EPA420-F-99-025

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NATIONAL VEHICLE AND FUEL EMISSIONS LABORATORY
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MAY 14 1999

OFFICE OF
AIR AND RADIATION

MEMORANDUM:

FROM: Gay MacGregor, Director *Gay MacGregor*
Regional and State Programs Division
Office of Mobile Sources

TO: Director, Air, Pesticides and Toxics Management Division, Regions I and IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Multimedia Planning and Permitting Division, Region VI
Director, Air and Toxics Division, Regions VII, VIII, IX, and X

SUBJECT: Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision

On March 2, the United States Court of Appeals for the District of Columbia Circuit issued a decision on the 1997 transportation conformity amendments (62 FR 43780) in response to a case brought by the Environmental Defense Fund. On April 16, 1999, the Department of Justice, Environmental Protection Agency (EPA), and Department of Transportation (DOT) decided not to seek rehearing of the DC Circuit Court of Appeals decision.

Both the EPA and DOT believe that we've created a workable administrative approach which addresses implementation of conformity requirements consistent with the court ruling. EPA and DOT are both issuing guidance to implement this workable approach. This memorandum is EPA's guidance, which has more details about using submitted budgets, projects requiring federal approval, non-federal projects, state implementation plan (SIP) disapprovals, and certain safety margins. DOT has concurred on this guidance. DOT also issued guidance on May 7, 1999, which explains projects that can advance during a conformity lapse and use of submitted SIP budgets. DOT's guidance supplements its earlier March 31, 1999, guidance.

EPA and DOT will be working together to formalize our guidance by proposing and ultimately finalizing amendments to the conformity rule. We expect this proposal to be issued at the same time as the transitional conformity rulemaking.

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Use of submitted SIP budgets: general

1. Q: Can I use a submitted state implementation plan (SIP) budget for conformity determinations?

   A: Yes, once EPA affirmatively finds the submitted SIP motor vehicle emissions budget adequate for conformity purposes, through the processes described below.

Submitted budgets that have never been used in conformity determinations:

2. Q: What if I have a submitted budget now or will soon submit a new budget, and this budget was never used in a previous conformity determination? Can I use it in future conformity determinations?

   A: Yes, once EPA affirmatively finds the budget adequate for conformity purposes.[1] EPA has worked closely with the litigants and DOT to create a new adequacy process which is consistent with the court's ruling and provides for public involvement on EPA's adequacy determination. EPA intends to review the adequacy of newly submitted budgets through this process within 90 days of EPA's receipt of the SIP.[2] EPA will work quickly to determine the adequacy of budgets that are already submitted but have not been used in previous conformity determinations.

   We will propose our new adequacy process as a conformity rule amendment, and we will follow this process as an administrative matter until a final rule amendment is effective. The substantive criteria by which we determine adequacy will be the same as those currently included in 40 CFR 93.118(e)(4). EPA's new adequacy review process is described below.

   - Notification of SIP submission: Within 10 days after a control strategy SIP or

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[1]Submitted budgets cannot be used if there is an approved SIP covering the same timeframe and Clean Air Act requirements as the newly submitted SIP. This aspect of the 1997 rule was unchanged by the court.

[2]EPA will only review the adequacy of those submitted budgets which could apply for conformity purposes before EPA approves them (see footnote 1).

maintenance plan is formally submitted[3,4], EPA will notify the public by posting a notice on EPA's Office of Mobile Sources website (www.epa.gov/oms/transp/adequacy.htm) and by notifying those who have previously requested notification of the SIP's submission. EPA's website will provide EPA Regional contact information so that interested parties can arrange or discuss notification processes. EPA will use postcards, letters, email or phone calls to notify requesters. The website will include information on how to obtain copies of the SIP.

- Public comment: A 30-day public comment period commences immediately upon the website posting in two circumstances: (1) if the state has made the SIP electronically available to the public via a website, electronic bulletin board, etc.; or (2) if no one has requested copies of the SIP within 15 days after the date of EPA posting notification. If someone does request a copy of the SIP and EPA receives the request within the first 15 days, the 30-day public comment period won't start until the date that EPA mails the copy. EPA is not committing to make SIP submissions electronically available on its OMS website. EPA's website will state when the public comment period begins and ends. If someone requests a copy of the SIP, the website will be updated to reflect any extension of the public comment period.

- EPA's adequacy determination: EPA will issue its adequacy determination, including a response to comments, by posting it on EPA's Office of Mobile Sources website (www.epa.gov/oms/transp/adequacy.htm) and by mailing it to requesters. EPA could also send the adequacy determination and response to comments by email, if both the EPA region and the requester(s) agree to it. EPA will also subsequently announce the determination in the Federal Register. The adequacy determination would take effect 15 days after publication in the Federal Register. Adequate budgets must be used in future conformity determinations; inadequate budgets cannot be used.

If you have questions about the new adequacy process, contact your EPA Regional Office.

3. Q: Is EPA willing to use other processes for determining the adequacy of submitted

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[3]The control strategy SIPs that must have motor vehicle emissions budgets for conformity are 15% plans, 9% plans, and attainment demonstrations.

[4]EPA will consider a SIP to be formally submitted on the date that the EPA regional office receives it (62 FR 43782, August 17, 1997).

budgets?

A: Yes, if EPA is moving forward to quickly propose action on a SIP, for instance in response to a court order, EPA could propose and take comment on adequacy as part of its proposed action on the SIP, in lieu of the process described in Q & A. 2. In such cases, EPA could take final action on adequacy by posting the determination on the web and announcing it in the Federal Register, as described in Q & A. 2. Alternatively, if EPA has followed the notification and comment process described in Q & A. 2., it could finalize its adequacy determination with response to comments as part of a proposed or final rulemaking action on the SIP.

4. Q: For budgets that have already been submitted to EPA but haven't been used in conformity determinations, when will EPA notify the public that the submission has been received and the new adequacy review process has begun?

A: As described above, EPA will notify the public of new submissions within 10 days of receiving them. For submitted budgets that are currently in-house, EPA will soon be notifying the public by posting a notice on EPA's Office of Mobile Sources website and by mailing, emailing, or calling those who have previously requested notification of the SIP's submission. If you are interested in receiving such notification, please contact your EPA Regional Office. The public comment period will begin according to the process highlighted in Q &A 2. (see "Public comment").

5. Q: What conformity test do I use before EPA has found the submitted budget adequate?

A: You use whatever conformity test applied before the new budget was submitted. For example, if your area has no other submitted or approved budgets for the given criteria pollutant, you would use the emission reduction tests that are required by 40 CFR 93.119 of the conformity rule. If you had previously approved budget(s) for a given pollutant or previously submitted budget(s) that EPA had found adequate, you would need to meet the approved or adequate budget(s) for all analysis years. The submitted budget is not used until EPA finds it adequate. Contact your EPA Regional Office if you have questions about what conformity tests apply in your area.

6. Q: What criteria will EPA use to determine the adequacy of a submitted budget?

A: EPA will continue to use the adequacy criteria contained in 40 CFR 93.118(e)(4) of the conformity rule. See the preamble for the final 1997 conformity rule (62 FR 43781-2, August 15, 1997) for more information about the adequacy criteria. EPA encourages air

quality and transportation agencies to work closely with EPA Regional Offices to ensure that the SIP includes clearly defined, adequate motor vehicle emissions budgets. Close consultation during the SIP's development will assist EPA in making adequacy determinations on submitted budgets quickly.

7. Q: How does EPA's adequacy process relate to completeness review or approvability of the SIP?

A: EPA's completeness review of a submitted SIP is separate from the conformity adequacy process, and it uses different criteria. Likewise, EPA's approval process requires a more detailed examination of the SIP's control measures and technical analyses than the conformity adequacy process. Although the minimum criteria for adequacy allow EPA to make a cursory review of the submitted control strategies, demonstrations, and motor vehicle emissions budgets for conformity purposes, EPA recognizes that other elements must also be in the SIP for it to ultimately be approved.

EPA's adequacy review should not be used to prejudge EPA's ultimate approval or disapproval of the SIP, since additional information may be submitted and more extensive review may change some of the conclusions. However, if EPA judges the budget inadequate, the state and local agencies should work closely with EPA to address the problems identified. A control strategy SIP or maintenance plan must contain an adequate motor vehicle emissions budget(s) in order for EPA to approve the SIP.

EPA's adequacy process will only be completed on SIPs that create motor vehicle emissions budgets used in conformity determinations (i.e., 15% SIPs, 9% SIPs, attainment demonstrations, and maintenance plans).

8. Q: If EPA finds a submitted budget inadequate, can it reevaluate the decision later and call it adequate based on further analysis or if new information on the adequacy of the budget is submitted? Can the opposite occur?

A: Yes, but EPA would first have to post a notice on the Office of Mobile Sources website explaining EPA's intention, so that the public could have an additional opportunity to comment. EPA would follow the details of the new adequacy process described above with respect to the newly submitted data.

<u>Submitted budgets that have been used in previous conformity determinations:</u>

9. Q: What if I used a submitted SIP budget in a previous conformity determination and

EPA had declared the budget adequate prior to the March 2, 1999 court ruling? Is my previous determination still valid?

A: Yes. In areas where the emissions budget has been declared adequate by EPA in compliance with 40 CFR 93.118(e)(4), the conformity determination remains valid. EPA will publish a list of the areas with adequate SIP budgets in the Federal Register shortly. These budgets continue to apply and must be used in future conformity determinations. If you have questions about whether your area's budget was found adequate before the March 2, 1999 court ruling, contact your EPA Regional Office.

10. Q: What if I used a submitted SIP budget in a previous determination before March 2, 1999, EPA had not formally found it adequate, and EPA has since approved the submitted SIP? Is my previous determination still valid?

A: Yes, the previous determination is still valid.

11. Q: What if I used a submitted SIP budget in a previous conformity determination, and EPA had not formally found it adequate before March 2, 1999? Is my previous determination still valid?

A: Yes, if one of the following occurs:

- EPA formally finds the budget adequate according to the adequacy criteria in 40 CFR 93.118(e)(4) of the existing conformity rule. EPA is in the process of finding these budgets adequate quickly according to the following schedule:

  - If the record of the state's public process contained no adverse comments about the budget's adequacy which remain unaddressed by the state and EPA believes the budget is adequate, then EPA has sent a letter confirming the adequacy determination to the state, MPOs, etc. EPA will announce these adequacy determinations in a Federal Register notice shortly (no public comment). These adequate budgets continue to apply for future conformity determinations. The Federal Register notice will also list the areas where EPA found budgets adequate prior to March 2, 1999 (see Q & A 7. above).

  - If the record of the state's public process contains adverse comments about the budget's adequacy that weren't addressed by the state but EPA believes the budgets is adequate, EPA intends to issue by approximately May 31, 1999 an interim final rule that finds the budget adequate. The

adequacy determination would take effect immediately upon publication, to be followed by a public comment period and final rule. These adequate budgets continue to apply for future conformity determinations.

- In cases where EPA cannot find the budget adequate, the MPO and DOT must reaffirm that the previous determination is still valid based on alternative conformity tests. See DOT's May 7, 1999, supplemental guidance for more details. EPA and DOT are working closely with areas that are in this situation, so that their previous determinations can be reinstated quickly. EPA will shortly announce in the Federal Register the list of submitted budgets that EPA has recently found inadequate.

Projects requiring federal approval:

12. Q: When can a project which requires federal approval, but no federal funding, be advanced during a conformity lapse?

A: Whether or not federal funds are involved, if a project requires federal approval, the Federal Highway Administration (FHWA) cannot grant the final approval until after the National Environmental Policy Act (NEPA) process is completed. Therefore, the project could proceed during the lapse only if all of the NEPA requirements are met and the final federal approval was granted before the lapse.

Non-federal projects:

13. Q: What are non-federal projects, and which ones are covered by the transportation conformity rule?

A: A non-federal project is a highway or transit project which requires no federal funding or approval, but is funded or approved by an agency that routinely receives funds from FHWA or the Federal Transit Administration (FTA). A state DOT or public transit agency would be an example of a routine recipient of federal funds. Only regionally significant non-federal projects are covered by the conformity rule. Interagency consultation is used to determine who are routine recipients of federal funds and whether a project is regionally significant. See 40 CFR 93.101 for the rule's definitions of "recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws" and "regionally significant project."

14. Q: How does the court's ruling affect the implementation of regionally significant non-federal projects?

A: The court's ruling does not affect the general implementation of non-federal projects. However, the ruling does eliminate the narrowly-targeted flexibility from the 1997 conformity rule which had allowed non-federal projects to be approved during a lapse if they had been included in the first three years of the previously conforming transportation plan and transportation improvement program (TIP) (or supporting regional emissions analyses). In sum, the court requires regionally significant non-federal projects to be approved by the non-federal entity before a lapse in order to proceed during the lapse. Once approved, non-federal projects can proceed to construction, even during a lapse, as long as the project's design concept and scope doesn't change significantly.

15. Q: When is a regionally significant non-federal project considered to be "approved" by the non-federal entity?

A: The definition of non-federal project "approval" is decided at the state and local level through the interagency consultation process and should be formalized in the area's conformity SIP.[5] For example, some areas have defined "adopt or approve a regionally significant highway or transit project" to be one of the following actions:

- Policy board action or resolution that is necessary for a regionally significant project to proceed.
- Administrative permits issued under the authority of the agency, policy board, or commission for a regionally significant project.
- The execution of a contract to construct, or any final action by an elected or appointed commission or administrator directing or authorizing the commencement of construction of a regionally significant project.
- Providing grants, loans or similar financial support, for the construction of a regionally significant project.

EPA discussed defining non-federal project "approval" in the preamble to the November 24, 1993 transportation conformity rule: "EPA believes that adoption/approval is never later than the execution of a contract for site preparation or construction. Adoption/approval will often be earlier, for example, when an elected or appointed commission or administrator takes a final action allowing or directing lower-level personnel to proceed (58 FR 62205, November 24, 1993)."

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[5]The conformity SIP is required by 40 CFR 51.390, and includes area-specific conformity procedures tailored to local and state agency needs. The conformity SIP does not contain a motor vehicle emissions budget.

Of course, to be approved, a regionally significant non-federal project must be included in a conforming plan/TIP and/or supporting plan/TIP regional emissions analyses prior to a conformity lapse.

Please contact your local or state air agency if you have questions about how your conformity SIP defines the point of approval for non-federal projects. If EPA has not approved your conformity SIP, the interagency consultation process should be used to determine the point of approval for non-federal projects.

Grace periods for SIP disapprovals:

16. Q: How does the court's ruling affect when conformity consequences of SIP disapprovals apply?

A: The 1997 conformity rule created a 120-day grace period following EPA's disapproval of a SIP without a protective finding, after which conformity freezes. A "freeze" means that only projects in the first three years of the transportation plan and program can proceed. The court eliminated this grace period, so now a conformity freeze begins on the effective date of EPA's disapproval. There are currently no areas that are in this situation. See the preamble of the 1997 conformity rule (62 FR 43796-7) for more information about SIP disapprovals, protective findings, and conformity freezes.

However, EPA believes that it can still effectively provide transportation agencies a short time period prior to the impacts of a conformity freeze. EPA has administrative discretion to make disapprovals of control strategy SIPs effective 60-90 days after the publication of the disapproval in the Federal Register. A conformity freeze would start upon the effective date of the disapproval. EPA believes that such a delayed effective date is appropriate to allow transportation agencies to complete conformity determinations that were well underway when EPA disapproves a SIP without a protective finding.

17. Q: When will a conformity freeze start in the case where a conditional approval converts to a SIP disapproval without a protective finding?

A: Unlike other types of SIP actions, conditional approvals automatically convert to SIP disapprovals if the condition of EPA's approval is not met within a fixed period not to exceed one year. Therefore, a conformity freeze would begin immediately upon the conversion of a conditional approval to a disapproval without a protective finding.

However, EPA notes that conditional approvals, by their very nature, inform transportation agencies well in advance that future conformity consequences could result if the conditions of the approval are not met. Because transportation agencies will be aware of potential conformity impacts approximately one year before they could occur, EPA believes that the practical impact of not providing a delayed effective date in these cases will be minimal.

Certain "safety margins":

18. Q: What was the court's decision on safety margins? Who is affected?

A: There is currently only one area that is affected by the elimination of this flexibility. The court's ruling eliminated the flexibility offered to certain areas under 40 CFR 93.124(b) of the conformity rule. This section was a narrowly targeted provision for areas that submitted SIPs before the original 1993 conformity rule. These areas could subsequently submit SIP revisions in order to allocate portions of the approved safety margin to the SIP's motor vehicle emissions budgets. The 1997 rule allowed these SIP revisions to be used before EPA approved them. The court decided that EPA must fully approve these safety margin allocations before they can be used for conformity.

19. Q: Are previous conformity determinations still valid if a submitted safety margin was used according to 40 CFR 93.124(b)?

A: Yes. Any past conformity determinations that relied on an unapproved safety margin allocation under 93.124(b) remains valid. EPA has approved most of the safety margin allocations that were used in past determinations, which satisfies the court's decision. Of course, future conformity determinations cannot be based on such submitted safety margin allocations, but must await EPA approval of the submitted allocation. EPA and DOT believe that to invalidate previous determinations that were based on submitted safety margin allocations under 93.124(b) would cause grave disruption to the transportation planning process.

20. Q: Can safety margins still be allocated to motor vehicle emissions budgets for use in conformity determinations?

A: Yes. The court eliminated the safety margin flexibility in section 93.124(b), but the majority of areas that allocate safety margins to their budgets are not affected by the court's ruling. In general, areas that do not have approved SIPs can use submitted safety margins in conformity determinations once EPA finds them adequate. Areas that have

approved SIPs and wish to reallocate their safety margin could use such a revision for conformity purposes once EPA has approved it.

If you have questions on this guidance, please contact Kathryn Sargeant (734) 214-4441, Meg Patulski (734) 214-4842, or Laura Voss (734) 214-4858.

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