

ASET Update (Last Updated March 12, 2002)

I. General Background on the Clean Air Act

Under the federal Clean Air Act (CAA), the U.S. Environmental Protection Agency (EPA) regulates six criteria pollutants. These include: ozone (also known as smog), carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter (also known as soot and dust) and lead. For each pollutant, EPA has established minimal standards that must be met. These standards are known as the National Ambient Air Quality Standards (NAAQS).

If an area exceeds EPA's standards for any one of these "criteria" pollutants, the area is designated a nonattainment area, triggering a series of steps that must be taken to come into compliance with the standards. In addition, for ozone, carbon monoxide and some particulate matter nonattainment areas, the EPA further classifies the area based on the magnitude of the nonattainment. These classifications are used to specify what pollution reduction measures must be adopted for the area and what deadlines must be met to bring the area into attainment.

Currently, the most pervasive problem for transportation planning purposes is ozone, followed by carbon monoxide and particulate matter. For ozone, the EPA utilizes the following classifications of attainment depending on the magnitude of the problem: Extreme, Severe, Serious, Moderate, and Marginal. These classifications dictate when an area must achieve attainment status for ozone¹ and what measures must be taken to achieve attainment.

Ozone is formed through a complex chemical reaction between volatile organic compounds (VOCs) and oxides of nitrogen (NOx) in the presence of sunlight. To reduce ozone, one must reduce one or both of the precursor pollutants. VOCs are best described as fumes emitted from sources such as automobiles, chemical manufacturing plants, dry cleaners, paint shops and any other source that uses solvents. NOx is formed when combustion occurs at high temperatures and primarily is emitted from electric utilities, industrial boilers and transportation sources. Since sunlight and warmer temperatures cause these reactions, ozone violations typically occur during the summer.

In 1997, the EPA proposed even stricter standards for particulate matter and ozone, which would make attainment more difficult to achieve. Those standards were temporarily set aside by the U.S. Court of Appeals for the D.C. Circuit, which held that EPA failed to base the standards on any intelligible principle. American Trucking Association v. EPA, 175 F.3d 1027 (D.C. Cir.

¹ Marginal ozone nonattainment areas had to meet compliance in 1993, Moderate in 1996, Serious in 1999, Severe in 2005-2007, and Extreme in 2010.

1999), reh'g en banc denied, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 120 S.Ct. 2003 (2000). However, that decision was reversed on February 27, 2001, by a 9 to 0 unanimous ruling by the U.S. Supreme Court in Whitman v. American Trucking Association 121 S.Ct. 903 (2001). The Court said EPA has the authority to make stricter standards, but with respect to the ozone standards, EPA has to devise a new implementation plan. The Court also ruled that EPA does not have to consider the cost of the new standards under the CAA. In fact, the Court stated the CAA prohibits EPA from considering costs. The case has been remanded back to the Court of Appeals to work out these further details. Oral arguments on the remand were held December 18, 2001.

Still at issue in the case is whether the proposed ozone and fine particulate matter standards are “arbitrary and capricious,” whether the EPA acted unlawfully when it set the standards but failed disclose certain scientific data upon which the proposed standards are based, and what remedy is appropriate. ASET members ARTBA, NSSGA and NAHB are parties in the lawsuit. In the meantime, EPA is moving ahead with implementation of the new standards. New nonattainment designations for the new standards are expected in 2004 or 2005 at the latest.

II. The Conformity Process

Air quality planning is linked to transportation planning through the “conformity” process. For each criteria pollutant for which an area fails to meet EPA’s NAAQS standards, the CAA requires the State to prepare State Implementation Plans (SIPs) to “attain” healthful air quality standards by bringing the area within EPA’s standards. A SIP typically contains restrictions on stationary sources (e.g., factories), area sources (e.g., landfills), and mobile sources (e.g., off road equipment, yard equipment, and motor vehicles). The SIP must be submitted to EPA for review and approval and must contain a specific motor vehicles emissions budget (MVEB) capping emissions from transportation sources. Because the SIP approval process can take several years, EPA can preliminarily approve the MVEB as “adequate” for transportation planning purposes before final SIP approval.

On the transportation planning side, Metropolitan Planning Organizations (MPOs) for each urban region develop a long-term regional transportation plan and short-term Transportation Improvement Program (TIP) under the Federal-Aid Highway Act (as amended by ISTEA and TEA-21). The U.S. Department of Transportation (DOT), through the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), must approve the TIP and any individual projects involving federal funding.

Section 176 of the CAA (as extensively amended in 1990) integrates the two sides. Section 176 mandates that the TIP must match, or “conform,” to the MVEB in the SIP. In a phrase, “the TIP must fit the SIP.” Conformity of the TIP is determined through computer modeling of estimated air pollution effects of motor vehicle travel on the present and planned transportation network. Individual projects cannot receive federal approval or funding or be awarded contracts unless they “come from” a presently conforming TIP.

The SIP, MVEB, TIP, and conformity analysis are essential building blocks in the planning process. Anti-growth groups have begun to target these building blocks through

“monkeywrench” lawsuits designed to disrupt the planning process and stop project construction. These legal actions are typically based on the “citizen suit” provision of the CAA, which potentially allows recovery of attorney’s fees, and claims under the federal Administrative Procedure Act (APA). These suits have become increasingly common in recent years since anti-growth groups have essentially exhausted all of their direct challenges to the conformity regulations and they are now challenging SIP compliance for many major urban areas.

III. Impact on Transportation/Construction Industry

Conformity lawsuits usually fall into two general categories: (1) suits against EPA challenging either the transportation “budget” or approval deadlines under state air quality plans (“SIP challenges”); or (2) suits against MPOs, state DOTs, and FHWA/FTA challenging the conformity determination, transportation plan, TIP, or individual project approvals (“TIP challenges”).

A. Consequences of TIP Challenges

TIP challenges pose the most direct and immediate threat to project approvals and contracts. If the TIP is invalidated, no individual projects can be bid, awarded, or approved. In addition, the MPO would have to devise a new TIP (which takes months). Past federal approvals for individual projects that were based on the invalidated TIP potentially could be struck down and enjoined.

Stopping approved projects would interfere with contracts and construction schedules and would precipitate contract disputes between ASET members and project sponsors. Anti-highway groups can also use the threat of injunctions, loss of federal funding, and attorney fees to leverage a favorable settlement with government.

B. Consequences of SIP Challenges

Two EPA SIP-related actions can have transportation planning consequences: (1) EPA’s disapproval of a SIP submitted by a State, and (2) EPA’s finding that a State in fact failed to attain air quality standards by the required deadline. An EPA disapproval of a submitted SIP has immediate transportation consequences. First, the area immediately falls into a “semi-freeze” during which only projects in the first three years of the current TIP may advance. See 40 C.F.R. 93.120(a)(2). As a practical matter, no new projects may be planned or bid. Second, an 18-month “sanctions clock” begins to run, at the end of which EPA can cut off all federal transportation funding (so that even projects in the first three years of the TIP cannot be funded) and the conformity status of the TIP will lapse (which means that no individual project approvals can occur, even if funding is not an issue). See 40 C.F.R. 93.120(a)(1); 42 U.S.C. 7509(a)(2).

The transportation consequences of failing to attain CAA goals by the required deadline are less direct. If EPA finds that an area failed to attain ozone standards, the State must submit a new SIP for the region within one year and the area is “bumped up” to a more stringent nonattainment status. Although there are no immediate transportation consequences of this action, the State would have to submit the new SIP before it was next needed for conformity

purposes. In addition, the State would have to impose new pollution-reduction measures and could possibly set a smaller MVEB, which could limit highway and housing/commercial development (but could also spur more mass transit and/or HOV lane construction). In any event, the reductions would not fall solely on transportation, but would be shared by limits on factory smokestacks, solvents in paints, etc.

SIP challenges technically cannot directly threaten already-approved projects under contract or under construction, but, if successful, could be used in a collateral suit to invalidate these project approvals.

IV. What is ASET?

Advocates for Safe and Efficient Transportation (ASET) was organized by the American Road & Transportation Builders Association (ARTBA) in 1999 to represent private and public sector interests in challenged CAA conformity cases. It includes nine groups representing organized labor and public and private sectors of the construction industry. ASET's goals are:

- (1) to establish federal case law that anti-growth groups cannot challenge conformity decisions under the citizen suit provision of the Clean Air Act (CAA) and that they generally lack legal standing to bring such challenges;
- (2) to defend government agency adequacy determinations, conformity approvals, and other "building blocks" of the conformity process on their substantive merits;
- (3) to convince courts and government entities that transportation conformity approvals should not be retroactively invalidated, thereby halting or delaying planned and approved projects, if flaws are discovered; rather, these flaws should be addressed in future emissions budgets, Transportation Improvement Programs (TIPs) and State Implementation Plans (SIPs); and
- (4) to demonstrate to regulators that industry will be an ally in supporting and defending their sound conformity decisions against challenges by anti-growth groups.

ASET has established itself as an expert in CAA conformity and is increasingly consulted when such issues arise around the country. ASET retains the law firm of Beveridge & Diamond, P.C. to monitor CAA conformity developments across the United States. ASET meets at least once a month to discuss these developments and determine how these developments will impact ASET members. ASET makes case-by-case determinations about legal involvement in specific actions and has built a body of knowledge that ASET members draw on to advocate for regulatory and legislative reforms to the transportation planning and development process.

ASET's involvement in CAA conformity cases is vital because:

- (1) ASET has an in-depth body of knowledge on CAA conformity issues that does not exist elsewhere;

- (2) Only ASET will vigorously defend the interests of the construction industry.
Government entities, especially local units of government, have limited resources to defend CAA conformity cases. As a result, the government has strong incentives to settle cases out of court, often to the detriment of transportation improvement projects. ASET's presence will deter secret backroom deals and help ensure that settlements consider the construction industry's vital interests. ASET has a clear policy that it will support all projects that have already been vetted through the transportation planning process;
- (3) ASET can make legal arguments that the government, as a matter of policy, often will not make. For instance, the government often will not challenge the legal "standing" of anti-highway groups to bring legal challenges to the conformity process. Such challenges are central to ASET's mission;
- (4) It is vital that when court decisions are rendered they are based on sound and full legal arguments. In the past, the industry has been severely harmed from bad legal precedent. Only if ASET is involved in the litigation can we ensure that all of the important legal issues are raised and good legal precedent is set;
- (5) ASET sends a clear message to no-growth groups that their often-frivolous lawsuits will not go unchallenged. ASET has proven itself to be a formidable adversary; and
- (6) ASET can raise policy issues that might not be apparent to the court or other parties. Namely that delaying or stopping planned transportation projects can have public health and safety consequences that may dwarf asserted marginal improvements (or non-improvements) in air quality.

The very significant legal expenses incurred by ASET are financed by voluntary member contributions to support ASET's efforts.

V. Summary of ASET's History

A. Sacramento, California: In January 2000, three local and national environmental groups filed a complaint against SACOG (Sacramento's MPO), CalTrans (the state DOT), FHWA, FTA, and DOT. Environmental Council of Sacramento v. Slater, N.D. Cal, No. CV-00-409, filed Jan. 10, 2000. The suit, filed as a citizen lawsuit, NEPA claim, and APA claim, alleged that the inspection and maintenance program developed by the California Air Resources Board (CARB) in 1994 was not achieving the emission reductions it had expected. As a result, the anti-highway groups claimed that the TIP was out of conformity because the TIP was based on these anticipated reductions. The suit sought to halt 59 transportation projects worth \$400 million in the TIP. On June 6, the court allowed ASET to intervene in the case. ASET moved to dismiss the citizen suit claim on the grounds that citizen suits are not intended to disrupt the transportation planning process. The judge agreed and issued an order November 6 dismissing the citizen suit and NEPA claim. In October 2000, U.S. DOT approved an updated TIP for

the Sacramento area. As a result, ASET and the government defendants argued that the remaining APA claims were moot. On January 19, 2001, the judge agreed that the case was moot with the exception of four projects. These four projects for whatever reason had not been included in the new TIP. On March 5, 2001, the judge issued a stay in the case for the parties to reach an out-of-court settlement, resolving the remaining issues related to the two projects. That settlement was filed in court on September 27, 2001, stipulating to a dismissal of the case. The settlement resulted in a full victory for ASET in that no projects were canceled or delayed and the settlement gives both the no-growth groups and transportation advocates more input into the transportation planning process. ASET was a party to the settlement agreement.

B. Baltimore, Maryland: Baltimore is in severe nonattainment for ozone. As a result, the CAA requires Maryland to submit a rate of progress (ROP) and attainment demonstration plan to demonstrate progress toward meeting air quality goals. Maryland submitted its ROP and MVEB for Baltimore to EPA in December 1999. Subsequently, Maryland conceded that its original MVEB had relied on outdated transportation data. As a result, the state submitted revised calculations to EPA, and EPA approved the MVEB for transportation planning purposes in February 2000. In April, an anti-growth group filed a lawsuit against EPA alleging the adequacy determination of the MVEB was unlawful and, therefore, the 2000-2004 TIP should be invalidated, which included \$1.8 billion worth of projects. 1000 Friends of Maryland v. Browner, 4th Circuit, No. 00-1489, filed April 24, 2000. ASET moved to intervene on June 2. On June 21, the court denied ASET's intervention and ASET requested a reconsideration on July 11. The motion to reconsider was denied on August 4, but the court invited ASET to file an *amicus* – or “Friend of the Court” -- brief. The case was held in abeyance all summer as the parties entered “settlement talks.” ASET remained involved in the case, assisting another intervenor in the case, BWI Business Partnership. On January 31, 2001, ASET filed an *amicus* brief in the case arguing the case should be dismissed because 1000 Friends lacked the “concrete, imminent injury” necessary to file a lawsuit. ASET also argued that the anti-highway group sued the wrong defendant in the case for the relief it is seeking in this suit. ASET stated that since 1000 Friends is seeking to stop transportation construction projects, it should have sued FHWA, MdDOT, etc., rather than the EPA. Oral argument in the case was held April 2, 2001. On September 11, the court unanimously ruled that EPA acted properly in approving the MVEB. The court stated that EPA does not have to require detailed photochemical grid modeling each time it amends an emissions budget – EPA needs to have flexibility and can use any method it deems reliable. In addition, the court stated that in approving a MVEB, EPA does not have to address every comment it receives opposing the approval – a simple statement why the MVEB is adequate is appropriate. The court, however, rejected ASET's claim that 1000 Friends did not have standing to bring the lawsuit. The court went on to say that ASET was denied intervention due to timeliness issues, not because ASET did not have a significant interest in the case.

C. Atlanta, Georgia: Atlanta is in serious nonattainment of the CAA for ozone. Atlanta has been targeted by anti-growth groups as the national “test case” for conformity litigation. Several lawsuits have been filed or anticipated in Atlanta:

- 1) **1999 Lawsuit** against the Atlanta Regional Commission (ARC) – Atlanta’s MPO -- and state and federal DOT -- Georgians for Transportation Alternatives v. Shackelford, Atlanta District Court, No. 99-0160, filed Jan. 1999. The national Sierra Club and local Atlanta environmental groups sued DOT, GaDOT and ARC to stop 71 projects worth \$720 million that were approved shortly before Atlanta fell out of conformity (lapsed). The projects had been grandfathered under EPA regulations, however, the regulations that allowed grandfathering were overturned on March 2, 1999, by the U.S. Court of Appeals for the District of Columbia Circuit in Environmental Defense Fund v. EPA, 167 F.3d 641 (D.C. Cir. 1999). ASET member ARTBA moved to intervene in this first Atlanta lawsuit, but was shut out of settlement talks and the case settled out of court with major concessions from the State (only 17 out of the 71 projects were allowed to go forward – 54 projects were \$610 million were put on hold). The settlement was announced in court on June 21, 1999 – the day of the hearing on ARTBA’s motion to intervene.

- 2) **MVEB Suit Against EPA** -- Georgians for Transportation Alternatives v. EPA, 11th Circuit (Atlanta), No. 00-12187, filed Apr. 28, 2000. The national Sierra Club and local groups challenged EPA’s determination that the Atlanta MVEB was adequate for transportation planning purposes. On June 1, 2000, ASET moved to intervene in the case. That motion was denied June 27. ASET filed a motion to reconsider on July 10, but the court denied it on August 4. On July 18, the court placed a stay on the MVEB, which would have, in effect, prohibited DOT from issuing a conformity determination, thus, halting federal transportation funds. However, ARC and U.S. DOT approved the TIP on July 25 based on an old MVEB (after consulting with ASET), which as a practical matter circumvented the 11th Circuit challenge. On January 26, 2001, the parties jointly agreed that EPA could withdraw the approval of the most recent MVEB and allow transportation planning to continue based on the old MVEB.

- 3) **Bump-Up Suit Against EPA** -- Sierra Club v. Browner, Atlanta District Court, No. 01-0127, filed Jan. 17, 2001. After settlement talks between the government and anti-growth groups failed in January 2001, Sierra Club, Environmental Defense (formerly called the Environmental Defense Fund), and local groups sued to force EPA to reclassify (“bump-up”) the Atlanta area from a “serious” to “severe” nonattainment area because Atlanta failed to attain ozone standards by the 1999 statutory deadline. Also at issue in this suit is EPA’s extension of the 1999 deadline to 2003 on account of pollution from upwind neighboring areas, known as “ozone transport.” To settle the suit, EPA solicited comments on whether to “bump” Atlanta to severe or to simply extend Atlanta’s compliance deadline based on the ozone transport theory. ASET members ARTBA and NAHB both filed comments January 25, 2002, arguing the deadline should simply be extended based on ozone transport. The comments also outlined the procedures that should be followed by the government if it should consider another course of action such as reclassifying the area as a severe nonattainment area.

- 4) **Conformity Suit Against ARC and DOT** – On February 13, 2001, Sierra Club filed

a Clean Air Act “conformity” lawsuit against the Atlanta Regional Commission (ARC), Georgia Department of Transportation and the Georgia State Transportation Board (GaDOT), and the U.S. Department of Transportation (USDOT). Sierra Club v. Atlanta Regional Commission, No. 01-0428 (N.D. Ga.). The Sierra Club sought to invalidate the approval of the Transportation Improvement Program (TIP) and halt all “capacity-increasing” projects (i.e., highways). There is no citizen suit count, but Sierra Club has requested attorney fees.

The complaint alleges that U.S. DOT’s July 2000 approval of ARC’s short-range TIP is invalid because (1) air emissions from projects in the TIP will exceed the 214 tons per day transportation budget, (2) the TIP used outdated vehicle speed and traffic volume data, (3) the TIP takes credit for mass transit funding that is not committed, (4) the TIP uses unrealistic assumptions about land use and voluntary programs, and (5) plaintiffs were denied public participation in approving the TIP. The common theme is whether U.S. DOT acted legally when it approved the TIP based on the old transportation budget, rather than the budget that was stayed by the Eleventh Circuit.

ASET moved to intervene in this case on March 5, 2001. On March 19, 2001, the anti-growth groups filed a motion opposing ASET’s intervention. On April 5, 2001, the Sierra Club filed a motion for a preliminary injunction to immediately halt what it describes as “air-quality degrading projects.” The injunction sought to halt 137 projects valued at over \$600 million.

On April 18, the court denied ASET’s intervention on the supposed failure of ASET to show it had projects in the affected TIP. However, ASET did make such a showing, but believed the judge was confused over the dual project numbering system. Based on this, ASET clarified the confusing project numbering system and asked the court on April 27 to reconsider. At the court’s request, ASET also filed a “friend of the court” brief opposing the preliminary injunction. A hearing on the preliminary injunction was held June 5 and 6, 2001, and on June 6, the court denied the injunction. The judge also granted ASET’s motion to intervene in the lawsuit on July 11.

On January 18, 2002, the court ruled on behalf of ASET and the government co-defendants on the issues that were most central to the case. The court held that conformity determinations are not rulemakings that require APA notice and comment procedures. Instead, the court likened the process to an adjudication and that U.S. DOT can rely on the public participation solicited by the MPO rather than seeking its own public input. The court also held that U.S. DOT followed EPA’s conformity regulations in selecting analysis years for conformity determinations. The court said that the rules govern, even if conformity is not determined within the lifespan of the TIP at issue and even if the CAA attainment deadlines have already passed (since Atlanta’s deadline has been extended due to ozone transport issues). The court also refused to hear Sierra Club’s challenge to the EPA’s conformity rules, stating that the challenge was not timely, since it was a belated rulemaking challenge.

The court, however, rejected two issues raised by ASET. First, the court said that the Sierra Club had legal standing to bring the lawsuit, and second, the court did not believe TEA-21 barred such lawsuits on jurisdictional grounds. The court failed to rule on a number of fact-specific issues noted above. However, on February 26, 2002, the Sierra Club requested that these remaining counts be dismissed so it could

immediately appeal the decision to the 11th Circuit U.S. Court of Appeals. On February 28, the court dismissed the remaining with prejudice (meaning they cannot be raised again). The Sierra Club has until March 30 to file a notice of appeal in the case. ASET must also file a notice of appeal by that date if it wants the Court of Appeals to address the standing and jurisdictional bar question.

D. San Francisco, California: Several lawsuits are expected in the San Francisco area. ASET has positioned itself in San Francisco to support transportation planning agencies both politically and through litigation. A letter of support was sent to MTC to foster good relations and will increase the likelihood that ASET will be allowed to intervene in any litigation (if it wishes) and to participate in settlement negotiations.

- 1) **Failure-to-Attain and Bump-Up Suit** against EPA -- Bayview Hunters Point Community Advocates v. Browner, San Francisco District Court, No. 01-50B2, filed Jan. 8, 2001. A coalition led by Sierra Club accused EPA of failing to disapprove an attainment SIP for the San Francisco area that was submitted in 1999 but never acted on by EPA. The suit also demands that EPA “bump up” San Francisco from “serious” to “severe” nonattainment status.
- 2) **Conformity Suit.** On February 21, 2001, environmental groups did file a suit against the Metropolitan Transportation Commission (MTC) – San Francisco’s MPO. However, the suit only made challenges against the transit agency for not increasing mass transit ridership and no transportation improvement projects were threatened. Bayview Hunters Point Community Advocates v. MTC, No. 01-750 (N.D. Cal.). On November 9, 2001, the district court held that a 15 percent transit ridership goal in the Bay Area SIP was a mandatory target that could be enforced in a citizen suit action. Briefly, the San Francisco SIP contained a transportation control measure (TCM) calling for implementation of transit policies designed to increase bus and BART ridership by 15 percent over five years. The goal was never met. In fact, ridership in the Bay Area had actually decreased over the last 10 years. Therefore, MTC did not take credit for associated emissions reductions in its TIP and conformity analysis. Despite finding that MTC had implemented the elements of the ridership TCM, the court ruled that failure to achieve the 15 percent goal itself was a violation of the SIP. Therefore, MTC faces \$25,000+ per day penalties. In subsidiary rulings, the court decided that TCMs remain in force until removed from a SIP, even if no credit is taken, and that U.S. DOT has no authority to contradict EPA interpretations of SIP obligations. The court also conflated implementation of TCMs with TCM effectiveness.
- 3) **Recent Developments:** Citing a potentially flawed public review process, state air quality officials July 27, 2001, postponed until September a vote on an ozone attainment plan for the San Francisco Bay Area. The decision by the California Air Resources Board (CARB) capped a marathon meeting in San Francisco where state and federal regulators made a futile attempt to salvage a controversial clean air strategy Bay Area agencies approved July 18. EPA Region IX warned state and local regulators, July 18 and again July 23, that it could not endorse the plan because it was neither technically sound, nor protective of the 1-hour NAAQS for ozone. According

to EPA, the data modeling results the Bay Area used to demonstrate attainment by 2006 was "inferior both quantitatively and qualitatively to what has been required and submitted elsewhere in the country." EPA suggested it could approve an amended revision of the plan that included a commitment from CARB to make up the 23-ton daily VOC emissions reduction shortfall EPA had identified in the modeling data. The state also would have to agree with EPA to revise the plan again in 2004 to incorporate the results of the Central California Ozone. ASET filed comments supporting the plan, which was found inadequate by EPA and on January 21, 2002, federal highway fund sanctions were implemented against the Bay area, leaving the funding of 50 highway projects worth \$784 million in limbo. Those sanctions were lifted February 14 after the MVEB was revised and found adequate by EPA for planning purposes. However, the San Joaquin Valley area indicated it will file suit against the revised the plan, stating that it does not adequately address ozone that drifts into the Central Valley.

E. Salt Lake City, Utah:

- 1) **Wetland Lawsuit** -- Several local environmental groups in Utah, the mayor of Salt Lake City, the League of Women Voters and a local chapter of the Audubon Society filed a lawsuit against FHWA and the Corps of Engineers of the issuance of the 404 permit for the project. The complaint alleges that the NEPA process was not followed in issuing the permit and that reasonable practicable alternatives were not closely examined. The complaint alleges that the route selected for the highway (for which the Corps issued the 404 permit) was objected to by U.S. EPA (even though EPA did not use its veto power to deny the 404 permit), the U.S. Fish and Wildlife Service, the city of Salt Lake City and other state agencies. The complaint also alleges that avoidance of parklands was not considered closely enough and avoidance of wetlands was not given the priority that it should have been under 404 (the Clean Water Act requires that projects first seek to avoid wetland destruction, then seek to minimize destruction and finally allow mitigation if destruction cannot be avoided or minimized). They also allege that HDR engineering had a conflict of interest in the case. HDR was hired by the Corps to assist it in the EIS/404 process. However, according to the plaintiffs, HDR also bid on the project, giving it an economic interest in the outcome. On July 26, hearings were held on this portion of the lawsuit, and on August 11, 2001, Judge Jenkins ruled against the no-growth groups on the NEPA and wetlands claims, allowing the project to go forward.

However, the plaintiffs appealed the judge's ruling to the 10th Circuit U.S. Court of Appeals and requested an injunction from that court blocking construction on the Legacy Highway until there is a decision on the appeal. The injunction was granted on November 16, blocking further construction on the Legacy Highway until the appeal has been completed. Oral arguments on the appeal are slated for March 20, 2002.

- 2) **Clean Air TIP Lawsuit** -- On February 13, 2001, Sierra Club filed a Clean Air Act "conformity" lawsuit against the U.S. Department of Transportation (USDOT) (the suit does not name either the regional planning board, Wasatch Front Regional

Council, or Utah DOT). Sierra Club v. USDOT, No. 01-0014 (D. Utah). Sierra Club is asking for an injunction of all highway projects, primarily the Legacy Highway project. The suit is primarily a conformity challenge, but also contains NEPA and wetlands counts almost identical to another lawsuit filed against the Legacy project by local environmental groups.

The conformity portion of the lawsuit alleges that (1) air quality modeling for the TIP used outdated data and unrealistic assumptions about land use, (2) more mass transit should have been funded, (3) plaintiffs were denied public participation, (4) the Legacy Highway project was not properly planned, and (5) projects for Ogden City failed certain tests.

ASET filed a motion to intervene in the lawsuit March 28. During oral argument held on May 1, the court denied ASET's motion to intervene and asked ASET to participate as an *amicus*. On that same day, the court consolidated the TIP lawsuit with the previously filed wetland lawsuit for trial. The court intends to handle all of the NEPA and wetland issues first, followed by the CAA counts.

ASET has appealed the court's ruling denying it intervention to the 10th Circuit U.S. Court of Appeals, where oral arguments were held January 14, 2002.

Wasatch Front Regional Council is currently putting together a new TIP. The parties have agreed not to brief the conformity part of the lawsuit until the new TIP is approved in the Spring of 2002. ASET has filed comments on the new TIP.

- F. Hot Spots to Watch:** San Francisco, California; San Joaquin Valley, California; and Houston, Texas.