nal approval was given when the region was no longer in conformity.⁷⁹ Following the *EDF* decision, the parties to the lawsuit in Georgia reached an out of court settlement.⁸⁰

Georgia responded to Atlanta's national air quality problems with the creation of the Georgia Regional Transit Authority.⁸¹ Since the birth of the Transit Authority, however, the Southern Environmental Law Center (SELC), on behalf of environmental groups challenging Atlanta's air quality plans, has filed two federal lawsuits.⁸² In 2000, the Eleventh Circuit decided in favor of the SELC and is currently hearing oral arguments on a related matter.⁸³ The City of Atlanta fears that existing and future legal challenges will "become an insurmountable obstacle to Atlanta's newly energized plans for improving its transportation network."⁸⁴

III. ANALYSIS

A. New York's Request to Waive Conformity Requirements of the CAA

On March 6, 2002, Representative Vito Fossella introduced H.R. 3880 to "provide a temporary waiver from certain transportation conformity requirements and metropolitan planning requirements under the Clean Air Act and under other laws for certain areas in New York where the planning offices and resources have

79. See *Yarne*, *supra* note 21, at 859 (stating that EPA ignored plain interpretation of § 7506(c)(2)(C)(i) of CAA). The CAA

states that a project may only "conform" with an applicable SIP if it "comes from a conforming plan and program," or in the alternate, if its projected emissions, "when considered together with emissions projected for the conforming [RTPs and TIPs] within the nonattainment area, will not cause such [RTPs and TIPs] to exceed the emission reduction projections and schedules assigned to [them] in the applicable [SIP]."

Id. at 860.

80. See *id.* at 844 (stating that seventeen of grandfathered highway projects were approved).

81. See *id.* at 844-45 (describing Georgia Regional Transit Authority as "bold experiment in regional government" to combat air quality conformity). The Georgia Rail Transit Authority was developed to assist the MPO's and maintain responsibility for developing a regional land use, transportation, and air quality plan. See *id.* at 872.

82. See *id.* at 882 (stating at time of note, federal lawsuit was filed challenging Atlanta's data for vehicle emissions model); see also Julie B. Hairston, *Environmental Lawsuit Hangs Over Road Plans*, THE ATLANTA JOURNAL AND CONSTITUTION, Jan. 28, 2002, at 1E (discussing Southern Environmental Law Center's appeal to 11th Circuit regarding Atlanta's regional plan for meeting air quality standards).

83. See Hairston, *supra* note 82 (stating Southern Environmental Law Center's expectation to overturn based prior case).

84. *Id.* (citing Georgia Tech Professor, Michael Meyer, as stating legal challenges will not become obstacle, instead present cautionary note).

been destroyed by acts of terrorism, and for other purposes.”⁸⁵ The Bill was referred to the House Committee on Energy and Commerce and the House Committee on Transportation and Infrastructure to consider the provisions falling within their respective jurisdiction.⁸⁶ Considerable changes were made to H.R. 3880 from the time of its introduction to its passage as Public Law 170-230.⁸⁷

New York suggested that drastic changes had taken place in the region following the terrorist attacks and as a result, contended that the old transportation plans were obsolete.⁸⁸ The State hoped the Bill would pass so they would not be frozen into transportation projects that would no longer make sense.⁸⁹ New York asserted that several projects were necessary to rebuild the city, including construction on West Street and the reopening of Port Authority Trans-Hudson (PATH) train lines and subway tunnels.⁹⁰ In addition, the suspension of PATH service to the area would force commuters to drive, which could have resulted in increased motor vehicle density and a higher concentration of pollution.⁹¹ Jennifer Post, spokesperson for the New York State Department of Environmental Conservation, stated that the waiver was necessary “in order to give [New York] time to rebuild the transportation plan and also allow [New York] to make immediate improvements in response to the World Trade Center attack.”⁹²

The proposed waiver was set to expire on September 30, 2005, at which time New York would have to meet previously established

85. H.R. 3880, 107th Cong. §§ 1,2 (2002) (enacted) (revealing following sponsors of Bill: Representatives Ackerman, Engel, Gilman, Grucci, Kelly, King, McCarthy, Meeks, Owens, Quinn, Rangel and Towns). Vito Fosella is the Staten Island Representative aiding the Administration in their request. *Id.* See also Perez-Pena, *supra* note 11 (explaining waiver sought).

86. See H.R. 3880, 107th Cong. §§ 1,2 (2002) (enacted).

87. Telephone Interview with Andrew Darrell, Environmental Defense (Oct. 23, 2002) [hereinafter Environmental Defense Interview II].

88. See Perez-Pena, *supra* note 11 (outlining New York State's arguments). Carl Johnson, a deputy commissioner from the New York State Department of Environmental Conservation, appeared before Congressional members to lobby for support of this waiver in December of 2001. See *id.*

89. See *id.* (citing Jennifer Post, spokesperson for State Department of Environmental Conservation).

90. See *id.* (suggesting ferry service may be necessary to replace Port Authority Trans-Hudson [hereinafter PATH] lines and additional park-and-ride locations may also be crucial).

91. See *id.* (suggesting increased air pollution may result from different commuting patterns). It should be noted tunnels into New York City are highly regulated by restrictions during commuting hours. *Id.*

92. *Id.* Ms. Post also failed to return several phone messages regarding the State's requested waiver. See *id.*

CAA conformity requirements.⁹³ New York's requested blanket waiver would have given the NYMTC more leeway by not having to report the status of achieving the necessary requirements under section 176(c) of CAA until January 1, 2004.⁹⁴ Specifically, the waiver would have required a motor vehicle emissions status report to be completed prior to the expiration of the waiver.⁹⁵ This interim air quality review would have helped to "identify the necessary steps that remain[ed] to be taken by September 30, 2005, in order for the transportation projects, programs and plans" to meet conformity requirements.⁹⁶

1. *Goals of the original H.R. 3880*

The purported goals of H.R. 3880 found in the draft report language were designed to: (1) relieve the area from an impending conformity lapse in October 2002, (2) provide time to recover from the loss of the NYMTC offices in the World Trade Center and reestablish an effective planning process, and (3) understand and adjust data and models to the change in travel patterns created by the September 11th attacks.⁹⁷

2. *EPA supports Pataki Administration's Proposed Waiver*

EPA publicly announced its full support to New York and further recognized and appreciated the need for New York City and its MPO to obtain relief from the conformity deadline.⁹⁸ As its goal, EPA sought to protect human health and the environment as it responded to the September 11th tragedies and ongoing threats.⁹⁹ EPA agreed that without an extension New York would have lapsed

93. See H.R. 3880, 107th Cong. §§ 1,2 (2002) (enacted) (explaining three years should be ample time for tests and plan development).

94. See *id.* (discussing interim progress report that will be presented to appropriate committees in United States Congress, i.e. Energy and Commerce and Transportation and Infrastructure in House and Environment and Public Works in Senate).

95. See *id.*

96. *Id.* (stating regional emissions and relevant air quality data will be presented by Sept. 30, 2004).

97. See EPA Letter, *supra* note 58 (explaining draft legislation as providing NYMTC ability to advance any project in New York City nonattainment area without being required to meet transportation conformity provisions until September 30, 2005).

98. See *id.* (understanding need for relief from October 2002 conformity and planning deadline). EPA wants to do whatever they can to assist New York City in recovering from the events of September 11th and plane crash of November 12, 2001. *Id.*

99. See Whitman Letter, *supra* note 47 (responding effectively to tragedies of September 11th and New York conformity concern). Ms. Whitman wrote that the

out of conformity.¹⁰⁰ Given that New York's difficulty arose from the unfortunate events of September 11th, it would have been unfair to hold New York to the then present CAA deadline.¹⁰¹ EPA planned to work closely with DOT to assure air quality protection in the most feasible and realistic manner during the transportation planning process.¹⁰²

When New York City last examined the conformity impact of future air quality on planned transportation systems, the State passed conformity for the year 2007 without the need for extra time.¹⁰³ In other words, "the projected emissions from the planned transportation system in 2007 was exactly equal to the attainment demonstration's budgets for 2007."¹⁰⁴ New York is in the process of revising its current attainment demonstration including matching the 2007 budget.¹⁰⁵

3. EPA's Suggestions

When reviewing H.R. 3880, EPA closely examined the language indicating that air quality projects would be considered through a "Federal/State inter-agency consultative process."¹⁰⁶ EPA understood this to "refer to the interagency consultation process set forth by New York's conformity regulation, adopted at 6 NYCRR part 240.6, which provides for inclusion of the MPO, local air agencies and other agencies as appropriate."¹⁰⁷ EPA also recognized that the waiver would lack a periodic "check" on emissions from new projects (provided by the conformity process) that would not be in place during the time period covered by the waiver.¹⁰⁸

Office of Management and Budget stated that this letter does not interfere with the standpoint of the President's program. *See id.*

100. *See* EPA Interview, *supra* note 57 (agreeing that without waiver New York would definitely lapse out of conformity).

101. *See id.* (approaching present situation with practical and sympathetic view).

102. *See* EPA Letter, *supra* note 58 (expressing appreciation for opportunity to review draft legislation). EPA understands the draft legislation to apply strictly to transportation, not general conformity. *See id.*

103. EPA Interview, *supra* note 57 (examining last time that New York City was faced with analyzing future impacts of air quality of its transportation system).

104. *Id.*

105. *See* EPA Letter, *supra* note 58 (warning for NYMTC to conform in 2005 they must be vigilant while making decisions regarding transportation conformity in interim).

106. *Id.* (interpreting language provisions in H.R. 3880).

107. *Id.* (noting EPA's understanding that H.R. 3880 refers to inclusion of MPO, local air agencies and other agencies).

108. *See* EPA Interview, *supra* note 57 (explaining new projects can be built without examining emissions impact).

EPA, however, suggested that an interim review and regional emissions analysis required by the proposed waiver would mitigate some possible ramifications resulting from the loss of the conformity “check.”¹⁰⁹ “Specifically, the interim review require[d] the New York metro area to analyze the emissions impacts of current and new transportation projects mid-way through the waiver period for informational purposes.”¹¹⁰ EPA believed the information provided by the interim emissions analysis would have helped determine whether New York’s plan would meet air quality goals of the area.¹¹¹ If the interim review indicated that the current and proposed projects were inconsistent with the emissions limit established in the SIP, there would still have been time remaining before the 2005 deadline to modify the transportation plan, or, if necessary, implement additional control measures to ensure conformity.¹¹² It would, therefore, be in New York’s best interest to proceed with new projects consistent with air quality objectives, allowing implementation of a conforming transportation plan once the deadline expired.¹¹³

109. *See id.*
Section 1(b) Interim Progress Report,

[N]ot later than January 1, 2004, the Governor of New York shall submit to the Committees on Energy and Commerce and Transportation and Infrastructure of the United States House of Representatives and to the Committee on Environment and Public Works a report regarding the status of the State’s progress towards achieving compliance with the provisions of law and regulation subject to the temporary waiver provided by section (a). Such report shall explain in detail the steps that the State has taken towards achieving such compliance and identify the necessary steps that remain to be taken by September 30, 2005, in order for the transportation projects, programs, and plans for the counties referred to in subsection (a) to be in compliance with the provisions of section 176(c) of the Clean Air Act, and the regulations promulgated thereunder, by September 30, 2005. The report shall also include a regional emissions analysis generally consistent with the requirements of 40 CFR 93.122, taken together with the relevant air quality data.

H.R. 3880, 107th Cong. §§ 1,2 (2002) (enacted).

110. EPA Interview, *supra* note 57 (suggesting interim review would mitigate concerns of environmentalists).

111. *See id.* (providing “check” to assure New York will be able to meet future deadline).

112. *See id.* (supporting three-year extension).

113. *See id.* (refuting argument New York could advance transportation project without regard to CAA requirements and with little connection to September 11, 2001).

B. Environmental Groups' Response to New York's Requested Waiver

Environmental Defense, Tri-State Transportation Campaign and Natural Resource Defense Council are committed to revitalizing New York City after September 11th in a manner most protective of New Yorker's health and air quality.¹¹⁴ These environmental groups "understand the need to allow NYMTC more time and flexibility in complying with the conformity requirements of the Clean Air Act and the metropolitan planning requirements of TEA-21 in the wake of September 11th," but suggested immediate steps be taken.¹¹⁵

1. *The Expansiveness of the Proposed Waiver*

The requested waiver in H.R. 3880 alarmed environmental groups.¹¹⁶ Critics challenged New York's reasoning as being overstated and effectively undermining the CAA.¹¹⁷ The waiver the State sought, critics alleged, was "so broad and would remain in place so long (until late 2005) that it would [have applied] to projects having nothing to do with the recovery from the attack."¹¹⁸

Environmentalists have identified two problems with the breadth of the proposed waiver.¹¹⁹ First, it allowed new projects to automatically receive a waiver and be added regardless of their ef-

114. See Briefing Paper, *supra* note 9. Environmental Defense is a nationwide organization headquartered in New York City consisting of fifty thousand members in the New York Metropolitan region and three hundred thousand nationwide. See *id.* The above groups, usually with the governor's closest environmental allies, have taken the lead on the issue, while other critical groups have stayed in the background. Perez-Pena, *supra* note 11; see also Clinton Letter, *supra* note 56. The Tri-State Transportation Campaign represents dozens of New York area organizations supporting transportation reform. See *id.* The Natural Resource Defense Council is a New York based non-profit organization with over fifty thousand members in New York and over five hundred thousand members nationwide. See *id.* (expressing heightened concern due to already existing air quality problems).

115. See Clinton Letter, *supra* note 56 (citing Letter from Environmental Defense to Senator Clinton of Dec. 13, 2001); see also Briefing Paper, *supra* note 9 (asserting importance of immediate action to restore not only air quality but also public confidences in both the air and in downtown New York City).

116. See Perez-Pena, *supra* note 11 (recognizing uncertainty of proposed waiver in Congress). Environmental groups are particularly concerned because the waiver comes at a time when people who live downtown are most concerned with air quality. *Id.*

117. See *id.* (addressing critics opposition to New York's waiver request).

118. *Id.* (identifying possibility that projects could go through without considering air quality consequences).

119. See Clinton Letter, *supra* note 56 (asserting environmentalists' primary objection).

fect on air quality.¹²⁰ Second, measures required by the SIP to offset increased emissions would not have been applied over the next four years, preventing the new motor vehicle emissions budgets from being executed.¹²¹ Opponents of the proposed waiver identified the need for a more targeted waiver that provided flexibility in order “to reprogram funds to meet altered transportation needs.”¹²² By asking for a complete waiver of the conformity requirements, environmental groups contended that the government could have constructed legislation to be more environmentally sensitive.¹²³

Environmentalists also disputed the Pataki administration’s assertion in support of New York’s need for the conformity waiver.¹²⁴ The administration sought to show a greater need for reliance on short-term buses and ferries due to the destruction and shut down of train lines.¹²⁵ The loss of tens of thousands of jobs in Manhattan, however, translated to fewer commuters, and with little documentation of this hardship, the proposed blanket waiver swept broader than necessary.¹²⁶ A chief concern centered on the administration’s failure did not cite explicit data for the transportation problems at issue and rather contended that because they had a problem, “they need[ed] a big, broad waiver without offering any evidence of the problem.”¹²⁷

2. *Suggestions For a More Targeted Waiver*

a. *Alternatives to a four-year waiver*

Environmental Defense offered three suggestions as alternatives to the proposed waiver.¹²⁸ The suggestions included: (1) limit-

120. *See id.* (stating hazards associated with road projects not in current regional transportation plan or program and to be added regardless of effects they may have on air quality during four-year period and recognizing possibility of harm to long-term economic and public health).

121. *Id.* (suggesting CAA initiatives would be hampered).

122. *Id.* (attributing problems with conformity analysis to work of outside consultants who were unaffected by World Trade Center disaster).

123. *See* Telephone Interview with Richard Perez-Pena, Journalist, N.Y. Times (Feb. 1, 2002) [hereinafter Perez-Pena Interview] (asserting unnecessary breadth of waiver reaches nine New York counties).

124. *See id.* (indicating further investigation is needed prior to granting waiver of CAA).

125. *See id.* (indicating various subway lines out indefinitely).

126. *See id.* (recognizing need for transportation alternatives).

127. *Id.* (recognizing traffic at Holland and Lincoln tunnels may, in fact, be higher, although not known with certainty).

128. *See* Clinton Letter, *supra* note 56 (noting current problems of waiver in addition to proposed suggestions).

ing the extension of the current TIP and transportation plan to two years, rather than a four-year waiver of all conformity and planning requirements, (2) “encourag[ing] conformity-exempt TCMs, or other emissions-reducing projects to move forward to help reduce congestion, clean the air and allow New York to begin addressing transportation and air quality needs quickly,” and (3) requiring the region to demonstrate conformity with the budgets in effect when the waiver expires.¹²⁹ Environmental Defense contended their suggestions would have offered a more targeted and appropriate solution than H.R. 3880, which would have most likely delayed all conformity and planning requirements of the Highway Code.¹³⁰

b. Suggested mitigation measures

Environmental activists urged the government to consider mitigation measures to provide air quality improvements from transportation sources during the waiver period.¹³¹ Environmental Defense suggested: (1) requiring heavy duty and non-road vehicles used in connection with this waiver be modified to conform to the best available pollution-control technologies, (2) demanding New York to submit a SIP measure to reduce smog and emissions particles, replacing old diesel buses and trucks with clean fuel buses and trucks within two years, and (3) permitting an additional five hundred million dollars for funding and accelerating “data collection, transportation and emission modeling, planning, streamlines project design and review, and development of new and expanded voluntary transportation incentive strategies, in order to expedite rapid recovery, reconstruction and revitalization.”¹³²

Environmentalists asserted New York should have looked to mitigate damage to air quality through available technological solu-

129. *Id.* (stating two-year extension would provide adequate opportunity for agencies to meet needs created on Sept. 11, 2001).

130. *See id.* (adding drafted four-year blanket waiver “would delay timely evaluation of the New York transportation plan and emissions against the recent 2005 SIP motor vehicle emission budget, and will unnecessarily delay pollution reduction measures that may be needed to protect public health.”).

131. *See id.* (asserting importance of pollution reduction measures during time period).

132. *Id.* at 3-4 (explaining cost-effective and retrofits are in existence and should be used); *see also* Briefing Paper, *supra* note 9, at 2 (stating urgent need for heavy-duty vehicles at World Trade Center site to take all practical steps to reduce their emissions, as they pose threat to air quality because they are major contributors of fine particulate matter and oxides of nitrogen). “Nationally, nonroad diesel engines emit more fine particles than all the nation’s passenger cars and trucks, heavy-duty onroad diesels and electric utilities combined.” *Id.* (explaining diesel particles pose greatest source of cancer risk from air pollution).

tions.¹³³ By simply replacing on-road and nonroad diesel fuel with low-sulfur diesel, it would have dramatically reduced particulates, NO_x (nitrogen oxides), hydrocarbon and carbon monoxide found in exhaust.¹³⁴ Low sulfur diesel immediately reduces air pollution when used for construction equipment and other nonroad vehicles.¹³⁵ Currently, there are sufficient suppliers of low sulfur fuel within New York City to enable vehicles at the World Trade Center to “use important after-treatment devices like particulate filters, oxidation catalysts, selective catalytic reduction and other emerging technologies that are available now” to “immediately and dramatically improve air quality.”¹³⁶

c. Available immediate action

To immediately reduce air pollution from the World Trade Center area, Environmental Defense suggested the use of more efficient equipment management, new contractual incentives and effective retrofit technologies to reduce diesel emissions.¹³⁷ The users of heavy-duty machinery frequently kept their engines idling

133. See Briefing Paper, *supra* note 9, at 5 (explaining advantages of technological solutions).

134. See *id.* at 5 (explaining use of low sulfur fuel for onroad vehicles lowers particulates 10-20%). Diesel particles, frequently found in diesel exhaust or diesel particulates from construction vehicles, are the largest factor found to cause cancer from air pollution and are responsible for thousands of premature deaths from other causes every year. See *id.* at 2. EPA established health standards for PM 2.5 in 1997. *Id.* “In reviewing the basis for EPA’s standards the D.C. Circuit Court rejected industry attacks on the underlying science and specifically held that EPA had an ample basis for its action.” *Id.* (explaining since decision, there has been new research findings corroborating EPA’s findings about adverse health effects associated with fine particles). Studies of the ninety largest U.S. cities indicate particulate pollution has been tied to heart attacks, increases in daily death rates, and in hospital admissions of the elderly. *Id.* at 3 (citing Samet et al., *The National Morbidity, Mortality and Air Pollution Study*, Health Effects Institute, June 2000) (indicating particulate pollution worsens bronchitis in asthmatic children and children’s emergency room visits for asthma increase on high particle pollution days). Because the studies of particulate matter have not identified a “safe” level of exposure, Environmental Defense asserts the importance of nonroad vehicles in lower Manhattan to use the state-of-the-art technology to lower emissions of PM 2.5. *Id.* Nitrogen oxides are produced from burning fuels, including gasoline and coal. *Id.*

135. See *id.* (articulating future mandate of low sulfur diesel fuels nationally as part of new federal regulations). Ordinary diesel fuel has a fairly high sulfur content. See Perez-Pena Interview, *supra* note 123. Sulfur is the source of the heavy particulate pollution (soot) that comes from burning diesel, contributing to lung disease and asthma. See *id.* Sulfur in the atmosphere turns into sulfur dioxide, which is the main component of acid rain. See *id.*

136. Briefing Paper, *supra* note 9 (explaining fuel could be provided through multiple small storage tanks, large centralized tank or dedicated fuel trucks).

137. See *id.* at 4 (comparing effectiveness of techniques mentioned to those at other large-scale construction sites).

between uses.¹³⁸ Environmental Defense proposed New York contractors should not have left their equipment idling for more than five minutes.¹³⁹ Further, fleet managers should regularly and periodically inspect equipment to ensure emission reduction technologies are used effectively.¹⁴⁰ Additionally, "construction permits and contract specifications should be structured to give contractors preference if they retire old equipment and purchase new equipment with endings that meet future regulatory requirements."¹⁴¹ Lastly, environmental groups encouraged the use of low-sulfur fuel with after-treatment technologies.¹⁴² Through the incorporation of both incentives and standards into contractual provisions used by agencies and contractors, Environmental Defense hoped World Trade Center clean-up crews would soon be required to use the available technologies to reduce dangerous emissions associated with construction machinery.¹⁴³

Steps could have been taken right away to ensure that clean air was not compromised while work continued on the World Trade Center site, transit lines and other infrastructure.¹⁴⁴ A suggested initial step was to apply retrofits to machines used in debris removal.¹⁴⁵ Environmental Defense stated it was a situation crying out for prompt correction.¹⁴⁶ Luckily, equipment management strategies, contractual incentives and retrofit technologies were available to reduce harmful diesel emissions.¹⁴⁷

IV. H.R. 3880 BECOMES PUBLIC LAW 170-230

The original draft of H.R. 3880 was amended and adopted by a voice vote in an open markup session by the House Subcommittee on Energy and Air Quality on July 24, 2002.¹⁴⁸ The House Commit-

138. *See id.* (demonstrating combination of idling machinery causes increased air pollution).

139. *See id.* (supporting their suggestion by looking to Massachusetts law which prevents vehicles from idling for more than five minutes).

140. *See id.* (offering additional suggestions).

141. Briefing Paper, *supra* note 9, at 4 (providing incentives to use new equipment).

142. *See id.* at 5 (indicating numerous alternative measures available).

143. *See id.* (encouraging use of incentives to meet regulations).

144. *See id.* (asserting progress can be made right away).

145. *See id.* (illustrating urgency of action and suggesting use of emergency funds to accomplish proposal).

146. *See* Briefing Paper, *supra* note 9, at 5.

147. *See id.* at 8-9 (stating Environmental Defense commitment to make reconstruction process fast, efficient and healthy).

148. H.R. REP. NO. 107-649, pt. 1, at 4 (2002) (stating full Committee consideration of H.R. 3880 with quorum present).

tee on Energy and Commerce met on September 5, 2002 and favorably ordered the report of H.R. 3880 to the House floor without further amendment.¹⁴⁹

When H.R. 3880 was first introduced, the Bill was also referred to the House Committee on Transportation and Infrastructure.¹⁵⁰ In a letter dated September 5, 2002 addressed to Chairman W.J. 'Billy' Tauzin of the Committee on Energy and Commerce, Chairman Don Young of the Committee on Transportation and Infrastructure stated that his Committee would not exercise their right to a sequential referral of the Bill.¹⁵¹ Chairman Young specifically stated, however, that this action did not waive the Committee's right to jurisdiction over the Bill.¹⁵² Instead, Chairman Young recognized the desire to bring H.R. 3880 before the House in an expeditious manner and responded accordingly.¹⁵³

The final version of the Bill included significant changes from the original drafting of H.R. 3880.¹⁵⁴ The amendments provide for the extension of deadlines under the transportation conformity provisions of the CAA, while incorporating protections to improve New York City air quality.¹⁵⁵ Before the House voted Representative Fossella of New York read into the record a letter of support on behalf of Environmental Defense.¹⁵⁶ Representative Fossella also noted that fourteen affiliated building and trade unions supported H.R. 3880 as amended.¹⁵⁷

149. *See id.* (stating Committee met in open markup and ordered reporting of H.R. 3880 by voice vote).

150. *See id.* at 8 (detailing exchange of committee correspondence).

151. *See id.* at 9 (requesting Committee on Energy and Commerce to include copy of letter in their report and include letter in Congressional Record). Chairman Tauzin replied to Chairman Young on September 9, 2002. *See id.* (appreciating Committee on Transportation and Infrastructure's decision).

152. *Id.* at 1 (reserving right to confer during House-Senate conferences regarding Bill and asking for Committee on Energy and Commerce to support Committee on Transportation and Infrastructure).

153. H.R. REP. NO. 107-649, pt. 1, at 4 (2002) (stating goals of H.R. 3880 were to allow New York to implement adjustments necessary because of unique circumstance of September 11th, thus warranting immediate action).

154. *See* Environmental Defense Interview II, *supra* note 87 (referring to Environmental Defense and Congressional record).

155. Letter from Environmental Defense to Congressman Fossella (Sept. 10, 2002) [hereinafter Environmental Defense Letter II] (narrowing scope of H.R. 3880 to remedy what Environmental Defense saw as unnecessary broad grant of power to New York through waivers).

156. 148 CONG. REC. H6145 (2002) (reading of letter at request of Environmental Defense).

157. *See id.* (expressing thanks to those on Committee of Energy and Commerce and others who helped bring H.R. 3880 to floor).

As stated previously, one of Environmental Defense's main concerns with the original drafting of H.R. 3880 was that the waiver would give highway projects a "free pass."¹⁵⁸ The amended version of H.R. 3880 states that regionally significant highway projects, not already in the adopted TIP, are specifically excluded from the waiver and cannot be advanced while the waiver is in effect.¹⁵⁹ Second, the final version narrows the scope of the legislation to include only transportation conformity, not general conformity.¹⁶⁰ Third, new highway projects for lower Manhattan must include air quality offsets within the affected county.¹⁶¹ New York is dedicated to meet the detailed interim milestones on the way to 2005.¹⁶² The State of New York must report to Congress, EPA and DOT any new emission reduction strategies adopted to offset amended estimates of air pollution emissions from cars and trucks.¹⁶³

On September 10, 2002, H.R. 3880 passed as amended before the United States House of Representatives.¹⁶⁴ This legislation then passed by unanimous consent, without amendment, by the Senate on September 12, 2002.¹⁶⁵ President George W. Bush signed this Bill into law on October 1, 2002.¹⁶⁶

DOT responded to the passage of Public Law 107-230 by issuing a Final Rule.¹⁶⁷ The Federal Highway Administration, in con-

158. See Environmental Defense Letter II, *supra* note 155 (arguing only highway projects in adopted TIP should be covered by Bill, new projects not related to reconstruction of lower Manhattan should be excluded).

159. See *id.* The only exception to this are projects related to reconstruction of Lower Manhattan (whose emissions must be offset locally). See *id.*

160. See *id.* The new legislation does not apply to port projects, airports, or other transportation projects that are subject to the requirements of general conformity under CAA regulation. *Id.*

161. See *id.* (contrasting this requirement against original version of H.R. 3880).

162. See *id.* (including promises to improve best practices transportation and pollution modeling).

163. See Environmental Defense Letter II, *supra* note 155 (resulting from newer assumptions, data, and emission models). This is significant because EPA and DOT have expertise to evaluate projects and analyze how New York is adhering to the milestone targets. *Id.*

164. 148 CONG. REC. H6148 (2002) (noting 377 yeas, 0 nays, and 55 not voting).

165. 148 CONG. REC. S8581 (2002) (reading of Bill three times and passed without debate).

166. See U.S. National Archives and Records Administration, Supplemental List of Public Laws, at http://www.archives.gov/federal_register/public_laws/107th_congress/230_233.txt (Oct. 2, 2002) (listing law numbers assigned to bills recently signed into law by President Bush).

167. Metropolitan Transportation Planning and Programming, 67 Fed. Reg. 194,62371 (Oct. 7, 2002) (to be codified at 23 C.F.R. pt. 450) (detailing final rule and background of legislation).

junction with the Federal Transit Administration, amended their regulation on Planning and Assistance Standards.¹⁶⁸ These standards govern the development of transportation plans and programs for urbanized (metropolitan) areas.¹⁶⁹ “This action waives the regulatory requirement for a triennial plan update for the New York metropolitan area for up to three years, until September 30, 2005, consistent with the date set by the Congress.”¹⁷⁰

V. IMPACT

The relief New York sought from CAA section 176(c) came from the United States Congress and President Bush.¹⁷¹ Since H.R. 3880 addressed the CAA conformity requirement, Congress determined the fate of New York’s transportation conformity following September 11, 2001.¹⁷²

When Atlanta discovered that their TIP would soon expire in 1997, the DOT granted them a TIP extension.¹⁷³ Despite this extension, Atlanta still suffered a conformity lapse in 1998 as a result of a subsequent three-year plan and conformity update requirement.¹⁷⁴ New York believed that if H.R. 3880 was not signed into law, they would have been unable to produce an acceptable transportation plan by their October 2002 deadline.¹⁷⁵ As a result, assuming EPA and New York’s predictions were correct, absent Congressional intervention, New York would have suffered a conformity lapse.¹⁷⁶

Due to the unprecedented uniqueness of the situation, Public Law 107-230 will have limited impact on future transportation con-

168. *See id.* (stating that Public Law 107-230 was indication of Congressional intent for this action).

169. *See id.* (providing New York City metropolitan area with more time to review transportation plan).

170. *Id.* at 194,62372 (expressing belief that good cause exists to waive prior notice and comment making on this rule and making rule effective upon publication of Federal Register).

171. *See* EPA Interview, *supra* note 57 (stating that legislative solution proper because asking for flexibility in CAA statute).

172. *Id.*

173. *See id.* (suggesting this is no longer alternative).

174. For a discussion of Atlanta’s conformity lapse, see *supra* notes 66-84 and accompanying text.

175. *See* Perez-Pena, *supra* note 11 (explaining support for strong belief in necessity of approval of waiver).

176. *Id.*; *see also*, EPA Interview II, *supra* note 28 (fearing impossibility of meeting deadline).

formity procedures.¹⁷⁷ Never before has this country encountered a situation quite like this nor could this situation have been contemplated before the morning of September 11, 2001.¹⁷⁸ H.R. 3880 was originally drafted to address this specific catastrophe and its effect would be difficult to apply outside of this precise context.¹⁷⁹

Without delay, Congress responded to the attacks by passing into law S.J. RES. 22, a joint resolution expressing Congress's outrage over the terrorist attacks launched against the United States.¹⁸⁰ In addition, within ten days, a subsequent joint resolution authorized the use of armed force against those responsible for the attacks.¹⁸¹ A law appropriating emergency funds for the disaster, and a law preserving viability of the United States air transportation system, were both passed.¹⁸² Due to the prompt and decisive response by Congress to the various needs of those individuals and states affected by the attacks, Congress acted appropriately in resolving New York's transportation concerns in a timely and favorable fashion.

New York has demonstrated their commitment to protect air quality during the course of this waiver.¹⁸³ Specifically, New York has stated "a commitment to make the reconstruction of lower Manhattan a model for clean-air construction practice statewide, by using clean fuels and retrofits to cut emissions from non-road machinery throughout lower Manhattan."¹⁸⁴ Environmental Defense noted "that the State of New York, at its highest executive leadership levels, has agreed to the conditions outlined above and is prepared to implement them vigorously."¹⁸⁵

177. See EPA Interview, *supra* note 57. The waiver is also severely restricted by its limited geographic reach. See *id.* The waiver would not apply outside of the counties named in the waiver and therefore would not be applicable outside the state. *Id.*

178. See *id.*

179. See *id.*

180. S.J. Res. 22, 107th Cong. (2001) (enacted) (explaining introduction by Senator Daschle on Sept. 12, 2001).

181. H.R.J. Res. 114, 107th Cong. (2002).

182. S.J. Res. 23, 107th Cong. (2001) (enacted) (indicating introduction by Senator Daschle on Sept. 14, 2001); see also H.R. 2888, 107th Cong. (2001) (recognizing Senator Young as sponsor); see also H.R. 2926, 107th Cong. (2001) (stating Representative Young introduced Bill on Sept. 21, 2001).

183. See Environmental Defense Letter II, *supra* note 155; and Environmental Defense Interview II, *supra* note 87 (committing to make reconstruction to making lower Manhattan model for practice statewide).

184. See Environmental Defense Letter II, *supra* note 155 (stating that non-road engines, like machinery at work on World Trade Center site emit more fine particulate matter than trucks, cars and power plants).

185. *Id.* (explaining why Environmental Defense supports amended version of H.R. 3880).

Key state agencies have also made a commitment to identify and adopt new transportation control measures.¹⁸⁶ This cooperative process, consisting of the New York State Department of Environmental Conservation, DOT and the Port Authority of New York and New Jersey, is dedicated to adopting new transportation control measures.¹⁸⁷

At the time of this publication, Public Law 107-230 was newly enacted.¹⁸⁸ However, the overwhelming support and collective effort moving forward from environmental agencies, our government and the State of New York, has demonstrated the likely smooth execution of this much needed legislation.

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186. *See id.* (committing to adopt incentives for increased use of transit).

187. *See id.* (demonstrating New York's commitment to taking additional steps to protect air quality during course of waiver).

188. Clean Air Act Amendments of 2002, Pub. L. No. 107-230, 116 Stat. 1469 (listing enactment as of Oct. 1, 2002).