
# "Zombie Regulation" Threatens to Bring Transportation and Infrastructure Plans Grinding to a Halt

*By Dan Byers*

In a memorable early scene of the inaugural episode of AMC's thriller series *The Walking Dead*, the show's main protagonist Rick Grimes makes his way past a miles-long traffic jam on Atlanta's I-85. The cars had been abandoned due to a zombie apocalypse, and Grimes was left to travel into the city by horseback.

Why are we talking about zombies? Well, *The Walking Dead* scene is in some ways a fitting metaphor for a little-noticed February D.C. Circuit Court decision that has, among other things, resurrected decades-old transportation planning requirements that were previously thought to be dead and buried. These requirements—zombie regulations, if you will—were superseded by newer ones long ago, but state and local governments have nonetheless been directed to re-impose requirements for goals they've already met.

The implications could be widespread and significant. In *The Walking Dead's* Atlanta, for example, the regional planning commission has sent a letter warning that the decision could threaten funding for over $1.5 billion worth of transportation projects.

The origin of this regulatory necromancy is long and complicated, but we will try to explain it without turning your brains to mush. It centers around air quality—specifically ozone—a pollutant that EPA, the states, and the private sector have worked to steadily reduce since the first regulations were promulgated in 1971. Over time, EPA has periodically tightened the standards, ratcheting them down to 80 parts per billion (ppb) in 1997, 70 ppb in 2008, and most recently the 70 ppb standard in 2015.

After each successive rule went into effect, states developed plans for each area of their state where ozone levels exceeded EPA's standard—known as nonattainment areas—to make progress toward bringing those areas in line with the current standard. Because ozone can form from combustion and countless other chemical processes, these plans typically impose limitations and detailed permitting requirements on everything from industrial facilities, power plants, and energy production to vehicles, road-building, lawnmowers, gasoline vapors, dry cleaners, and much more.

For example, localities seeking to build or expand roads must undertake extensive modeling and planning—known as transportation conformity—to ensure proposed projects will not contribute to future ozone violations. While these compliance measures often present a significant challenge and cost to states and localities, the efforts have been an undisputed success, as ozone-forming emissions have declined by 50 percent since 1980 while our population and economy have grown substantially.

Importantly, these compliance requirements were additive, not sequential, so states and localities were forced to undertake permitting efforts for each standard they did not meet (i.e, they must undertake separate transportation conformity actions for both the 1997 and 2008 standards). Recognizing the enormous planning burdens imposed by each successive ozone regulation, the Obama Administration in 2015 took the logical step of revoking the 1997 standard of 80 ppb, noting that any

state or local plan that complied with a 75 ppb standard would by definition also meet an 80 ppb standard. This meant that states would not be required to undertake separate and duplicative compliance and permitting systems for the older, superseded standard.

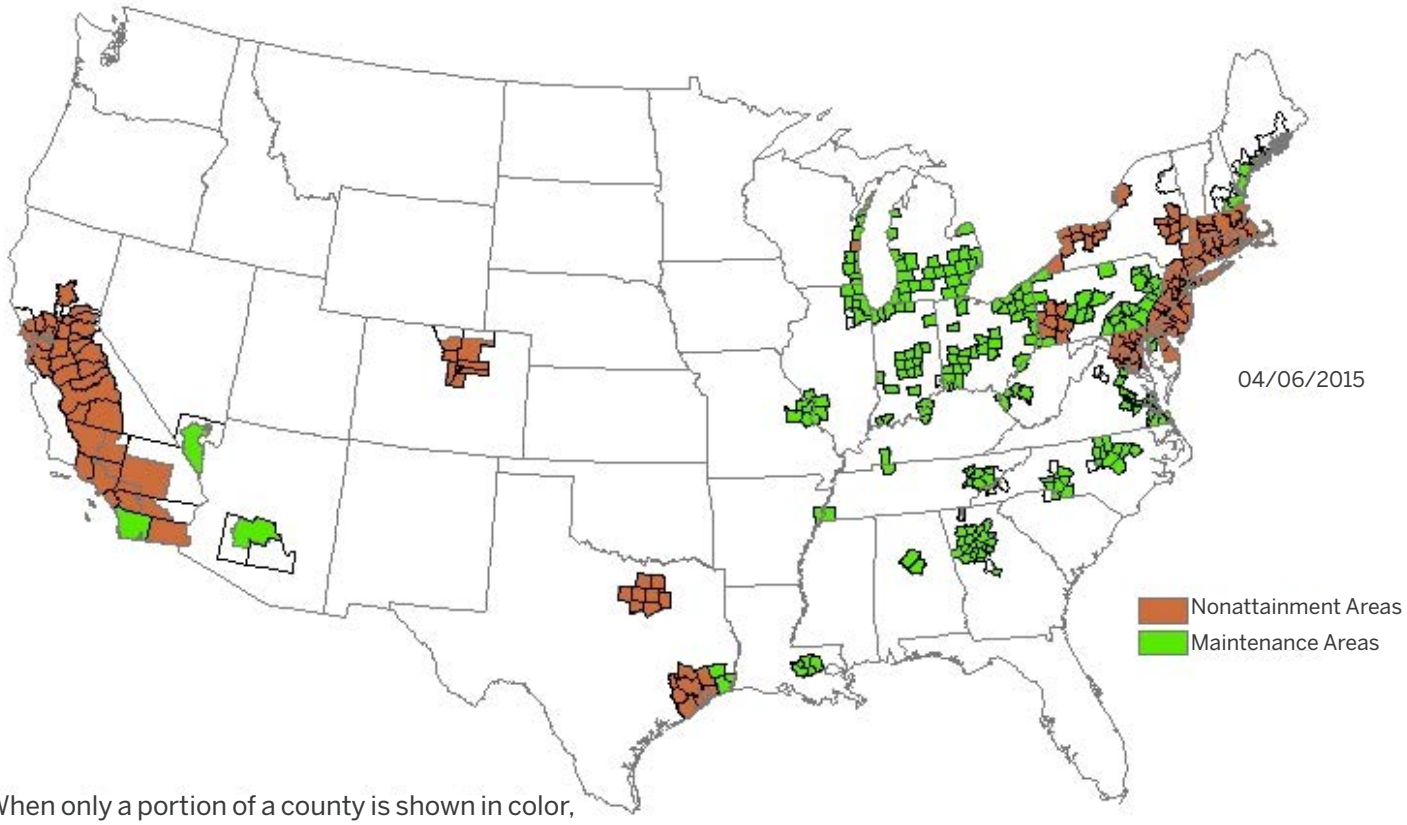
This made sense to the Obama Administration, but apparently not to the Sierra Club. The Club sued EPA using the Orwellian argument that revoking the less stringent and obsolete 1997 standard and replacing it with the more stringent 2008 standard amounted to a "relaxation" of protections under the Clean Air Act, thus triggering certain "anti-backsliding" measures.

EPA argued that this challenge lacked merit, explaining that:

*Because it is impossible to attain the 2008 Ozone NAAQS without also attaining the 1997 ozone NAAQS, States would simply be squandering their limited financial, scientific and legal resources by satisfying overlapping planning requirements and preparing scientifically complex and voluminous regulatory submittals for the obsolete 1997 NAAQS.*

To the surprise of many, on Feb. 16, the court sided with Sierra Club and immediately reinstated the 1997 rule. While stakeholders are still studying the practical implications of this decision, it appears they could be severe. When the Obama Administration revoked the 1997 standard in 2015, 115 areas located in 32 states and 434 counties were in nonattainment (see map).

**8-Hour Ozone Nonattainment and Maintenance Areas**
**(1997 Standard - Revoked)**




When only a portion of a county is shown in color, it indicates that only that part of the county is within an area boundary

The 1997 Ozone NAAQS was revoked effective April 6, 2015 (80 FR 12264).

Many if not most of these areas have progressed well beyond the 1997 standards to the point that they now meet the even more stringent 2008 standard. But that may not matter. Nonetheless, they will still be forced to implement the revived 1997 standard as if it had never been met in the first place, and as if they weren't also meeting the more strict 2008 standard. This means reinstituting lengthy and costly permitting systems and compliance measures that directly impact a wide range of economic sectors.

A recent letter to EPA from the American Association of State Highway and Transportation Officials (AASHTO) and Association of Metropolitan Planning Organizations (AMPO) described the threat as it relates to transportation:

> *The immediate re-imposition of conformity requirements will prevent States and metropolitan planning organizations (MPOs) from approving transportation plans and transportation improvement programs (TIPs) until the necessary air quality analysis and conformity determinations can be completed. Without an approved plan and TIP, the flow of federal funds for highway and transit projects in many areas will be halted…As an indication of the potential magnitude of the problem… In Atlanta alone, the MPO has approximately $1.5 billion of projects in its TIP; in Houston, the MPO has approximately $4.37 billion of projects in its TIP; in Hampton Roads, Virginia, the TIP includes $4.89 billion of projects… To avoid immediate and far-reaching disruption to transportation projects, it is critical to seek every available means to obtain relief from this court decision.*

Interestingly, the White House's infrastructure plan, which was released just six days prior to this court ruling, explicitly attempts to address this nonsensical problem by calling on Congress to "[amend] the Clean Air Act to clarify that conformity requirements apply only to the latest NAAQS for the same pollutant." It is ironic that so many projects could come grinding to a halt at a time of bipartisan interest in, and momentum for, tackling the nation's countless infrastructure challenges. But sadly this story is one of many examples of how regulatory red tape trumps common sense and scares away capital that is critical to boosting economic growth.

Here's to hoping that some combination of our three branches of government can restore a semblance of common sense and provide relief from this 20-year-old zombie regulation before countless highway projects and industrial investments find themselves dead projects walking.