



U.S. Department
of Transportation

Memorandum

**Federal Highway Administration
Federal Transit Administration**

Subject: **INFORMATION:** Supplemental Guidance
for the Implementation of the Circuit Court
Decision Affecting Transportation Conformity

Date: May 7, 1999

From: Kenneth R. Wykle
Administrator
Gordon J. Linton
Administrator

Reply to
Attn. of: HENE

To: FHWA Division Administrators
Federal Lands Highway Division Engineers
FTA Regional Administrators

On March 2, 1999, the United States Court of Appeals for the District of Columbia Circuit issued a decision on EPA's third set of transportation conformity amendments in response to a case brought by the Environmental Defense Fund. On April 16, 1999, the Department of Justice, EPA, and DOT decided not to appeal the Court of Appeals decision. Both the EPA and DOT feel that we can work within the ruling, and EPA will be providing revised conformity regulations that implement this ruling in the near future. This memorandum supersedes the interim guidance issued on March 31, 1999, and advises you on how to proceed in the future, particularly for those areas that currently have conformity determinations based on submitted State implementation plan (SIP) emissions budgets. The EPA has concurred with the following conformity guidance.

Grandfathering:

The decision holds that projects that had previously been found to conform and had completed the National Environmental Policy Act (NEPA) process (grandfathered projects) may not be advanced (that is, such projects should not be approved) in nonattainment and maintenance areas which do not have a currently conforming plan and transportation improvement program (TIP). Thus, in such areas, you should not make any approvals or grants for further development of projects (i.e., completion of NEPA process, final design, right-of-way acquisition, or construction). The only projects which can receive further approvals or grants during a plan and TIP conformity lapse are: (1) projects exempt from the conformity process; and (2) transportation control measures (TCMs) which are included in an approved SIP.

Projects that received funding commitments (plans, specifications, and estimates (PS&E) approval, full funding grant agreement, or an equivalent approval or authorization) before the court decision will not be stopped or otherwise penalized, even if the funding was committed during a lapse. However, subsequent phases of a project for which FHWA has not taken an approval action may not proceed in the absence of conformity. For transportation projects not

requiring a project specific PS&E approval, you should instruct the State or local transportation agency not to take actions committing the State or local agency to proceed with the project during a lapse unless the project has already received full approval or authorization for funding before the lapse, or before the March 2, 1999, court decision.

When a community is facing a conformity determination lapse within 6 months, FHWA, FTA, and EPA will meet and jointly evaluate the potential consequences of the lapse and assess any concerns. The FHWA, FTA, and EPA will meet at least 90 days before a conformity lapse to determine which projects could receive funding commitments before the lapse, and which projects could potentially be delayed, and the actions that would be necessary to correct the lapse.

When a conformity lapse is imminent or actually occurs, FHWA Division Administrators and FTA Regional Administrators shall notify the Governor or the Governor's designee immediately to inform him/her of the consequences, and potential solutions to minimize disruptions to the transportation programs in the respective nonattainment and maintenance areas. The FHWA and FTA will consult with EPA regional offices before notifying the Governor or the Governor's designee of conformity consequences and solutions.

Use of Submitted SIP Emissions Budgets:

The decision held that conformity determinations can no longer be based on submitted SIP emissions budgets, prior to a positive adequacy determination by EPA. Consequently, the areas in which submitted SIP emissions budgets were used to determine conformity shall be governed by the following guidance:

(1) Submitted SIP emissions budgets which were found adequate by EPA

In areas where the SIP emissions budget has been declared adequate by EPA in compliance with 40 CFR, section 93.118(e) (4), the conformity determination remains valid. A list of these areas will be published in the Federal Register shortly.

(2) Submitted SIP emissions budgets used for conformity determinations with NO prior EPA actions

(a) For SIP emissions budgets that were submitted before the court decision and already used for conformity determinations, EPA will quickly attempt to make an adequacy determination using the criteria in the existing conformity rule:

- If the record of the State's public process contains no adverse comments about the submitted SIP emissions budget's adequacy (or the State has appropriately addressed the comments), EPA will send a letter confirming the adequacy determination to the States, MPOs, etc. The EPA will announce these adequacy determinations in a Federal Register notice (no public comment) shortly.

- If the record of the State's public process contains adverse comments about the submitted SIP emissions budget's adequacy that weren't addressed by the State, EPA will issue by May 31, 1999, an interim final rule that determines adequacy. The adequacy determination would take effect immediately upon publication, to be followed by a public comment period and final rule.

(b) Where EPA does not find a submitted SIP emissions budget adequate, the metropolitan planning organization (MPO) and DOT can reestablish conformity if it is demonstrated with the following tests:

- Submitted SIP emissions budget plus build/no-build and/or 1990 test¹ for every analysis year and pollutant for which a submitted SIP was used; or
- Approved SIP emissions budget for every analysis year for which a submitted SIP was used.

Conformity can be reinstated provided that there is an opportunity for public review and comment on any conformity emissions tests. The MPOs should determine through the interagency consultation process, that has been established for each area, the appropriate level of public involvement and interagency consultation that is necessary. At a minimum, the MPO should notify the public of what was done and why, so that the public is informed and has an opportunity to comment on the findings. The MPO should provide reasonable public access to technical and policy information considered by the agency as required by 40 CFR, section 93.105(e). Information on additional conformity tests and public involvement should be submitted to the FHWA division and FTA regional offices. The DOT offices will review this information, in consultation with EPA, and send the MPO a letter once it is determined that conformity should be reinstated.

If new analyses are required, the MPO would need to again conduct a public involvement process, since this had not occurred in the past. Conformity can also be reinstated if an MPO had already completed the conformity tests described above and public involvement occurred. For example, a MPO may have done the build/no-build and less-than-1990 tests in its previous plan/TIP conformity determination, even though it was not required. In this case, additional public involvement would not be necessary if the public had already had an opportunity to comment on these conformity tests. The MPO would simply submit to DOT the previous analyses and evidence that public involvement had occurred; new analyses and public involvement would not be necessary.

¹ For moderate and above ozone areas and moderate above 12.7 ppm and serious CO areas, build/no-build and less-than-1990 tests should be used. For NOx and PM-10 areas and all other ozone and CO areas, the build/no-build or no-greater-than-1990 test should be used. The requirements of the tests are described in 40 CFR, section 93.119.

(c) Until EPA finds a SIP emissions budget adequate or the MPO and DOT reestablish conformity determination, conformity is suspended. The DOT will not make further project approvals in these areas, except for exempt projects and TCMs in an approved SIP.

(3) Future submitted SIP emissions budgets

For SIP emissions budgets submitted in the future (or already submitted but not yet used to determine conformity), EPA will complete the adequacy finding within approximately 90 days of EPA's receipt of the SIP emissions budget in accordance with a proposed process that EPA will be issuing.

Other Issues:

The EPA, in coordination with DOT, will be issuing additional guidance on the following areas covered by the court decision through the rulemaking process:

- The ruling invalidates a provision of the regulation dealing with the approval of regionally significant non-Federal projects in areas in conformity lapse. The EPA, in consultation with DOT, will be issuing additional guidance on this issue to clarify available flexibility.
- Areas which have their SIP disapproved will no longer have a 120-day grace period in which to complete an ongoing conformity analysis. Thus, on the effective date of an EPA SIP disapproval, only projects in the plan and in the first 3 years of the TIP that are in place at that time can go forward, as described in 40 CFR, section 93.120(a)(2). The EPA will issue guidance on when disapprovals will become effective.
- The court struck down 40 CFR, section 93.124(b), thus submitted SIPs that allocate a portion of the emissions "safety margin" to mobile sources can not be used until they are approved by EPA.

If you have questions on this supplemental guidance, please contact Mr. James Shrouds (202) 366-2074 or Ms. Cecilia Ho (202) 366-9862 of FHWA, or Mr. Abbe Marner (202) 366-4317 of FTA.

cc: Resource Center Directors