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Memorandum

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Subject: **INFORMATION:** Frequently Asked
Questions on the Transportation
Conformity Lapse Grace Period

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/S/Original signed by
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To: Division Administrators

PURPOSE

The purpose of this memorandum is to share a new set of Frequently Asked Questions (FAQs) to clarify the implementation of the transportation conformity lapse grace period. These questions address when the lapse grace period applies, what can move forward during the lapse grace period, and the impact of the lapse grace period to the metropolitan transportation plan, transportation improvement program (TIP) and project level conformity.

These FAQs do not address all the requirements in the transportation conformity rule, nor are they intended to supersede or alter the transportation conformity regulations (40 CFR part 93), which should be consulted in all cases regarding these requirements. The U.S. Environmental Protection Agency (EPA) and the Federal Transit Administration were consulted on the development of these FAQs.

BACKGROUND

The conformity lapse grace period was added to the Clean Air Act (CAA) in the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and incorporated into the transportation conformity rule on January 24, 2008, to allow a 1-year grace period before the consequences of a conformity lapse apply to metropolitan planning organizations that miss an applicable transportation conformity deadline. The applicable deadlines include the 4-year clock to update the metropolitan transportation plans and TIPs or the 24-month clock to determine conformity after EPA takes action on a State Implementation Plan establishing a motor vehicle emissions budget. These FAQs provide responses to common questions that have arisen regarding the transportation conformity lapse grace period.

Questions related to these FAQs should be directed to Cecilia Ho at cecilia.ho@dot.gov or 202-366-9862 or Emily Biondi at emily.biondi@dot.gov or 202-366-9482.

Frequently Asked Questions on the Transportation Conformity Lapse Grace Period

1. What is the conformity lapse grace period?

The conformity lapse grace period is a 12-month grace period before the consequences of a conformity lapse apply. It was added to the Clean Air Act (see Section 176(c)(9)) in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (section 6011(e)) and the transportation conformity rule (40 CFR 93.104(f)). The 12-month lapse grace period allows a metropolitan planning organization (MPO) to correct a conformity deficiency before entering into a conformity lapse.

2. Where does the conformity lapse grace period apply?

The conformity lapse grace period applies to metropolitan nonattainment and maintenance areas and any associated donut areas.¹ It is important to note that the lapse grace period only applies to transportation conformity, and not to Federal Highway Administration (FHWA) and Federal Transit Administration's (FTA) transportation planning requirements. The FHWA, FTA and the U.S. Environmental Protection Agency (EPA) agree that planning requirements still must be met during the lapse grace period in order for FHWA and FTA to fund or approve a project during a conformity lapse grace period.

3. When does a conformity lapse grace period begin?

The 12-month grace period starts on the date an applicable conformity deadline is missed. The applicable deadlines are the 4-year conformity update cycle for metropolitan transportation plans and TIPs (40 CFR 93.104(b)(3) and (c)(3)) or the 24-month conformity determination triggered by EPA actions on State Implementation Plans (SIPs) establishing a motor vehicle emissions budget (40 CFR 93.104(e)).

4. What projects can proceed during a conformity lapse grace period?

As long as a valid TIP and Statewide Transportation Improvement Program (STIP) are in place during the conformity lapse grace period, both exempt and non-exempt projects can continue to be authorized by FHWA and FTA. Non-exempt projects can be found to conform during the lapse grace period if they are included in the currently conforming or most recently conforming metropolitan transportation plan and TIP. Exempt projects can proceed during the lapse grace period because conformity does not apply to these projects.

5. What are the different metropolitan transportation plan/TIP expiration scenarios that may impact whether a project can proceed during a conformity lapse grace period?

To be found to conform during the lapse grace period, a project must be included in the currently conforming metropolitan transportation plan and TIP (40 CFR 93.104(f)(1)), or from the most recent conforming metropolitan transportation plan and TIP (40 CFR 93.104(f)(2)) and also must meet all other project-level conformity requirements. In addition, FHWA/FTA projects must also meet FHWA and FTA's planning requirements to receive Federal funding or approval. Specifically, 23 U.S.C. 134(j)(3) and 49 U.S.C.

¹ Isolated rural nonattainment and maintenance areas are not impacted because these areas do not include an MPO with a conformity determination on a metropolitan transportation plan and TIP that can lapse.

5303(j)(3) require a TIP to be in place and 23 U.S.C. 135(g)(4) and 49 U.S.C. 5304(g)(4) require a STIP to be in place for FHWA or FTA to authorize transportation projects.

Three specific scenarios are presented below to show how expiration of the metropolitan transportation plan and/or STIP/TIP at the time of the missed conformity deadline affects the ability to advance FHWA/FTA projects during the conformity lapse grace period.

Scenario 1: If the metropolitan transportation plan has expired, but the STIP and TIP are still in effect:

- The FHWA/FTA can continue to authorize projects, approve environmental documents, and make project level conformity determinations, provided all other FHWA and FTA requirements are met
- The FHWA/FTA can continue to authorize projects in the STIP and TIP for the duration of the grace period or the duration of the TIP, whichever is shorter
- The MPO cannot amend the metropolitan transportation plan or TIP and the State cannot amend the affected portion of the STIP

Scenario 2: If the metropolitan transportation plan is still in effect, but the STIP and/or TIP have expired (i.e., the STIP was not updated within the 4-year update cycle and therefore the STIP and all associated TIPs have expired):

- The FHWA/FTA cannot authorize projects until a new STIP and/or TIP are developed that contains only projects that are consistent with the metropolitan transportation plan that is still in effect
- A new conformity determination on the TIP would be needed unless it includes only exempt projects, synchronization projects, or TCMs in an approved SIP (however, this determination could rely on the previous regional emissions analysis as long as the requirements of 40 CFR 93.122(g) are met)

Scenario 3: If the metropolitan transportation plan and STIP and/or TIP have expired:

- The FHWA/FTA cannot authorize projects under the FHWA and FTA planning regulations

In summary, in order for projects to proceed during a conformity lapse grace period, the MPO and the State should ensure that a STIP and TIP with the desired projects, including exempt projects, are in place prior to the expiration of the metropolitan transportation plan. The MPO may want to amend its TIP before the metropolitan transportation plan expires to allow projects from the fifth year of the metropolitan transportation plan to proceed during the lapse grace period. The conformity determination for such an amended TIP would have to be made before the lapse grace period begins, but the determination could rely on the previous regional emissions analysis as long as the requirements of 40 CFR 93.122(g) are met.

6. How are projects affected if both the metropolitan transportation plan and TIP are still valid during the conformity lapse grace period?

If the metropolitan transportation plan and TIP are still valid at the time of the conformity lapse grace period, when the conformity lapse grace period is due to missing the 24-month conformity determination triggered by an EPA action for a SIP establishing a motor vehicle

emissions budget, then projects can continue to advance as long as all other project-level conformity and FHWA and FTA planning and other requirements have been met. Since both the metropolitan transportation plan and TIP are still valid, amendments can be made to exempt projects because they do not require a new conformity determination (exempt projects are listed in 40 CFR 93.126, 127, and 128)

7. How will the STIP be affected during the conformity lapse grace period?

The FHWA and FTA planning regulations require a TIP and STIP to be in place in order for FHWA/FTA to authorize projects. Therefore, in the area of the State under the conformity lapse grace period, FHWA/FTA can continue to authorize projects as long as the STIP and the TIP for that area are still in effect. However, no amendments can be made to the TIP and affected portion of the STIP if the metropolitan transportation plan has expired. It is important to note that while the lapse grace period may impact authorizations and amendments within in the affected portion of the STIP, transportation conformity does not apply to the STIP.

8. Can projects be found to conform (i.e., project level conformity be determined) during a conformity lapse grace period?

The Clean Air Act allows a non-exempt project to be found to conform during a conformity lapse grace period, as long as the project was included in the currently or most recently conforming metropolitan transportation plan and TIP and all other applicable project-level conformity requirements are met, including any required hot-spot analysis. Project-level conformity requirements are listed in Table 1 of the conformity regulations (40 CFR 93.109). Any Federal project must also meet FHWA and FTA's planning requirements to receive Federal funding and approval.

9. How should exempt projects be handled during a conformity lapse grace period?

Exempt projects (40 CFR 93.126) and traffic signal synchronization projects (40 CFR 93.128) can proceed during the conformity lapse grace period because conformity, including project level conformity determinations, does not apply to these projects. Projects that are exempt from regional emissions analysis (40 CFR 93.127) may proceed during a conformity lapse grace period if all other applicable project-level conformity requirements are met, including any required hot-spot analyses. For all FHWA/FTA projects, however, FHWA and FTA's planning and other project requirements must still be met (i.e., the project must be included in the TIP and STIP in order to receive Federal funding and approval).

10. Does the conformity lapse grace period apply to newly designated nonattainment areas?

No. The conformity lapse grace period does not apply to the deadline for newly designated nonattainment areas to determine metropolitan transportation plan and TIP conformity. This deadline is 12 months after the nonattainment designation becomes effective, as required under the Clean Air Act §176(c)(6) (42 U.S.C. §7506(c)(6)), and the conformity rule (40 CFR 93.102(d)). In a newly designed nonattainment area, if metropolitan transportation plan and TIP conformity has not been determined within 12-months of the effective date of being designated nonattainment, then the area will be in a conformity lapse.²

² Note that DOT and EPA use the term "lapse" to describe these situations, even though the statutory and regulatory definition of "lapse" does not cover a newly designated area since no conformity determination was ever made.

11. What happens at the end of the 12-month conformity lapse grace period?

At the end of the twelve month grace period, a conformity lapse will occur if a new metropolitan transportation plan and/or TIP conformity determination for applicable pollutants/NAAQS is not made.

12. What is a conformity lapse?

A conformity lapse, as defined in 42 U.S.C. 7506(c)(10) of the Clean Air Act and 40 CFR 93.101 of the transportation conformity rule, means that the conformity determination for a metropolitan transportation plan or TIP has expired, and thus there is no currently conforming metropolitan transportation plan or TIP.

13. How is a conformity lapse different from the conformity lapse grace period?

During a conformity lapse, the only projects that can receive further approvals are exempt projects and transportation control measures (TCMs) from an approved SIP. In accordance with 23 CFR 450.322(l) and 450.324(m), an exempt project or SIP-approved TCM must be included in an interim metropolitan transportation plan and TIP prior to advancement during a conformity lapse. Project phases, including, final design, right-of-way acquisition, or construction may proceed during a lapse if FHWA or FTA has made funding commitments or an equivalent approval or authorization prior to the conformity lapse³.

14. What is a conformity freeze? How does the conformity lapse grace period apply during a conformity freeze?

A conformity freeze occurs if EPA disapproves a control strategy SIP without a protective finding for the motor vehicle emissions budgets in that SIP (40 CFR 93.120(a)(2)). During a freeze, projects that are included in the first four years of the conforming metropolitan transportation plan and TIP can be advanced, but the MPO cannot make any new conformity determinations on the metropolitan transportation plan/TIP as a result of a metropolitan transportation plan/TIP revision until a new SIP is submitted with motor vehicle emissions budgets that EPA approves or finds adequate. If the SIP disapproval is not resolved within two years, highway sanctions would apply and the conformity freeze becomes a lapse. In this case, the lapse grace period would not apply.

The lapse grace period would only apply during a freeze if the metropolitan transportation plan or TIP expires before highway sanctions apply. An area that is in a conformity freeze and subsequently enters the lapse grace period would be in a conformity lapse at the end of the grace period, or when highway sanctions apply, whichever comes first.

15. Where can I find more information about the conformity lapse grace period?

Information about the conformity lapse grace period can be found in the “[Transportation Conformity Rule Amendments to Implement Provisions Contained in the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users \(SAFETEA-LU\); Final Rule](#)” (73 FR 4423-4425) and the transportation conformity rule (40 CFR 93.104(f)).

³ [Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity](#); Notice (67 FR 5882-5885)