

APPENDIX O



U.S. Department of Transportation and U.S. Environmental Protection Agency



**NATIONAL MEMORANDUM OF UNDERSTANDING
BETWEEN
THE U.S. DEPARTMENT OF TRANSPORTATION
AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY**

BACKGROUND

A number of transportation planning and conformity issues revealed the value that improved Federal agency coordination could add in identifying and resolving conformity issues and questions about transportation plan/transportation improvement program (TIP) status and specific project actions. Interagency coordination can minimize disruptions to the transportation planning and project development processes while ensuring that communities are making progress toward air quality compliance. In addition, the Environmental Protection Agency (EPA) and Department of Transportation (DOT), in coordination with the President's Council on Environmental Quality, agree that there is an obvious need to clarify the transportation conformity rule's provisions regarding projects that can proceed during a conformity lapse. Additional information is available in the FHWA/FTA June 18, 1999, guidance memorandum entitled, "Additional Supplemental Guidance for the Implementation of the Circuit Court Decision Affecting Transportation Conformity," and EPA's May 14, 1999, guidance memorandum entitled, "Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision."

Also important to this Memorandum of Understanding (MOU) is the fact that in 1998, Congress enacted an environmental streamlining provision, directing U.S. DOT and environmental agencies to streamline Federal highway and transit project development through a coordinated environmental review process (Section 1309 of TEA-21).

I. PURPOSE OF THIS AGREEMENT

The purpose of this national MOU is to ensure the proper implementation of the transportation conformity rule's provisions through better and more efficient EPA and DOT consultation in order to facilitate timely conformity decisions. It also ensures that integrated transportation and air quality planning and project development processes will be achieved in a timely way, through the transportation conformity and State Implementation Plan (SIP) development processes. This MOU also fulfills part of the January 16, 1998, agreement between DOT and EPA. The March 2, 1999, District of Columbia Circuit Court decision does not affect

the consultation provisions of this MOU. This MOU does not change any of the requirements in the metropolitan planning regulations¹, transportation conformity regulation (40 CFR parts 51 and 93), or National Environmental Policy Act (NEPA)² provisions.

This national MOU provides an overall interagency coordination framework between EPA and DOT. The EPA and DOT field offices will use the national framework of this MOU, in addition to EPA and DOT regional/division MOU provisions that are supportive of the MOU's goals. The EPA and DOT field offices are encouraged to develop or update their regional/division MOUs in accordance with this framework. The EPA and DOT field offices are encouraged to use existing consultation/notification processes, such as the provisions included as part of the interagency consultation process, to implement the national MOU, whenever appropriate.

The EPA and DOT will carry out this MOU consistent with the statutory mandate to streamline environmental decisionmaking for Federal surface transportation projects and programs. In particular, conformity coordination and decisions will be carried out under the terms of the MOU on environmental streamlining, which was signed by seven Federal agencies in July 1999.

This national conformity MOU supersedes the "Memorandum of Understanding Between the Department of Transportation and the Environmental Protection Agency Regarding the Integration of Transportation and Air Quality Planning," which was signed on June 14, 1978.

II. GOALS OF THIS MOU

The DOT and EPA have identified several goals which will be addressed by this agreement or future policy memoranda, including:

- ▶ To support ongoing EPA and DOT consultation on conformity determinations to ensure the proper use of the conformity rule's provisions.
- ▶ To improve interagency consultation so that transportation planning, conformity, and project development issues are identified and resolved prior to a conformity lapse and freeze.

¹ The Statewide and metropolitan planning regulations as well as the NEPA and related procedures for transportation projects are being revised.

² It should be noted that the provisions of this MOU that are related to NEPA only apply to transportation projects.

- ▶ To improve interagency consultation in the SIP development process, so that SIP measures that will reduce mobile source emissions are expeditiously implemented.
- ▶ To carry out conformity reviews consistent with NEPA streamlining efforts.

III. DOT AND EPA AGREE TO THE FOLLOWING:

A. Improved EPA and DOT Coordination: General

1. The DOT and EPA will notify each other when conformity determinations and SIPs are submitted. The EPA and DOT should also utilize existing opportunities and coordination of transportation and air quality planning activities among the Federal agencies through the interagency consultation processes for transportation conformity.
2. The EPA and DOT field offices will provide the opportunity for each agency to comment on the conformity determinations of transportation plans, TIPs, (and on new conformity determinations required by plan/TIP amendments), and projects and on the transportation-related provisions of SIPs and Federal Implementation Plans (FIPs) within a reasonable, expedient and mutually agreeable time frame, such as within 30 days. All comments and responses to comments should be documented. The EPA and DOT field staff and managers will notify each other when issues arise, so that there will be a reasonable opportunity for discussion. This coordination will ensure that issues can be escalated to EPA and DOT Regional and Division Administrators when necessary. Details for achieving close coordination on conformity and SIP reviews should be determined collaboratively by individual EPA and DOT field offices. If such details are included in the existing interagency consultation process, they should be adopted.
3. If the issues remain unresolved and efforts to resolve the issues are exhausted between the affected EPA Regional Administrator and FHWA Division Administrator and FTA Regional Administrator, the issues must be escalated to EPA and DOT headquarters offices for the purpose of seeking resolution within 30 days, before DOT makes its final conformity determination or before EPA takes its approval action on the SIP or FIP. If both DOT and EPA agree, this time period may be extended. Ultimately, under the CAA it is DOT's affirmative responsibility to make the final conformity determination. Likewise, the ultimate responsibility for final approval action on the SIP and FIP rests with EPA.
4. Senior managers from FHWA, FTA, and EPA headquarters offices will meet semi-annually to discuss conformity and SIP issues and to evaluate the implementation of this national MOU. Meetings may be canceled if EPA and DOT agree that a meeting is unnecessary.

B. Implementation of Transportation Conformity and Transportation-Related SIP Requirements:

1. In the event of an impending conformity determination lapse, the project development process will not be accelerated for the purpose of approving projects so they can proceed during the lapse.
2. The DOT will no longer grant TIP extensions in nonattainment and maintenance areas.
3. The Clean Air Act and TEA-21 require that an integrated transportation/air quality planning process be used as the vehicle to identify effective transportation control measures (TCMs) and ensure their funding sources. Therefore, the procedures in Appendix A must be used, if the States propose to advance new TCMs during a conformity lapse.

C. Improved EPA and DOT Coordination: Prior to a Conformity Lapse and Freeze:

The following provisions will apply 6 months prior to an anticipated conformity lapse or when EPA has notified an area of a freeze, unless the EPA and FTA Regional Administrators and FHWA Division Administrator agree that additional Federal coordination is unnecessary:

1. The EPA and DOT field managers will meet periodically to discuss pending conformity determinations, transportation project development actions, and SIP deficiencies, as appropriate, for the particular nonattainment or maintenance area.
2. The EPA and DOT field managers will meet at least 90 days before an anticipated conformity lapse or freeze to determine which projects could receive funding commitments (plans, specifications, and estimates approval, full funding grant agreement, or an equivalent approval or authorization) before the lapse, which projects could potentially be delayed, and which actions are necessary to correct transportation-related SIP deficiencies prior to the lapse or freeze. The EPA and DOT meetings are encouraged more than 90 days before an anticipated conformity lapse or shortly after EPA has notified the State of the impending freeze. The EPA and DOT headquarters offices encourage their regional and division offices to negotiate more specific consultation procedures where appropriate. The EPA and DOT regions and divisions will exchange information necessary to facilitate timely discussions.
3. The EPA and DOT field offices agree to notify EPA and DOT headquarters offices if sub-section III.C. of this MOU is initiated. If it is anticipated that an issue cannot be resolved at the EPA and DOT Regional and Division Administrator levels, the issue must be escalated to EPA and DOT headquarters offices for the

purpose of seeking resolution within 30 days of escalation, before the DOT regional or division office makes its conformity determination. If both DOT and EPA agree, this time period may be extended. Similar steps will be taken when a conformity lapse is caused or exacerbated by SIP issues.

IV. AGENCY SIGNATURES

We commit that our agencies will adhere to the specific agreements outlined in this MOU. The DOT and EPA have worked closely in the development of this agreement, and both agencies look forward to the continued cooperative working relationship in the successful implementation of the SIP/FIP process, the metropolitan planning regulations (23 CFR part 450), the transportation conformity rule (40 CFR parts 51 and 93), and the NEPA process (42 U.S.C. 4321 et seq.).

This agreement is effective on 4/19/2000 .

United States Department
of Transportation:
(Original signed by)

Kenneth R. Wykle
Administrator
Federal Highway Administration
(Original signed by)

Nuria I. Fernandez
Acting Administrator
Federal Transit Administration

United States Environmental
Protection Agency
(Original signed by)

Robert Perciasepe
Assistant Administrator for
the Office of Air and Radiation

Advancing New Transportation Control Measures During a Conformity Lapse

A. Interim Plan and TIP Requirements

Federal transportation law requires that projects must be in a plan and TIP to receive Title 23 and Title 49 funds. Therefore, in the event of a conformity lapse, an MPO must create an Interim Plan and TIP for any projects to be federally-funded and approved during the lapse, including exempt projects and transportation control measures (TCMs). The Interim Plan and TIP must be developed in a manner consistent with 23 U.S.C. 134, particularly these criteria:

1. The Interim Plan and TIP must be developed based on previous planning assumptions and goals; appropriately adjusted for currently available projections for population growth, economic activity and other relevant data.
2. The Interim Plan and TIP must be developed with public involvement consistent with the normal transportation plan and program development processes.
3. The Interim Plan and TIP must satisfy the Title 23 and 49 requirements for financial planning and constraint, and, as appropriate, for congestion management systems.
4. The Interim TIP must be approved by the MPO and the Governor (or the Governor's designee).

B. TCMs in a previously conforming Plan and TIP

Projects in the previously conforming transportation plan must be included in the Interim Plan and TIP if State and local agencies intend to request EPA to approve them into the SIP as new TCMs (as defined in 40 CFR 93.101 of the transportation conformity rule which includes TCMs defined by Section 108(f)(1)(A) of the Clean Air Act (CAA)) and if they have emission reductions benefits. The TCMs can not proceed during a conformity lapse until they are contained in an EPA approved SIP with identifiable emission reduction benefits. States may, but are not required to, apply the identified emission reduction benefits directly as SIP credits in control strategy SIPs and maintenance plans. Future conformity analyses may reflect the emission reduction benefits identified in the SIP for regionally significant TCMs; such emission reduction benefits must be adjusted to reflect latest planning assumptions (40 CFR 93.110) at the time of the conformity analysis, and as appropriate to meet the requirements of 40 CFR 93.122. For non-regionally significant TCMs, the emission reduction benefits identified in the SIP may be used for

future conformity analyses; such emission reduction benefits must be adjusted to reflect latest planning assumptions (40 CFR 93.110) at the time of the conformity analysis, and as appropriate to meet the requirements of 40 CFR 93.122(a).

C. New TCMs not from a previously conforming Plan and TIP

New TCMs, not included in a previously conforming Plan and TIP, may be advanced during a conformity lapse provided they are included in an Interim Plan and TIP that meet the criteria in Section A and are contained in an EPA approved SIP with identified emission reduction benefits. They must also meet the following criteria:

1. They must be identified through the interagency consultation process (i.e., Federal, State, and local transportation and air quality agencies).
2. They must be described at a level of detail and analysis appropriate to their overall level of investment and complexity (i.e., regionally significant TCMs must be described and analyzed at a significant level of detail, appropriate to the scale of the project and adequate for emissions analysis purposes, while non-regionally significant TCMs may be presented in much less detail).
3. If regionally significant (as defined in 40 CFR 93.101), they must be shown to yield reduced emissions on a regional basis compared to regional emissions without the TCMs for the analysis period. The analysis period will include the SIPs milestone year(s) (if relevant), and the year the TCMs are open to traffic or become operational (if the TCMs's schedule is outside the SIP's time frame). Transportation and air quality planners must consult with each other on the methodologies used to estimate the transportation and air quality benefits of the regionally significant projects. Off-model analysis techniques must be used, to the extent possible, to quantify emissions benefits for non-regionally significant TCMs. Appropriate techniques will be decided through interagency consultation.
4. The TCMs will be submitted as a SIP revision to EPA for approval, and their emissions benefits must be identified to support EPA's approval into the SIP. TCMs can not proceed during a lapse until they are contained in an EPA approved SIP with identifiable emission reduction benefits. States may, but are not required to, apply the identified emission reduction benefits directly as SIP credits in control strategy SIPs and maintenance plans. Future conformity analyses may reflect the emission reduction benefits identified in the SIP for regionally significant TCMs; such emission reduction benefits must be adjusted to reflect latest planning assumptions (40 CFR 93.110) at the time of the conformity analysis, and as appropriate to meet the requirements of 40 CFR 93.122. For non-regionally significant TCMs, the emission reduction benefits identified in the SIP may be used for future conformity analyses; such emission reduction benefits must be adjusted

to reflect latest planning assumptions (40 CFR 93.110) at the time of the conformity analysis, and as appropriate to meet the requirements of 40 CFR 93.122(a).

Under this scenario, the State and MPO may advance any TCMs defined by 40 CFR 93.101 of the transportation conformity rule (which includes TCMs defined by Section 108(f)(1)(A) of the CAA).

It is expected that the process necessary to develop Interim Plans and TIPs with new projects, not previously conforming, will take most areas at least 6 months. Areas which expect to return to conformity earlier than 6 months should concentrate on reestablishing conformity, rather than embarking on developing an Interim Plan and TIP, for new projects.

The DOT's planning regulations and EPA's conformity regulation will be amended to clarify the implementation of the TCMs processes outlined above.



U.S. Department
of Transportation

Memorandum

Federal Highway Administration Federal Transit Administration

Subject: **INFORMATION:** National MOU between
DOT and EPA on Transportation Conformity

Date: April 25, 2000

(Original signed by)
From: James M. Shrouds
Director of Natural Environment, FHWA
(Original signed by)
Robert W. Stout
Director, Office of Planning Operations, FTA

Reply to
Attn. of: HEPN-1/TPL-10

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

Attached is a Memorandum of Understanding (MOU) between DOT and EPA, the purpose of which is to improve coordination and consultation on conformity issues and the key transportation provisions in State Implementation Plans (SIPs). The intent of this MOU is to provide for timely review and comment on transportation and air quality planning documents and to establish a framework for trying to resolve outstanding issues before final decisions are made. This MOU does not alter DOT's statutory responsibility for making conformity determinations, nor does it alter EPA's important consultative role in the process. We want to highlight two subjects covered by the MOU:

Process for resolving disputes – The MOU recognizes the FHWA Divisions'/FTA Regions' authority for making conformity determinations. We expect in the great majority of cases that disagreements on conformity issues will be settled by the DOT and EPA field offices. However, in the event that disagreements cannot be settled by the senior managers of the field offices, there is a provision for escalating the outstanding issues to the agencies' headquarters offices. The purpose is to provide a full airing of the issues, within a 30-day time period, before DOT makes its decision. The decision to escalate a specific case to Headquarters should be a joint decision of the DOT and EPA field offices. We expect that relevant background information on the issues will be provided to FHWA and FTA Headquarters offices at the same time. The EPA regional office will be responsible for coordination with the Office of Transportation and Air Quality (Ann Arbor).

Advancing TCMs during a conformity lapse – The process for advancing TCMs during a lapse is covered in a three-page appendix to this MOU. This is a relatively recent addition to the MOU, although we have been discussing this subject with EPA for a long time. The wording in the appendix states as clearly as possible that we expect TCMs in the SIP to have documented

emission reductions. Note that TCMs cannot advance during a conformity lapse unless they have already been approved into the SIP by EPA. When dealing with new TCMs, the combined transportation planning/SIP approval process will take a minimum of 6 months to complete, and likely much longer. Thus, this guidance states that if the lapse is estimated to last less than 6 months, the MPO should focus on reestablishing plan/TIP conformity while advancing the TCMs which have already been approved in the SIP.

If you have any questions about this MOU, please contact Ms. Cecilia Ho of FHWA at (202) 366-9862, or Mr. Abbe Marner of FTA at (202) 366-4317.

Attachment

cc: Resource Center Directors