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Transportation Conformity Under the Clean Air Act: In Need of Reform?

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Summary

Under the Clean Air Act, areas that have not attained one or more of the six National Ambient Air Quality Standards (currently more than 100 areas with a combined population of at least 159 million) must develop State Implementation Plans (SIPs) demonstrating how they will attain the standards and, once they have attained them, how they will maintain air quality. The Act requires that, in these areas, federal agencies not engage in, approve, permit, or provide financial support for activities that do not “conform” to the area’s SIP.

Although a wide range of federal funding and programs is subject to conformity, it is transportation planning (and ultimately highway funding) that is most commonly affected. Before a new transportation plan can be approved or a new project can receive federal funding in a nonattainment area, a regional emissions analysis must demonstrate that the projected emissions are consistent with the emissions ceiling established by the SIP. While some express concern at the potential impact of these conformity determinations in delaying or altering new highway projects, others note that the process simply obligates the federal government to support rather than undermine the legally adopted state plans for achieving air quality.

Conformity lapses have occurred in 63 areas in 29 states and Puerto Rico since 1997. Most of these areas have returned to conformity quickly without major effects on their transportation programs: according to the General Accounting Office, only 5 areas had to change transportation plans in order to resolve a conformity lapse. Nevertheless, the impact of conformity requirements is expected to grow in the next few years for several reasons. First, the growth of emissions from SUVs and other light trucks and greater than expected increases in vehicle miles traveled have made it more difficult to demonstrate conformity. Second, recent court decisions have tightened the conformity rules, making it more difficult to grandfather new projects. And third, the implementation of more stringent air quality standards for ozone and particulates in 2004 means that additional areas will be subject to conformity, many for the first time. Thus, numerous metropolitan areas may face a temporary suspension of highway and transit funds unless they impose sharp reductions in vehicle, industrial, or other emissions.

This report, which will be updated as events warrant, provides an explanation of the conformity requirements, discusses the experiences of metropolitan areas that have experienced a conformity lapse during the last 10 years, and reviews some of the recent proposals for reform. Among the issues raised have been the frequency with which conformity should be demonstrated, whether transportation planning and SIP timeframes are mismatched, and to what extent projects should be “grandfathered” if they were once part of a conforming transportation program. The House and Senate surface transportation bills (H.R. 3550 and S. 1072), the Administration’s highway and transit funding bill, are among the bills discussed, as is the Administration’s Clear Skies bill (H.R. 999 / S. 485), which proposes changes that would affect the number of areas required to demonstrate conformity.

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Transportation Conformity Under the Clean Air Act: In Need of Reform?

Introduction

This report discusses the transportation conformity provisions under Section 176 of the Clean Air Act and various proposals to modify the provisions now under consideration. Conformity was established by Congress as a means of insuring that federal actions, including the provision of federal funds for local projects, not undermine air quality in areas that have not attained air quality standards. By potentially denying federal funds to such areas, conformity serves as an important stimulus for local governments to assess potential air quality impacts of projects and, if necessary, modify them to assure that they not interfere with progress toward or maintenance of clean air.

The report begins with an explanation of the Act's requirements, discusses the experiences of metropolitan areas that have experienced what is called a "conformity lapse" during the last 10 years, and then proceeds to a discussion of recent proposals for reform.

Conformity Requirements

Under the Clean Air Act, areas that have not attained one or more of the six National Ambient Air Quality Standards¹ established by EPA (more than 100 areas with a combined population of at least 159 million²) must develop State Implementation Plans (SIPs) demonstrating how they will attain the standards. A SIP contains projections of emissions, generally including a motor vehicle emissions budget, as well as an identification of measures that will be taken to reduce the

¹ The standards are for ozone, particulate matter, carbon monoxide, nitrogen dioxide, sulfur dioxide, and lead.

² EPA data on the number of nonattainment areas and the affected population are somewhat inconsistent. An EPA air quality report issued September 15, 2003, *Latest Findings on National Air Quality*, stated that 124 areas are in nonattainment, and a combined population of 146.2 million lived in counties with air quality concentrations above the level of the NAAQS in 2002 (see [http://www.epa.gov/airtrends/2002_airtrends_draft12a-new.pdf]). These data include areas that do not meet two new standards, for 8-hour ozone concentrations and for fine particulates (PM_{2.5}), as well as areas that do not meet the old standards for all six pollutants. EPA can include counties that do not themselves have readings exceeding the standards in nonattainment areas, if they contribute to nonattainment in other counties or if they are part of a metropolitan area that has readings violating the standard in at least some of its counties. Thus, in designating the 8-hour ozone nonattainment areas April 15, 2004, the Agency included counties with a combined 159 million people in the 124 nonattainment areas. For information on nonattainment areas, visit EPA's website at [<http://www.epa.gov/oar/oaqps/greenbk/index.html>].

emissions in order to reach attainment by the statutory deadline. Deadlines vary, depending on the severity of the pollution, but generally a nonattainment area must demonstrate that it is making annual emission reductions sufficient to reach attainment. (For a more extended discussion of the requirements for nonattainment areas, see CRS Report RL30853, *Clean Air Act: A Summary of the Act and Its Major Requirements* and CRS Report RL32345, *Implementation of EPA's 8-Hour Ozone Standard*.)

Conforming Projects. Under Section 176, departments and agencies of the federal government are prohibited from engaging in, supporting, licensing, permitting, approving, or providing financial support for any activity that does not conform to a State Implementation Plan after such a plan has been submitted and approved. The Act contains nearly three pages of detail regarding what constitutes a conforming project. In general, conformity to a SIP means that a proposed project or program “will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.”³

Although a wide range of federal funding and programs is subject to conformity, it is transportation planning (and ultimately highway funding) that is most commonly affected. Before a new transportation plan can be approved or a new project can receive federal funding, a regional emissions analysis must demonstrate that the emissions projected from the plan or project are consistent with the emissions ceiling established by the SIP.

The conduct of this analysis brings together federal, state, regional, and local transportation and environmental planners. Ultimately, the Federal Highway Administration, Federal Transit Administration, and metropolitan planning organizations (urban regional planning bodies required by federal surface transportation law) make conformity determinations for a list of projects identified as a region's priorities by the MPO. They make these determinations based on the most recent estimates of emissions, population, employment, travel, and traffic congestion provided by a variety of agencies. Combining these data, the MPO must estimate vehicle miles traveled and emissions using an approved EPA mobile source emissions model. These models are periodically updated to reflect the current mix of vehicles and their emission characteristics.

To reflect the changing nature of both economic and environmental inputs, both the statute and the regulations require that a nonattainment area's Long Range (20-year) Transportation Plan obtain a new demonstration of conformity no less frequently than every three years. The area's Transportation Improvement Program (or TIP), which identifies projects to be funded in the short term, must be updated, with a new demonstration of conformity, every 2 years. In practice, many large urban areas obtain a new determination that their TIP conforms on an annual basis.

³ U.S. EPA, “Transportation Conformity Rule Amendments: Flexibility and Streamlining,” Final Rule, 62 Federal Register 43780, August 15, 1997.

Exempt Projects. In the absence of conformity, the regulations provide that a limited set of exempt projects can go forward.⁴ The list includes 20 categories of highway safety projects, rehabilitation and reconstruction of transit facilities, purchase of replacement buses and rail cars, noise attenuation projects, and pedestrian and bicycle facilities. It does not include most new transit or highway projects, however. According to EPA's Office of Transportation and Air Quality (OTAQ), EPA defined the exempt projects as those that are "air quality neutral" — that is, they neither improve nor degrade air quality.⁵

In addition, according to OTAQ, projects that were already approved and funded in the previous Transportation Improvement Program may continue to be funded during a conformity lapse if they are in the early planning and preliminary design phases, or in the later phases, provided that approval is not sought for a new phase of the project. These later phases include determination of environmental impacts under the National Environmental Policy Act, right-of-way acquisition, final design, and construction. Activities within each of those phases can continue for projects that were found to conform in earlier versions of a TIP.

Transportation Control Measures (TCMs) listed in an approved State Implementation Plan are also allowed to proceed during a conformity lapse. These projects can include programs for improved public transit, construction of HOV (high occupancy vehicle) lanes, traffic flow improvement programs, fringe parking, and pedestrian facilities.⁶ States are often reluctant to include TCMs in their SIPs, however. According to a 1999 study of conformity, many areas avoid doing so because once such projects are listed, any delay in their implementation could cause a conformity lapse.⁷ In addition, by listing such programs as TCMs, the commitment to construct or implement them becomes legally enforceable.

Waivers. Section 176 and the regulations promulgated to implement it do not specifically provide for administrative remedies, waivers, or grace periods, once an area is subject to conformity, and it is the Agency's view that it lacks authority to provide a waiver of the conformity requirements.⁸

Experience of Areas in Conformity Lapse

⁴ The kinds of projects that are exempt are listed in 40 CFR 93.126.

⁵ Congressional briefing, Rudy Kapichak, U.S. EPA, Office of Transportation and Air Quality, Transportation and Regional Programs Division, September 3, 2002.

⁶ A full list of TCMs is provided in Section 108 of the Clean Air Act.

⁷ Arnold M. Howitt and Elizabeth M. Moore, *Linking Transportation and Air Quality Planning: Implementation of the Transportation Conformity Regulations in 15 Nonattainment Areas*, a Report to the U.S. Environmental Protection Agency and the Federal Highway Administration, U.S. Department of Transportation, Publication No. EPA420-R-99-011, March 1999, p. 92.

⁸ In a variety of cases, courts have made it clear that the absence of waiver provisions in statutory language does not preclude a regulatory agency from providing waivers. Nevertheless, EPA has not formally waived a conformity lapse.

Table 1. Areas Currently in a Conformity Lapse
(as of September 15, 2003)

Area	Affected Population	Date Conformity Lapsed
Ashland, Kentucky	66,877	October 3, 1998
Billings, Montana	6,000	July 12, 2002
Missoula, Montana	52,356	November 17, 2002
Searles Valley, California	11,000	April 22, 1999
Thurston County, Washington	81,014	May 4, 2002

Note: As of September 2003, no projects are affected in any of these areas.

Source: U.S. Environmental Protection Agency. Affected population is not necessarily the population of the entire area.

Table 1 shows the areas in conformity lapse as of September 2003. Although the current number of areas at any one time is usually small, since 1997, 63 areas in 29 states and Puerto Rico⁹ have experienced a lapse, according to EPA. With a few notable exceptions,¹⁰ these areas were either medium size cities or they were suburban areas near some of the nation's largest cities.

Most of the lapsed areas returned to conformity quickly. Of the 63 areas, 40 conformed within 6 months. Only 10 areas lapsed for more than a year, and few of these were major urban areas: the General Accounting Office (GAO), citing EPA conformity program managers, reported that "most of these areas did not have pending new projects and, therefore, were not under time pressures to resolve their lapse."¹¹

⁹ Alabama, Alaska, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Puerto Rico, Rhode Island, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin. Since 1993, areas in 35 states have experienced a lapse: the 29 listed above, plus Maine, Massachusetts, Minnesota, Oregon, Pennsylvania, and Virginia.

¹⁰ The Los Angeles area was out of conformity for two months in 1998, Houston for five months in 1999-2000, and the Bay Area of California for two short stretches in 2002 and 2003. None of the other top 15 cities in population experienced a conformity lapse. At the other end of the spectrum, about 15 relatively small cities, such as Great Falls, Montana and Ashland, Kentucky, experienced lapses.

¹¹ U.S. GAO, *Environmental Protection: Federal Planning Requirements for Transportation and Air Quality Protection Could Potentially Be More Efficient and Better Linked*, Report GAO-03-581, April 2003, p. 14. Hereafter referred to as "GAO report."

None of the lapsed areas permanently lost transportation funding. Highway funds are made available for a multi-year period under federal law. Ultimately, when an area develops a conforming TIP, it receives the funds that were withheld.

Pre-1999 Conformity Lapses. Aside from the observations noted above, it is difficult to generalize about the experiences of these areas. Each has, or had, its own special set of circumstances leading to the conformity lapse, and the transportation agencies and EPA have responded in numerous, often unique ways. Many of the areas were allowed to demonstrate conformity by adopting additional emission reduction measures, by changing the models or modeling assumptions used in the conformity demonstration, or by modifying the list of projects included in their TIP. In a recent survey, GAO found that, over the past 6 years, only 5 metropolitan areas had to change transportation plans in order to resolve a conformity lapse.¹²

In general, until a March 1999 court decision,¹³ state and federal transportation agencies followed a less stringent interpretation of the Act's requirements that allowed numerous projects to be funded and to continue through design and construction on the grounds that they had been approved and thus "grandfathered" prior to the lapse. In March 1999, however, the U.S. Court of Appeals for the D.C. Circuit struck down the grandfather clause. Since then, EPA and DOT have implemented more stringent requirements, in part through revised regulations, but mostly through guidance documents and memoranda that are posted on the EPA Office of Transportation and Air Quality's website.¹⁴

Atlanta. Atlanta is generally considered the "poster-child" for the most extreme effects of a lapse in conformity. Atlanta is classified as a Severe¹⁵ ozone nonattainment area under the 1-hour ozone standard. While it has implemented numerous controls to reduce emissions and improve air quality, it continues to exceed the ozone standard.

The Atlanta area has grown rapidly in recent years and is considered a prime example of sprawl development. Among 66 urban areas with populations greater than 500,000, it ranks 4th in land area, but 56th in population density. In large measure because of this sprawl, the Atlanta area also ranks 4th in the nation in vehicle

¹² Ibid., p. 4.

¹³ *Environmental Defense Fund v. EPA*, 167 F.3d 641 (D.C. Cir. 1999).

¹⁴ [<http://www.epa.gov/otaq/transp/traqconf.htm>]. On June 30, 2003, the Agency proposed regulations that would incorporate EPA and DOT guidance implementing the 1999 court decision into the conformity regulations. See "Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes," 68 Federal Register 38974, June 30, 2003.

¹⁵ Depending on the seriousness of the pollution at the time the 1990 Clean Air Act Amendments were enacted, ozone nonattainment areas are classified as Marginal, Moderate, Serious, Severe, or Extreme. For a more extended discussion of the categorization scheme, see CRS Report RL30853, *Clean Air Act: A Summary of the Act and Its Major Requirements*, pp. 4-7.

miles traveled per capita.¹⁶ Vehicle emissions are, therefore, major contributors to the area's ozone nonattainment.

At the time of the D.C. Circuit's March 1999 conformity decision, the Atlanta metropolitan area was already in the second year of a conformity lapse. (The lapse began January 17, 1998 and lasted until July 26, 2000.) Initially, U.S. DOT had allowed the continued funding of numerous highway projects in Atlanta, despite the lapse in conformity, on the grounds that they were grandfathered. In January 1999, the Sierra Club and two local environmental groups filed suit, however, challenging 61 of the grandfathered projects, contending that they should not have been allowed to proceed except as part of a conforming TIP.¹⁷ In light of the D.C. Circuit opinion, the parties reached a settlement agreement in June 1999, under which many of the grandfathered projects were halted, but 17 were allowed to go forward.

The heart of the Atlanta settlement was a new Interim Transportation Improvement Program (or ITIP). When conformity lapsed in January 1998, the Atlanta Regional Commission (ARC) had developed and received approval for an ITIP, which included the various grandfathered projects. In light of the litigation and D.C. Circuit decision, ARC developed a second (and ultimately a third) ITIP that the state and federal transportation departments, and EPA, as well as the environmental groups that had filed suit agreed could go forward during the lapse of conformity.

Because they followed the D.C. Circuit decision and were themselves the product of settlement negotiations in a separate suit, the second and third Atlanta ITIPs are the best examples of what is now allowed during a conformity lapse. These ITIPs, according to the Atlanta Regional Commission, included only three kinds of projects: projects that were exempt under 40 CFR 93.126 (discussed above, on pages 2-3), Transportation Control Measures, and a small group of projects that had received necessary approvals or funding and were allowed to continue to the completion of the phase that they were in.¹⁸ In all, about \$700 million in projects that would have expanded highway capacity were stopped.

Ultimately, in July 2000, ARC received approval for a new Transportation Improvement Program. The new program de-emphasized new highway capacity. Instead, 40% of its funds were dedicated to transit, 10% to bicycle and pedestrian facilities, 21% to safety measures and bridge and intersection improvements, and 26% to highway capacity.¹⁹

¹⁶ Data are from Atlanta Regional Commission, *Highlighting Regional Progress: 2001 Annual Report*, p. 5, available at [<http://www.atlreg.com/aboutus/AnnualReport2001.pdf>].

¹⁷ *Georgians for Transportation Alternatives v. Shackelford*, No. 99-CIV-0160 (N.D. Ga., filed Jan. 22, 1999).

¹⁸ Personal communication, Chris Chovan, Atlanta Regional Commission, August 2002.

¹⁹ See "DOT, EPA Clear Atlanta Transportation Plan, Freeing \$700 Million in U.S. Highway Money," Bureau of National Affairs, *Daily Environment Report*, July 27, 2000, p. A-14.

Besides the new TIP, an important result of Atlanta's conformity lapse was the development of the Georgia Regional Transportation Authority, whose Board includes the heads of six state agencies as well as nine members appointed by the Governor. The authority is widely credited with improving coordination among transportation, planning, and environmental officials.

Thus, although conformity requirements disrupted Atlanta's transportation planning, they now appear to be serving their intended function, forcing transportation and environmental officials to confer regarding the environmental impacts of transportation programs before and during major planning, design, and construction decision points and reorienting the area's transportation planning to a more multi-modal approach than the previous one, which relied heavily on new highway capacity. Not all parties are happy with these results, of course, but it would be hard to argue that they violate the intent of the conformity requirements.

Conformity's Growing Reach. The impact of conformity requirements is expected to grow in the next few years for several reasons. First, the growth of emissions from sport utility vehicles and other light trucks and greater than expected increases in vehicle miles traveled have made it more difficult to demonstrate conformity. Second, recent court decisions (noted above) have tightened the conformity rules, making it more difficult to grandfather new projects. And third, the implementation of more stringent air quality standards for ozone and particulate matter (PM) in 2004 will mean that additional areas will be subject to conformity, many for the first time. Thus, numerous metropolitan areas will face a temporary suspension of highway and transit funds unless they impose sharp reductions in vehicle, industrial, or other emissions. In GAO's recent survey, about one-third of local transportation planners responding expected to have difficulty demonstrating conformity in the future.²⁰

Conformity Issues

A number of issues could be of concern to areas facing a potential conformity lapse. As noted, the Clean Air Act provides no authority for waivers or grace periods during a lapse, and only a limited set of exempt projects (mostly safety-related or replacement and repair of existing transit facilities) can be funded in lapsed areas. This makes conformity a potent tool for forcing air quality considerations into the transportation planning process.

MPOs in areas that are currently classified nonattainment or maintenance are familiar with the conformity process and have worked with EPA and the state and federal transportation departments as the requirements of the process have evolved. The potential impacts of a conformity lapse appear to be of special concern, however, in areas that will be designated nonattainment for the first time under the new ozone and particulate standards, in 2004.

EPA / Administration Proposals. To address these concerns, EPA and DOT have taken (or proposed) several steps that would have the effect of delaying

²⁰ GAO Report, previously cited, p. 4.

or eliminating²¹ conformity requirements for numerous areas as part of a broader relaxation of formal nonattainment standards.

1. Early Action Compacts. First, EPA has allowed many areas that expected to be designated nonattainment under the new 8-hour ozone standard to avoid being formally designated by committing instead to “Early Action Compacts.” Compact areas agree to undertake a number of voluntary actions intended to reduce emissions. In return, EPA agrees to defer the effective date of their designation until April 15, 2008 (4 years after the April 15, 2004 designation of other areas).²² On April 15, 2004, the Agency identified 30 areas, mostly in the southeastern states, that are included in this program.²³ The Agency appears to have no formal legal authority for this approach, but thus far has not had to defend the program from legal challenge.

2. Transitional Area Exemptions. Second, in its Clear Skies bill (H.R. 999 / S. 485), the Administration proposed to allow what it calls “transitional areas” — areas that demonstrate that they will attain the 8-hour ozone and PM_{2.5} standards by December 31, 2015 — to avoid being designated nonattainment unless their pollutant concentrations exceed the standards at the end of that period, in effect granting them a 12-year grace period. If enacted, this proposal would exempt numerous areas from the conformity requirements until at least 2016. (For a discussion of the Transitional Area proposal, also see CRS Report RS21611, *Ozone and Particulate Air Quality: Should the Deadline for Attainment Be Extended?*)

3. SAFETEA Proposals. Third, the Administration also proposed to change conformity requirements in its highway and transit reauthorization bill, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 (SAFETEA, H.R. 2088 / S. 1072). As introduced, Section 6001 of the bill would have replaced the current requirement that Transportation Improvement Programs be updated and demonstrate conformity every two years²⁴ with a five-year requirement. (The five-

²¹ The Administration proposals would not formally eliminate conformity requirements for any area, but by delaying the designation of nonattainment areas, the net effect for some areas could be elimination of the requirement, provided that they reach attainment during the Early Action or transitional period.

²² Early Action Compacts are further discussed in CRS Report RS21611. In order to insure continued progress, the effective date is deferred in three stages, rather than granting a 4-year deferral upon acceptance of the compact. The protocol is available at [http://www.epa.gov/ttn/naaqs/ozone/ozonetech/8hro3protocol_061902.pdf]. Additional information on the implementation schedule for compact areas can be found at [http://www.epa.gov/ttn/naaqs/ozone/ozonetech/des8h_eac_111402.pdf].

²³ For the list of areas, see 68 Federal Register 70108. Three of the areas listed in the Federal Register notice (Memphis, Knoxville, and Chattanooga) subsequently failed to meet a milestone and were removed from the compact program.

²⁴ Reading the current regulations on this point can be somewhat confusing. EPA’s conformity regulations (at 40 CFR 93.104(c)(3)) require that TIPs obtain a new demonstration of conformity “no less frequently than every three years”; but they also state that a new or revised TIP must demonstrate conformity. Since DOT regulations (at 23 CFR (continued...))

year time frame represents a minimum frequency; states or local areas could update the TIP more frequently if they wanted to.) In addition, in the Administration bill, the TIP — rather than being a stand-alone document — would have consisted of the first 5 years of projects in an area’s Long Range Transportation Plan (LRTP). The bill would have shortened the planning horizon over which conformity must be demonstrated in the long range plan to 10 years in most cases, instead of the current 20 years.

The Administration’s Early Action Compacts and its Transitional Area proposals have not been the subjects of much controversy, even though they might have substantial effects on the conformity requirements. The SAFETEA proposals, on the other hand, are controversial, perhaps because they propose changing the transportation planning process as well as the conformity timeframes.

A recent report by the General Accounting Office shows the complexity of reactions to the SAFETEA conformity proposals. GAO recommended that “DOT, in coordination with EPA, consider (1) revising its regulations to extend the current 3-year time frame between required updates of the long-range transportation plan, and (2) submitting a legislative proposal to revise the conformity provisions of the Clean Air Act so that they similarly extend the time frame between required conformity determinations for the plan.”²⁵ The report discussed extending the time for TIP updates and the related conformity determinations, but made no recommendations on that subject.

GAO’s analysis relied on data it gathered through surveys of local (MPO) transportation planners and state-level air quality planners, as well as information provided by EPA and DOT. The surveys found that “nearly three-quarters of the transportation planners favored extending the frequency between updates of the long-range plan and most preferred at least once every 5 years, rather than once every 3 years....”²⁶ But only 45% of the planners favored extending the frequency between updates of the TIP, and only 30% favored combining the TIP and the LRTP into a single document. Air quality planners responding to GAO were even less disposed to support changes in the TIP timeframe: only 6 of 43 respondents supported a 5-year update cycle for the TIP, with most who specified a timeframe preferring a 2 or 3-year period.²⁷

Similar results were found in a survey of MPOs conducted by the Association of Metropolitan Planning Organizations (AMPO). AMPO sent surveys to all 341 MPOs July 15, 2003, and received responses from 115. Eighty-five percent of the respondents agreed that the requirement that the planning cycle requiring long run transportation plans to be updated every 3 years is too short, but 63% thought the 2-

²⁴ (...continued)

450.324(b)) require a new TIP at least every two years, conformity determinations in fact are required on a two-year cycle rather than three.

²⁵ GAO report, previously cited, p. 5.

²⁶ Ibid., p. 4.

²⁷ Ibid., p. 58.

year TIP cycle was “just right.” Only 27% favored a longer period between updates of the TIP. Also, 77% of the AMPO respondents opposed the Administration’s plan to eliminate the TIP as a stand-alone document. Commenters noted that its value as a short range planning document could be lost if it were only updated every 5 years, and combining it with the LRTP “is most troublesome because any amendment to the TIP would seem to open up the entire plan for scrutiny as well — with the opportunity for unnecessarily broad challenges mid-stream, thereby negating a longer and presumably more stable ‘planning’ cycle.”²⁸ The AMPO survey includes several narrative responses that provided elaboration on the survey results. Only one of the narrative responses supported the SAFETEA proposal. More typical was this response: “The process seems to be working well now. Combining the TIP and LRTP on a five-year cycle is a **bad** idea.”²⁹

From an air quality perspective, the proposed changes in the TIP might have little impact, since revisions to the TIP would still require a new conformity demonstration. Most large metropolitan areas do revise their TIP frequently — many annually. These areas would continue to undertake conformity demonstrations more frequently than required, just as they do now.

What could be lost in a longer TIP cycle, however, would be the need for all areas to incorporate revisions to the data on population, vehicle miles traveled, and emissions on a frequent basis. If the projects listed in a 5-year TIP were unchanged, it could be as long as 5 years before the TIP would need to be updated to reflect new emissions data (as opposed to 2 years now).

Providing Additional Resources. One point on which both transportation planners and environmental interest groups appear to agree is on the desirability of additional resources for the conformity process. GAO’s report, citing transportation planners, contains numerous comments about the need for additional staff and funds to demonstrate conformity, particularly in areas that will be subject to its requirements for the first time.³⁰ Environmental Defense, while disagreeing with many aspects of the GAO report, echoed the comments on the need for more resources: “The key solution to the problems noted in the GAO report is to set aside more planning, training, and technical assistance funding in the transportation bill to help local and state air quality and transportation agencies administer these planning requirements....”³¹

Changing the SIP Timeframe. GAO and others have also focused attention on the SIP portion of the conformity process. There are two SIP-related issues: 1)

²⁸ Association of Metropolitan Planning Organizations, “AMPO TIP Survey: Results,” available at [<http://www.ampo.org/survey/TIPSurveyResults.pdf>].

²⁹ Ibid. (emphasis in original)

³⁰ GAO report, previously cited, p. 20.

³¹ Michael Replogle, “Transportation Conformity: With Biased Report, GAO Joins Road Builder Attack on Successful Public Health Protection Program,” White Paper, Environmental Defense, May 8, 2003, p. 5.

whether SIPs should be subject to more frequent updates, and 2) how to address the mismatch between SIP and LRTP timeframes.

Regarding the first of these issues, GAO noted that while transportation planners are required to regularly update their plans and incorporate the most current data on population, vehicle miles traveled, and emissions, “State air quality planners, on the other hand, are not required to periodically update their plans [the SIPs] and vehicle emissions budgets to reflect the more current data and model.”³² The net result is that if the transportation models show an increase in emissions as a result of a new transportation project, an increase in vehicle miles traveled, or increased use of SUVs and light trucks, the reductions necessary to demonstrate conformity now come entirely from the transportation sector.

If the SIP were required to be updated at the same time and to use the same data, the changes in transportation emissions might be offset by reductions in other sectors. As GAO explained it, “If states periodically updated their air quality plans to incorporate the most current data and model, they could reassess whether these types of transportation changes were best for an area, or whether they have achieved enough, or more cost-effective, reductions from other sources so that they could revise the vehicle emissions budgets and provide transportation planners some flexibility.”³³ Thus, GAO proposed that EPA “assess the advantages and disadvantages of statutorily requiring that the emissions budgets in air quality plans be regularly updated with new travel data and emissions models.”³⁴

EPA neither agreed nor disagreed with this recommendation, according to GAO. The Agency noted that states already have the flexibility to undertake such updates and are in a better position than EPA to decide whether the cost of doing so is justified.³⁵

A second SIP issue is what is described as a “mismatch” between SIP and LRTP timeframes. LRTPs are 20-year planning documents, whereas a SIP’s timeframe varies depending upon the area’s nonattainment status. For areas in nonattainment for the old (1-hour) ozone standard, the SIP’s planning horizon is the area’s required attainment date — generally 2005, 2007, or 2010. Areas designated nonattainment for the new 8-hour standard generally have 3, 5, or 6-year deadlines. Once an area reaches attainment, it is required to revise its SIP to demonstrate how it will maintain its status. These maintenance SIPs have 10-year horizons.

As AMPO describes it,

The result of this mismatch is that for the purpose of conforming the Long Range Transportation Plans, the Transportation emissions budget for the years beyond the SIP horizons is a presumed projection rather than the result of a negotiated

³² GAO report, previously cited, p. 5.

³³ Ibid., p. 6.

³⁴ Ibid., Highlights, unnumbered page.

³⁵ Ibid. p. 29.

agreement that considers the trade-offs between mobile and non-mobile source sectors. This disjointed process ... results in the transportation agencies essentially becoming the long term air quality planning organization, but without the authority to implement the types of programs (e.g., I/M, RFG)³⁶ needed to substantially reduce mobile source emissions.³⁷

There are at least two possible solutions to this mismatch: 1) shorten the LRTP planning horizon for conformity purposes (e.g., to 10 years in most cases, as the Administration proposes in SAFETEA, or, as AMPO suggests, to whatever the operative time horizon is for the SIP — generally less than 6 years); or 2) lengthen the SIP time horizon to 20 years. The latter might be viewed as resource-intensive, but it might better preserve the role of conformity as an air quality planning tool.

The most costly transportation projects often require more than 10 years from planning to completion, so the shorter conformity horizon might have the effect of allowing the largest projects to advance through design, right of way acquisition and early construction without a full consideration of the air quality impacts of the completed project.³⁸ For this reason, the Administration's proposal (and presumably AMPO's, as well) is opposed by environmental groups (led by Environmental Defense) and by air quality planning officials (represented by the State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials, STAPPA/ALAPCO).³⁹

The Administration's proposal does envision that conformity might need to be demonstrated beyond 10 years in some cases. It would require that the conformity determination for projects whose construction extends beyond the 10-year horizon include the year of completion and opening of the project. Thus, a 15-year project would need to demonstrate conformity for 15 years, rather than 10. But the analysis would not include subsequent years, when growth and development associated with the project could occur.

Senate and House Actions on Conformity. Both the Senate and House have now passed surface transportation bills. As passed on February 12, S. 1072 would require less frequent conformity demonstrations (at least every 4 years for both the TIP and the Long Range Transportation Plan, instead of every 2 years and 3

³⁶ I/M refers to inspection and maintenance programs for automobile emission control equipment; RFG is reformulated (lower emission) gasoline.

³⁷ Association of Metropolitan Planning Organizations, "MPO Issues: Transportation Air Quality Conformity Timeframe Mismatch," at [http://www.ampo.org/mpo_issues/aq/aq_timeframe.html].

³⁸ Testimony of Michael Replogle, Transportation Director, Environmental Defense, *CMAQ and Conformity Program Oversight*, Hearing, Subcommittee on Clean Air, Climate Change, and Nuclear Safety, Committee on Environment and Public Works, U.S. Senate, March 13, 2003, p. 4.

³⁹ See Testimony of Annette Liebe, Oregon Department of Environmental Quality, on behalf of STAPPA/ALAPCO, "Implementation of the CMAQ and Conformity Programs," Hearing, Subcommittee on Clean Air, Climate Change, and Nuclear Safety, Committee on Environment and Public Works, U.S. Senate, March 13, 2003, pp. 5-6.

years, respectively, in current law), and would shorten the planning horizon over which conformity must be demonstrated to 10 years in most cases, instead of the current 20 years, in line with the Administration's proposal. The bill would allow replacement of Transportation Control Measures in SIPs without triggering new conformity determinations; would allow new nonattainment areas to use such tests as the Administrator may determine in demonstrating conformity until an emissions budget is determined to be adequate; and would grant areas two years following approval of a new motor vehicle emissions budget before they would need to demonstrate conformity with the new budget. The bill also provides additional resources to MPOs and State DOTs for planning purposes, increasing the resources available for conformity determinations. The Administration proposal to combine the TIP and long range transportation plan was not adopted, nor were any changes made to the SIP time frame.

As passed by the House, H.R. 3550 contains similar provisions, except that it would require that the local air pollution control agency agree if the planning horizon were to be shortened. The House bill also establishes a 12-month grace period following a failure to demonstrate conformity before a lapse would be declared.

Conclusion

Conformity is an important, but complicated process. Conformity determinations are a means of enforcing State Implementation Plans for achieving air quality standards, once SIPs have been adopted. If federal agencies were not required to conform to a SIP, the plan might not be implemented as intended, significantly weakening the Clean Air Act's effectiveness. The absence of conformity would put federal agencies in the role of undermining the legally adopted state plan for achieving air quality.

While much emphasis is placed on the problems potentially caused by areas incurring a lapse in conformity, the need to make conformity determinations affects transportation decisions in all nonattainment and maintenance areas. In this respect, conformity serves an important tool for ongoing planning and coordination between transportation and air quality officials as well as providing a means of enforcing the Act.

The debate regarding proposed changes in conformity requires an understanding of both the transportation planning and the air quality planning processes. But it tends to be colored by the camp (air quality or transportation) to which one belongs. Those who focus on the need to modify the process generally have concluded that conformity determinations are interfering with or delaying needed transportation improvements. Those whose primary concern is air quality, however, tend to view the process as requiring a necessary analysis of air quality impacts before the commitment of large sums of public money to specific highway or transit projects.

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