

# Transportation Conformity Reform: Introduction

The Associated General Contractors of America (AGC) is the largest most diverse trade association in the construction industry. The association's 35,000 members include 7,500 of the nation's leading general construction contractors. They are engaged in the construction of highways, bridges, tunnels, airport runways and terminals, buildings, factories, warehouses, shopping centers, and both water and wastewater treatment facilities. AGC members perform construction contracts for states and other recipients of federal highway and other transportation funding, and as a result, they are directly impacted by changes in administration of the federal-aid highway program. AGC is pleased to provide the following comments on Clean Air Act (CAA) transportation conformity requirements.

## Clean Air Progress

Over the last 30 years, Americans have made great progress in cleaning the air. National emissions have been declining: each year in the 1990's had better air quality than any year in the 1980's. Air quality has improved nationwide primarily because motor vehicle emissions have substantially decreased, even as vehicle travel has rapidly increased. From 1980 through 1998, overall motor vehicle emissions of volatile organic compounds (VOC) declined 41 percent, emissions of nitrogen oxides (NOx) declined 10 percent, and carbon monoxide emissions declined 35 percent. This improvement came despite a 72 percent increase in travel during the same period.

These reductions are the result of an array of cleaner fuels that have virtually eliminated lead and other pollutants. Reformulated gas has reduced smog and tailpipe emissions. New engine technology and vehicle design and construction have reduced tailpipe emissions in the average car in use today by 95 percent compared to the average car in use in the 1960's.

The U.S. Environmental Protection Agency (EPA) studies show that by 1996 air quality had improved to the point that 80 percent of Americans lived where air quality met the standards for all of the criteria air pollutants, nearly double the amount from 10 years earlier. Since 1996, air quality has continued to improve. In the past ten years, the average number of days the air in major metropolitan areas failed to meet federal ozone (smog) standards was cut in half. Violations of the national standards for carbon monoxide have been virtually eliminated. EPA studies estimate that an additional 32 million tons of emissions per year (22 percent) will be eliminated between 1997 and 2015 because of better motor vehicle technology. All of this progress will come despite the significant increase in motor vehicle usage.

## Background on Transportation Conformity

The CAA requires metropolitan areas with air quality problems to demonstrate that future transportation projects will not impede the areas' ability to attain air quality standards established by the Act. The Act establishes air quality standards for six pollutants (ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter, and lead). For each of these pollutants, EPA evaluates monitoring data across the country to determine which metropolitan areas are not complying with these standards. If an area is not complying with a standard, it is said to be in "nonattainment."

Once EPA designates an area as in nonattainment, the area must develop a plan—called a “state implementation plan” or SIP—that demonstrates how the area will achieve attainment by a certain date. The SIP must include a limit on emissions from cars and trucks (the “motor vehicle emissions budget”). Nonattainment areas are then required to demonstrate, using various calculations and models, that car and truck emissions associated with current and future road, highway, and transit projects listed in the area’s long-term transportation plan and short-term transportation improvement program (TIP) are below this budget. This demonstration is called “transportation conformity.”

## **Transportation Conformity Demonstrations**

Transportation conformity has been described as an “accounting check,” ensuring that future transportation networks conform to an area’s air pollution reduction plan. Demonstrating transportation conformity is a prolonged and arduous process. The metropolitan planning organization (typically, a local council of governments) must conduct extensive emissions modeling and inventory work. All demonstrations must go through an interagency consultation process and other agency scrutiny that involves EPA, the U.S. Federal Highway Administration (FHWA), and state agencies. Demonstrations also must go through public notice and comment and public hearing procedures.

Once a conformity demonstration is complete (often after more than a year and hundreds of thousands of dollars worth of work), it remains subject to a potential lawsuit from environmental organizations and others who are unhappy with such issues as growth, the construction of certain road projects, or the area’s mass transit choices. Transportation conformity lawsuits have occurred in cities across the country, including Houston, Atlanta, Sacramento, San Francisco, and Salt Lake City. These suits force local governments and other interested parties to mount legal defenses which are expensive and time consuming. The costs of these legal defenses take funds that could otherwise be used to provide public services. The potential repercussions of a successful lawsuit or otherwise failing to demonstrate conformity are enormous. They include the withholding of federal highway funding or the halting of road and transit projects, including those that do not receive any federal funding.

## **Requirements of Transportation Conformity**

Under federal transportation requirements, metropolitan areas must develop both a long-term (20-year) transportation plan and a short-term (three-year) TIP. The TIP includes transportation projects proposed to be funded or approved by FHWA or the Federal Transit Authority (FTA). Both of these transportation plans must be found to conform to the SIP. In theory, transportation conformity must be demonstrated at least every three years. In practice, numerous other events activate this requirement much more frequently. Metropolitan areas and state transportation departments must demonstrate conformity:

- When an area adopts a new transportation plan and TIP, or an amendment to the plan or TIP;
  - Under the U.S. Department of Transportation’s (DOT) metropolitan planning regulations, plans expire every three years;
  - Under TEA-21, TIPs must be updated every two years (therefore, conformity for TIPs is determined every two years);

- For a TIP, within six months after a new plan or plan amendment is adopted; and
- Within 18 months of certain actions involving a SIP, such as EPA’s adequacy finding for and EPA’s approval of a SIP (or a SIP revision).

The excessive frequency of conformity determinations (due to the overabundance of triggers) means that planning organizations are continually performing overlapping demonstrations. The resulting web of incongruous deadlines is a minefield of procedural traps for nonattainment areas. As Judge Williams in the U.S. Circuit Court of Appeals for D.C. wrote, “the Act’s conformity requirements are astonishingly confusing, and could if interpreted as stringently as possible seriously disrupt state and local transportation planning.”<sup>1</sup>

## **Consequences of Failing to Demonstrate Conformity—“Lapse”**

Transportation activities must conform to air quality plans before the federal government adopts, approves, or funds these activities. One of the principal disruptions to state and local transportation planning is a conformity “lapse.” During a conformity lapse, the metropolitan planning organization’s conformity determination for a transportation plan or TIP is no longer valid. Such a lapse would occur under the following circumstances:

- Failure to make a new conformity determination in accordance with the provisions and schedules in the rules (see “Requirements of Transportation Conformity” above);
- Expiration of a transportation plan or TIP;
- Failure to meet certain SIP requirements (e.g., EPA’s finding of a failure to submit or complete a SIP or EPA’s disapproval of a required SIP); and
- Invalidation via a citizen suit of the conformity determination or the motor vehicle emissions budget on which the conformity determination was based.

Only certain types of projects can advance during a conformity lapse. FHWA will not fund active highway design and right-of-way acquisition projects during a conformity lapse. Only those highway projects which have received full funding and/or approval prior to the conformity lapse may continue. A conformity lapse applies to both road and transit projects—even preventing mass transit projects from moving forward. Moreover, lapses impact both federally funded and non-federally funded but regionally significant projects (since these projects require federal approval or approval from an agency that accepts federal funds). For example, a locally funded or state funded toll-road cannot progress from “planning and design” to “contract letting” during a conformity lapse since this advancement would likely require approval by a metropolitan planning organization that accepts federal funds. Conformity lapses therefore can halt even those transportation projects that use absolutely no federal money.

Conformity lapses have suspended work on necessary transportation projects across the country. Financially, delays increase project costs due to normal cost escalation factors and contractors needing to reschedule planned work. Costs also increase due to prolonged traffic congestion. (For example, the Houston-Galveston Area Council estimates that traffic congestion costs the Houston area approximately \$2 billion per year.) Delays due to conformity lapses also affect road safety. According to DOT, poor road conditions or obsolete road and bridge alignments are a factor in 12,000 highway-related deaths each year—four times the number killed in fires, and a third more than die annually of asthma and bronchitis combined.

---

<sup>1</sup> *Environmental Defense Fund v. EPA*, 167 F.3d 641, 651 (D.C. Cir. 1999).

Conformity lapses are almost never caused by a nonattainment area building too much transportation infrastructure. They are almost always caused by procedural problems with the timing of multiple deadlines for revising the motor vehicle emissions budget, revising the transportation plans, and/or lawsuits.

## **Conformity Process Does Not Improve Air Quality**

The current process for reconciling transportation and air quality goals is disjointed, inefficient, and largely ineffective at improving air quality. The U.S. General Accounting Office (GAO), in testimony before the Senate Committee on Environment and Public Works, said that “only 31 percent of the planners responding to our survey found the process of demonstrating conformity to be effective in helping their areas achieve air quality goals (40 percent found it to be ineffective).”<sup>2</sup> GAO also testified that “the current clean air and surface transportation requirements and programs do not directly encourage communities to consider more innovative transportation projects or alternative land development strategies as a means to reduce emissions. Nor do they encourage communities to take action that will preserve the clean air that they still enjoy.”<sup>3</sup>

In addition, the conformity process is being used as a means to prevent transportation improvement projects from being built, not because of their impact on air quality but as a tactic to prevent any transportation improvement project from being undertaken. Transportation project opponents use legal challenges and other maneuvers to disrupt the planning process and stop project construction. This activity undermines safety improvements, increases the cost of the projects significantly and can undermine clean air objectives. Delaying or stopping transportation improvements has no beneficial impact on air quality and can have a negative impact by keeping congestion relief projects from moving forward. Idling in traffic significantly increases air pollution. Eliminating bottlenecks and traffic congestion can reduce carbon monoxide emissions by as much as 45 percent and ozone-forming VOCs by 44 percent. Automobiles operate at a higher efficiency at higher speeds, whereas emission rates for major air pollutants increase at slower speeds. Congress should reconsider whether the costs associated with the transportation conformity process result in equal benefits.

## **Reform Needed**

The transportation conformity process is overly-burdensome, disjointed, and inefficient. With the advent of EPA’s new air quality standards for ozone and fine particulate matter, an additional 194 areas covering 656 counties may soon be in nonattainment and subject to this defective process for the first time. (Currently, there are 142 areas covering 414 counties out of compliance for ozone alone, with more out of compliance for other pollutants.) Legislative reform is needed before this happens.

AGC is seeking to include improvements in the transportation conformity process in the legislation necessary to reauthorize the federal-aid highway program. The attached papers outline AGC’s specific recommendations.

---

<sup>2</sup> *Environment Protection: The Federal Government Could Help Communities Better Plan for Transportation That Protects Air Quality*, United States General Accounting Office, Testimony Before the Committee on Environment and Public Works, U.S. Senate, GAO-02-988T, July 30, 2002, p. 10.

<sup>3</sup> *Id.* at 15-16.

## **Transportation Conformity Reform: Restore EPA's Grandfathering Provision**

***Issue: If a metropolitan area fails to demonstrate conformity, virtually all road and transit projects in the area are halted, including projects previously determined to meet air quality goals.***

Metropolitan areas that are not in compliance with national air quality standards must demonstrate that transportation system choices made by the community are consistent with achieving and maintaining the national air quality standards. If a metropolitan area fails to make this demonstration, road and transit project development in the area can come to a grinding halt—leading to harmful delays in much needed congestion relief. Only exempt projects and those that are “transportation control measures” can be approved during a conformity lapse.

When the transportation conformity rules were first published in 1993, EPA had planned to assist transportation planners in implementing the complicated transportation conformity program. The 1993 rules had allowed road and transit projects included in a previously conforming transportation plan (a plan that was found to conform to air quality goals) to move forward, even if a new transportation plan was found not to conform. EPA believed this “grandfathering” of projects provided a more efficient, one-time-only analysis of air quality impacts. Unfortunately, the so-called grandfathering rule was challenged in court and held to be invalid. The invalidation has since threatened transportation projects across the country. Moreover, the transportation conformity process is now being used to stop new and necessary transportation improvement projects at the eleventh hour, even after years of local planning and environmental reviews have taken place.

### **Problems with Transportation Conformity: Absence of Grandfathering Provision**

The largely unnecessary and potentially debilitating effects of conformity lapses on metropolitan areas across the country were exacerbated in a decision issued by the U.S. Court of Appeals for the D.C. Circuit on March 2, 1999. The federal appeals court struck down EPA's preexisting conformity rules that had allowed the following projects to proceed (without further conformity determinations) during a conformity lapse: (1) federally-funded projects included in a previously conforming transportation plan and TIP (where the projects had completed the National Environmental Policy Act or “NEPA” process); and (2) non-federally funded regionally significant projects included in a previously conforming transportation plan and TIP. EPA created these rules because the agency believed that a conformity demonstration should only be required once for a given road or transit project. As EPA stated in its 1997 transportation conformity revisions, “EPA has always believed that there should only be one point in the transportation planning process at which a project-level conformity determination is necessary. This maintains stability and efficiency in the transportation planning process.”<sup>4</sup> On March 2, 1999, however, the U.S. Court of Appeals for the D.C. Circuit held that “grandfathering” of transportation projects violated the CAA.

---

<sup>4</sup> 62 Fed. Reg. 43780, 43783.

The dissenting judge in the case summed up the ruling as follows:

Of course when a congressional effort to micromanage local transportation planning in as much detail as this statute is followed by a judicial decision that the agency must put states and localities in an even tighter straightjacket, one may feel that Congress asked for it. But one cannot say the same for the hapless citizens who must live with the results.<sup>5</sup>

In the aftermath of the court's decision, EPA and the FHWA promptly issued guidance prohibiting the funding of "active highway design" or preliminary engineering projects and right-of-way acquisition projects unless full funding has been secured prior to a conformity lapse. Projects throughout the country have been threatened by the removal of the grandfathering provisions. In Atlanta, for example, a conformity lapse suspended over \$700 million in much needed road work. In the Southern California area, \$0.5 billion and \$2 billion in transportation projects were subject to postponement during a 1998 and 2001 conformity lapse, respectively. In Houston, a conformity lapse between November 1999 and June 2000 delayed design and right-of-way acquisition for several significant transportation projects, including the widening and reconstruction of U.S. 59 South and Interstate 10 West. In the San Francisco Bay area, an eight-week lapse suspended work on five projects and would have suspended work on numerous other projects if it had not been for quick political mobilization.

Legislative change is necessary to reestablish EPA's rule and allow the grandfathering of transportation projects. Right now, virtually all federally funded and non-federally funded regionally significant projects are potentially at risk during a conformity lapse. Once a transportation project is approved under the conformity rules, the project should be allowed to proceed notwithstanding any lapse in the plan or program's conformity status. As EPA argued in defense of the grandfathering provisions, "EPA's rule reflects its rational judgment that Congress intended a more reasoned approach to transportation planning during periods in which there is no applicable SIP, that Congress intended that there be an attempt to balance the general pollution-reduction requirements of the Act with the needs of state and local planning organizations for certainty and finality in their transportation planning process."<sup>6</sup> Congress should reintroduce this reason and balance.

## **Solutions:**

- ***The CAA should be amended to allow grandfathering of projects that previously were determined to conform to air quality goals. Such an amendment would remove procedural redundancies without harming air quality, and ensure that road and transit projects found to conform can move forward without harmful delays.***
- ***Congressman Kevin Brady (R-TX) recently proposed the "Safe Highways and Roads Act of 2003." The Act, in part, seeks to reestablish the grandfathering provisions—thereby requiring a one-time-only conformity determination. Whether it is through the Brady bill or another piece of legislation, Congress should amend the CAA to allow grandfathered projects to proceed during a conformity lapse.***

---

<sup>5</sup> *Environmental Defense Fund v. EPA*, 167 F.3d 641, 652 (D.C. Cir. 1999).

<sup>6</sup> *Environmental Defense Fund v. EPA*, Case No. 97-1637, D.C. Cir., Respondent's Brief, June 10, 1998, p. 30.

## **Transportation Conformity Reform: Reduce the Number of Conformity Determinations & Synchronize the Transportation and Air Planning Timelines**

***Issue: The current transportation conformity process is inefficient and duplicative.***

Metropolitan areas that are not in compliance with national air quality standards must demonstrate that transportation system choices made by the community are consistent with achieving and maintaining the air quality standards. The CAA requires a nonattainment area to demonstrate conformity every three years. Additionally, there are many other conformity triggers that result in nonattainment regions continually performing conformity demonstrations that often overlap and are considered obsolete before they are complete.

### **Problems with Transportation Conformity: Numerous Triggers and Inconsistent Timelines**

The regulations employed to implement the transportation conformity requirements of the CAA result in an inefficient, cumbersome, and non-stop process of study and evaluation. Nonattainment areas are continually and exhaustingly performing conformity demonstrations. Although the CAA appears to require a conformity demonstration only once every three years, numerous other triggers render this timetable meaningless. Under EPA's rules, nonattainment areas must demonstrate conformity each time the motor vehicle emissions budget is revised and each time a transportation control measure is added, modified, or deleted. Conformity demonstrations are also needed each time the metropolitan planning organization adopts a new plan and TIP, or adds or modifies a project in its transportation plan or TIP (since a road or transit project cannot generally move forward unless it is specifically included in a conforming transportation plan).

In addition to the excessive number of conformity triggers, the current transportation conformity process sets out inconsistent transportation and air quality planning timelines. While conformity is required at least every three years, the TIP must be revised every two years—even though it's a three-year program. The overabundance of conformity triggers and inconsistent planning timelines means that planning organizations are continuously performing overlapping demonstrations, wasting valuable time and resources.

To illustrate the conformity problems just described, consider the following hypothetical:

**Operating a Grocery Store Using the Transportation Conformity “Accounting Check”** – Under the transportation conformity “accounting check” system, the grocery store must first determine how many bananas, jars of peanut butter, loaves of bread, and gallons of milk, etc. it will stock on its shelves *20 years from now*, along with the total cost of these products. After this next-to-impossible and highly speculative task is completed, the grocery store must write down these products and quantities specifically into a 20-year purchase plan (the “plan”). This plan must be strictly adhered to and the total dollar estimate cannot be exceeded. For example, the grocery store cannot stock more apples, potato chips, and pork chops than what is written in the original plan.

Once the plan is complete, the store is required to update the plan at least every three years (which takes a considerable amount of time and money). The store also must revise the plan anytime it wants to sell more peaches, sacks of flour, boxes of oatmeal, etc. than it originally wrote down in the plan. In addition, the plan must be revised whenever a new market report indicates that a change in the plan is necessary (for example, a study indicates that more people are buying cottage cheese).

Every time the plan is revised, the grocery store must look not only at the grocery item to be changed, *but all of the grocery items in the entire plan*. For example, if the grocery store wants to buy more peanuts to sell, it can do so only if it updates the cost estimates for all of the other grocery items in the plan (dog food, paper plates, charcoal, cheese sticks, etc.) and determines that buying more peanuts will not exceed the total cost it estimated in the original plan.

This is how the conformity “accounting check” works for transportation projects as well. The illustration points out the numerous flaws in the current conformity process—including redundant determinations, overlapping updates, and the inability to make simple plan changes.

## **Solutions:**

- ***The length of time between transportation plan updates should be increased to at least five years. The plan update process is extremely labor-intensive and many planners are already having trouble meeting the three-year requirement. A five-year cycle would allow for better planning.***
- ***The length of time between mandatory conformity determinations should be increased to five years. This five-year cycle is needed for consistency with the change to a five-year cycle for plan updates. Since most road projects take at least 15 to 20 years to plan and construct, projects still will have several opportunities to be included in a conformity demonstration.***
- ***Eliminate the requirement of a conformity determination for the three-year transportation improvement program since it is duplicative of the conformity requirement for the 20-year plan.***
- ***Changes in transportation control measures (TCMs) should not constitute a state implementation plan (SIP) revision and should not mandate a new conformity determination, as long as the substituted TCMs achieve equivalent emission reductions in the same time frame.***
- ***A method is needed whereby metropolitan planners can add or modify a road or transit project (to some degree) without the need for a full conformity demonstration. Currently, planning organizations must essentially go through a full conformity analysis in order to make minor changes to a road or transit project. This exercise is unnecessary and a waste of valuable local, state, and federal resources. Congress should provide a de minimis exemption whereby transportation projects may be built if they result in emissions below a certain emissions level. De minimis exemptions are used effectively in many other CAA programs, including the New Source Review Program and the General Conformity Program.***



## **Transportation Conformity Reform: Align Planning Horizons**

***Issue: Transportation plans and SIPs are not aligned with one another due to different planning horizons and update frequencies.***

Metropolitan areas that are not in compliance with national air quality standards must demonstrate that transportation system choices made by the community are consistent with achieving and maintaining the national air quality standards. Conformity determinations must demonstrate that emissions in the last year (i.e., 20<sup>th</sup> year) of the plan meet emissions budgets in the SIP. Emissions budgets in the SIP generally cover a much shorter time frame. The resulting “mismatch” creates problems when determining conformity for years outside of the plan.

### **Problems with Transportation Conformity: Disjointed Planning Horizons**

The transportation planning and air quality planning horizons are not coordinated with each other. Under the CAA and TEA-21, transportation plans must cover a 20-year timeframe. State implementation plans must cover a much shorter timeframe—often only 5 to 10 years. This results in “disjointed” planning horizons in which transportation plans must consider emission controls in the absence of a comprehensive state air quality plan. The disparity in the planning horizons imposes an undue burden on the on-road mobile source sector (i.e., highway vehicles) and hampers the ability of local governments to make comprehensive emission reduction choices for their communities.

The current conformity process does not provide for a comprehensive evaluation across all sectors (stationary and mobile sources) to determine the most cost-effective strategies for reducing emissions and for providing expeditious attainment of air quality standards. State attainment plans normally include control measures up to the attainment date only, and not beyond. In the years covered by the transportation plan that go beyond the attainment plan, metropolitan areas cannot rely on control measures that are not included in the attainment plan. Still, on-road mobile source emissions are required to meet emissions budgets beyond the end of the attainment plan timeframe (i.e., the attainment date).

The following example demonstrates the problems with this inconsistent treatment:

A metropolitan area with an attainment date of 2007 must develop a motor vehicle emissions budget that caps on-road mobile source emissions in 2007. The metropolitan area then must demonstrate that its long-term 20-year transportation plan conforms to this 2007 budget. In other words, the area must demonstrate that the 2007 motor vehicle emissions budget will not be exceeded in 2023 (despite increases in population and vehicle miles traveled). A problem arises, however, if the demonstration indicates that the budget will be exceeded in a later year, for example, 2020. In order to solve this problem, metropolitan planners must revise the transportation plans to lower the emissions, even though it might be more cost-effective and appropriate to lower emissions from a stationary source or off-road source instead.

The restriction in the above example prevents metropolitan areas from making comprehensive air quality and transportation choices. Metropolitan areas should be free to choose the option that is best for their community, whether that option is altering a transportation project or lowering emissions from another source.

Below are comments from transportation/air quality experts regarding the planning horizon problem:

- “TEA-21 and the CAA require that transportation plans must cover at least 20 years and be found conforming for that entire time period. However, air quality plans have much shorter planning horizons, often only 5-10 years, resulting in a ‘mismatch’ in which transportation plans must consider emissions controls in the absence of comprehensive air quality planning. Without comprehensive air quality planning, there is no analysis of the most cost-effective emissions controls across all sources beyond the end of the SIP timeframe.”<sup>7</sup>

--Mary E. Peters, Administrator, Federal Highway Administration

- Transportation conformity “has become an apples and oranges type comparison, rather than a true test as to whether the emissions associated with the transportation plan are truly ‘consistent’ with an emissions budget in an air quality plan.”<sup>8</sup>

-- James Shrouds, Director of the Federal Highway Administration’s Office of Natural Environment

- “Given the ever-changing influence of national and regional economic conditions, local public policy initiatives and individual choices and preferences on travel demand and behavior, the expectation that travel models will be able to capture and predict the real world experience some 20 years ‘down the road’ is unreasonable.”<sup>9</sup>

--Harvey S. Bloom, Director of Transportation Planning Division, Baltimore Metropolitan Council

- “A real potential exists for a conformity lapse due to the mismatch of air quality and transportation planning schedules, and the SCAG region will continue to face this constant threat.”<sup>10</sup>

--Southern California Metropolitan Planning Organization

---

<sup>7</sup> Statement of Mary E. Peters, Administrator of the Federal Highway Administration, U.S. Department of Transportation Before the Committee on Environment and Public Works, United States Senate, Hearing on Transportation and Air Quality, July 30, 2002.

<sup>8</sup> James Shrouds, Director of the Federal Highway Administration’s Office of Natural Environment, *Transportation: Rules for Ensuring Conformity with Air Act Need Revision, Officials Tell Industry Seminar*, BNA Daily Environment Report, July 2, 2002.

<sup>9</sup> Letter to the Committee on Environment and Public Works entitled “Transportation and Air Quality Conformity Case Study,” Harvey S. Bloom, Director of Transportation Planning Division, Baltimore Metropolitan Council, July 23, 2002.

<sup>10</sup> Southern California MPO Survey, Testimony before the U.S. Senate Committee on Environment and Public Works, July 30, 2002.

## **Solution:**

- ***Conformity should be demonstrated only through the attainment date (i.e., the duration of the attainment SIP). For the remaining years of the transportation plan, a regional emissions analysis may be conducted for informational purposes. Aligning the planning horizons in this manner will allow metropolitan areas to focus conformity analyses on the period in which emissions can be forecast with greater certainty. Metropolitan areas may then select the most cost-effective and appropriate emission reduction choices for their communities.***
- ***Clarify that conformity analysis for maintenance areas must extend only to the end of the maintenance period. Since conformity requirements do not apply after the maintenance period has ended, there is no basis for requiring conformity to be demonstrated beyond the last year of the maintenance period.***

## **Transportation Conformity Reform: Require Use of the Latest Models & Planning Assumptions**

***Issue: Inconsistent models and assumptions are often used in setting SIP emissions budgets and in determining emissions for purposes of demonstrating conformity.***

Under the CAA, metropolitan areas that are not in compliance with national air quality standards must demonstrate that transportation system choices made by the community are consistent with achieving and maintaining the national air quality standards. Emission estimates for a transportation plan must be based on the “most recent emissions model available.” In practice, the emissions budgets in many SIPs are still based on previous models. The use of different models can lead to drastically different predictions of emissions, thus complicating efforts to demonstrate conformity of transportation plans to the emissions budget in the SIPs.

### **Problems with Transportation Conformity: Inconsistent Models**

Metropolitan areas have unnecessarily experienced road and transit construction delays due to planning assumption changes in the “eleventh hour” of the conformity process. The CAA requires metropolitan areas to use the latest planning assumptions in all conformity demonstrations. A problem occurs when the latest planning assumption is introduced just weeks or months before a conformity deadline. The Act specifically states that “the determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.”<sup>11</sup> The EPA has appropriately interpreted this provision literally. When a new planning assumption is introduced before a conformity deadline, metropolitan areas sometimes are placed in the impossible position of re-calculating a year’s worth of data in a few weeks in order to avoid a conformity lapse (and subsequent transportation construction delays).

Even when metropolitan areas are able to re-calculate, some are unable to timely demonstrate conformity due to the disconnect between the latest planning assumptions and those assumptions used to create the motor vehicle emissions budget in the SIP. For example, if a nonattainment area sets a motor vehicle emissions budget at 159 tons of NO<sub>x</sub> per day and later realizes, prior to its next conformity determination, that the number should really be 165 tons per day (because of new planning assumptions regarding the number of sport utility vehicles in the area), the metropolitan area could have a difficult time demonstrating conformity to the lower number. This problem could cause a conformity lapse and subsequent transportation construction delays because it would take several months to revise the motor vehicle emissions budget through the notice-and-comment rulemaking process.

Below is a comment from the California Air Resources Board regarding another aspect of this issue . . . the inefficiency of constantly revising the motor vehicle emissions budget to reflect the latest planning assumptions:

---

<sup>11</sup> 42 U.S.C. § 7506.

The most difficult problem with the current conformity process is the inability to take new information into account in a workable way. Air quality plans or “SIPs” must define the emission target needed to achieve clean air as defined by national air quality standards. That emission target is based on the state of the science at the time the air quality plan is done. Once approved by the U.S. Environmental Protection Agency, the SIP is the federally enforceable benchmark for transportation conformity purposes. There is no requirement to update a SIP prior to the deadline for meeting the air quality standard.

On the other hand, transportation plans must be updated routinely. And, as a practical matter, changes in individual transportation projects are proposed often monthly in major urban areas. These changes typically trigger a process that requires new information to be used in the conformity analysis. When the SIPs have not been updated with the same information, the inherent inconsistency may derail the process.

In California, we face this issue virtually statewide. As a result, we will be revising 23 SIPs over the next year or so. And while this will put us back on a consistent process track in the near-term, it is a major undertaking that will not in itself provide air quality benefits. What we want to avoid in the future is the triggering of a comprehensive SIP update each time new information becomes available. Under today’s rules, this is the only way to avoid conformity problems as the science improves.<sup>12</sup>

## **Solution:**

- ***The CAA should be clarified to stipulate that “the most recent estimates of emissions” are those used to develop the latest motor vehicle emissions budget. In the alternative, the Act should be amended to include a time-delay before new estimates must be used in a conformity determination.***

---

<sup>12</sup> Testimony of Lynn M. Terry, Deputy Executive Officer, Air Resources Board, California Environmental Protection Agency Regarding Transportation and Air Quality before the U.S. Senate Committee on Environment and Public Works, July 30, 2002.

## **Transportation Conformity Reform: Align Conformity Lapse Consequences with Highway Sanctions Clock**

***Issue: The current conformity requirements impose excessive penalties on communities that fail to demonstrate conformity for reasons that are minor or outside their control.***

Metropolitan areas that are not in compliance with national air quality standards must demonstrate that transportation system choices made by the community are consistent with achieving and maintaining the national ambient air quality standards. This demonstration is called transportation conformity. If a metropolitan area fails to make this demonstration, the area immediately falls into a conformity lapse even if the reasons are minor or outside the community's control. During a conformity lapse, most road and transit projects cannot move forward. This penalty is unnecessarily drastic. Metropolitan areas should be given a short, specified period of time to correct minor deficiencies before projects are halted. Such a period would save communities millions of dollars in otherwise costly transit and construction delays.

### **Problems with Transportation Conformity: The Immediate and Drastic Effects of a Conformity Lapse**

Metropolitan areas are sometimes caught in conformity lapses for minor technical problems or problems that are outside the metropolitan planner's control. For example, if a nonattainment area sets a motor vehicle emissions budget at 159 tons of NO<sub>x</sub> per day and, one month before its next conformity determination, realizes that the number should be 165 tons based on new information from the county regarding the number of sport utility vehicles in the area, the metropolitan area could have a difficult time demonstrating conformity to the lower number because it would take several months to revise the budget through the rulemaking process. If the area could not otherwise demonstrate conformity, the area would find itself in a conformity lapse. This lapse would not be due to the area's actions or inactions, but to the technical fact that the area received new planning information that it legally did not have enough time to incorporate. This "gotcha" system is unnecessary and costly. Road and transit projects should not be delayed for minor problems that easily can be rectified.

When an area fails to demonstrate conformity and enters into a conformity lapse, the consequences of the lapse are immediate. On the other hand, if an area fails to submit or implement an adequate SIP, there is a range of time (a minimum of 18 to 24 months) before sanctions are imposed.<sup>13</sup> The disparate treatment between these sanctions is unfounded. Transportation planners should also have time to remedy problems before sanctions are imposed. Most of the time conformity lapses occur only for a few short months due to a technical or procedural error. Rather than the current "gotcha" system, planners should be given a short period of time to correct technical deficiencies before projects are halted. Adding a lag period will save communities millions of dollars in otherwise costly transit and construction delays.

---

<sup>13</sup> See Clean Air Act § 179.

## **Solution:**

- ***Add a specified lag period before the effects of a conformity lapse are imposed. Metropolitan planners should be given a short, designated period of time to rectify minor problems before public transportation projects are halted. Adding a lag period will bring lapse sanctions into line with the other sanctions imposed under the CAA.***

For more information, please contact:

***Leah F. Wood, Esq.***

Senior Counsel, Environmental Law  
Associated General Contractors of America  
333 John Carlyle Street  
Suite 200  
Alexandria, Virginia 22314  
Phone: (703) 837-5332  
E-mail: woodl@agc.org

***Brian Deery***

Senior Director, Highway Division  
Associated General Contractors of America  
333 John Carlyle Street  
Suite 200  
Alexandria, Virginia 22314  
Phone: (703) 837-5319  
E-mail: deeryb@agc.org