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106TH CONGRESS, *2d Session* | SENATE | REPORT 106–228

EXTENSION OF CONFORMITY REGULATIONS UNDER THE CLEAN AIR ACT

FEBRUARY 2, 2000.—Ordered to be printed

Mr. SMITH of New Hampshire, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

MINORITY VIEWS

[to accompany S. 1053]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred the bill (S. 1053) to amend the Clean Air Act to incorporate certain provisions of the transportation conformity regulation, as in effect on March 1, 1999, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

GENERAL STATEMENT

Objectives of the Legislation

Section 176 of the Clean Air Act (CAA) requires all Federal activity to "conform" to implementation plans approved under the CAA. This section of law prohibits permitting, approval or funding of transportation projects by the Department of Transportation unless the project comes from a transportation plan that conforms with an implementation plan approved under the CAA. It also prohibits approval by a metropolitan planning organization of any project or

plan that does not conform to an implementation plan. The United States Court of Appeals recently found the Environmental Protection Agency (EPA) regulations implementing Section 176 to violate the CAA [Environmental Defense Fund v. Environmental Protection Agency, No. 97–1637, 1999 U.S. App. LEXIS 3161 (D.C. Cir. Mar. 2, 1999)]. That case highlighted shortcomings in both the law and the implementing regulations. The Court found that the regulations violate the law. The law allows no flexibility to continue activities prohibited by Section 176 during a short-term conformity lapse, to continue funding construction of project that was fully approved as part of a conforming transportation plan or to allow estimates from submitted, but unapproved plans, to be used for conformity determinations.

The Court found that the regulations inappropriately allowed certain transportation projects to be "grandfathered" from the conformity test without satisfying the requirements of Section 176. The central question in the aftermath of the case is, under what circumstances is it appropriate to allow transportation projects to proceed in the event that the transportation plan containing that project does not conform with the implementation plan describing an area's plan for achieving the National Ambient Air Quality Standards (NAAQS)? The case also leaves questions regarding the use of emission budgets from submitted, but unapproved, implementation plans for determining conformity.

The bill addresses this question by amending Section 176 to allow for a minimum of disruption in transportation planning and construction activities during a lapse in conformity. S. 1053 as reported by the committee attempts to strike a balance between the important goal of ensuring that transportation plans conform to emission limitations and strategies set forth in implementation plans and the desire to maintain a smooth and efficient process for planning, designing and constructing transportation projects.

The bill would permit transportation projects contained in a transportation plan to proceed if Federal funds have been obligated for the project, or a full funding grant agreement has been reached, or if the NEPA review process for that project has been completed not more than 2 years prior to the conformity lapse. The bill would also allow an emissions budget from a submitted, but not approved, implementation plan to be used for determining conformity.

Background

When it amended the CAA in 1977, Congress added a new Section 176 to the Act that required that any activity approved by a Federal agency conform to the affected State's implementation plans. In 1990, Section 176 was modified specifically to prohibit the approval by the Secretary of Transportation of any transportation plan unless it was demonstrated that the anticipated emissions from highway and transit projects contained in the 3-year transportation implementation program, together with the highway and transit emissions from the existing transportation system. The 1990 amendment was intended to encourage transportation planning officials and air quality officials to cooperate in the development of a transportation system that would address both mobility and air quality needs.

Since the implementation of the CAA Amendments of 1990, numerous transportation plans have been disapproved for both substantive and technical failures to comply with the conformity provisions in Section 176. Many of these failures have been rectified in a matter of months and with only minor adjustments to submitted plans. The implementation of the revised Section 176, along with revisions in Federal surface transportation laws, have resulted in improved coordination among air quality and transportation planners.

In some cases, however, institutional obstacles to coordination, coupled with rapid growth and persistent air quality problems continue to result in conformity lapses in some areas of the nation. In response to concerns raised by some transportation and air of ficials EPA promulgated a revised rule to govern the process of determining transportation conformity on August 15, 1997. Among the aims of these regulations was an effort to protect the continuity of highway projects for an area that could not demonstrate conformity of its transportation plans to its implementation plans.

Under this regulation, as under the previous (1993) regulation, if an area's transportation plan failed to conform with the State's implementation plan—if a conformity lapse occurred—the Section 176 prohibition on funding or approval of projects would be suspended under certain circumstances. The rule allowed continued activity on projects for which a review conducted according to the requirements of the National Environmental Policy Act of 1969 (NEPA) had been completed. The rule also made flexible other provisions of Section 176, including allowing conformity determinations to be based on emissions budgets from submitted implementation plans, even if no determination had been reached by EPA regarding the utility of those budgets in a State's effort to achieve the NAAQS.

Two extensions of the conformity status of one area by the United States Department of Transportation allowed that region time to make more than 100 projects eligible for grandfather status during the conformity lapse that followed the second extension of conformity for that area. Those actions led to the lawsuit against EPA's regulations. In deciding this case [cited above] the court found the flexible implementation of the CAA provided by EPA's 1997 rule to be beyond the authority granted by Section 176. In the wake of the decision, the Administration issued guidance to fill the void of regulations.

Because the current Administration guidance allows exemptions that appear to be beyond the clear authority granted by Section 176, legal jeopardy may persist for EPA's actions on conformity. Furthermore, because the guidance is more restrictive than the rule thrown out by the court, concern remains in the transportation community about the potential disruption for planning and construction activities during even brief conformity lapses that occur as a result of technical violations.

SECTION-BY-SECTION ANALYSIS

Section 1. Inapplicability of Transportation Conformity Funding Prohibition to Certain Transportation Projects

SUMMARY

Use of Emissions Budgets

The bill would modify Section 176 to permit conformity determinations to be made using emission budgets contained in a submitted, but unapproved implementation plan. Those emission budgets may be used for conformity determinations once the Administrator determines their adequacy for that purpose, or 90 days after the submission of the implementation plan, whichever is first.

Exemption From Conformity Test

The bill establishes a general rule for grandfathering individual projects from further conformity review. If, prior to a lapse of conformity, a funding agreement had been approved for the project the project can proceed during a lapse. The funding agreement can be either in the form of an approval of plans, specifications, and estimates under title 23 of United States Code, a full funding grant agreement under chapter 53 of title 49 of United States Code, or an equivalent approval. This step involves the commitment of funds from both the State and Federal Governments to complete the construction of a project.

The bill provides for a project to be temporarily grandfathered from conformity review if the project has not reached the point of a funding agreement, but a NEPA review for the project was completed not more than 2 years prior to the conformity lapse. Projects in that category shall be allowed to proceed for 1 year after the start of lapse. The 1-year limit on this grandfather provision will prevent projects from proceeding indefinitely unless conformity between transportation plans and air quality plans is demonstrated.

Regulation

Within 1 year of enactment of this bill, EPA would be required to promulgate regulations to implement this legislation. The bill would restore, for a period of 1 year from enactment of the bill, the regulations in effect immediately prior to the March 2, 1999 decision by the United States Court of Appeals. After the sooner of EPA promulgation of regulations under the authority that would be granted by this bill, or 1 year after enactment of this bill, the regulations in effect prior to the March 2, 1999 court decision would be nullified.

Activity During a Conformity Lapse

The bill also extends the opportunity for State and local governments to use their own resources during a conformity lapse to prevent interruption of a project that may not be eligible for either of the two previously described categories. Once the transportation plan that includes those projects is found to conform with the implementation plan, State and local expenditures incurred during a lapse for right-of-way acquisition or design activities could be counted toward a State's obligated share of project funding under

title 23 or title 49 of United States Code. During a conformity lapse, mass transportation projects also would be grandfathered from the prohibitions in Section 176 on approval, acceptance or funding.

DISCUSSION

After EPA's conformity regulations were overturned in court, transportation officials expressed concern that highway construction could be interrupted by conformity lapses occurring after all approvals had been granted. Delays caused by a conformity lapse could jeopardize transportation safety, increase costs, and impact economic development while planning officials addressed concerns regarding future expansions of the transportation system.

By allowing a funding agreement to serve as a final point at which a project may be reviewed for conformity the bill treats the agreement as a contract that, once committed to, should be honored as such irrespective of subsequent developments. By allowing a temporary grandfather for projects that have met NEPA requirements, disruption in transportation activities is minimized.

Section 2. Effect of Revised Ozone Standards on Conformity Determinations

SUMMARY

The bill would ensure that no area shall be considered out of conformity with an implementation plan solely because it is designated nonattainment for an ozone standard promulgated after January 1, 1997 until an implementation plan is required to be submitted to address the new standard. One year from the date the Administrator finds adequate the emission budgets contained in an implementation plan for a new standard an area would no longer be protected from conformity determinations based solely on the new standard.

DISCUSSION

Due to litigation, the final form of the standards promulgated by EPA in November 1997 remains unclear. Under current law, States would be required to submit attainment designations for the 8-hour ozone standards regardless of the status of litigation involving the rule. In the past, the courts have declared attainment designations to be the starting point for application of the conformity requirement. The result of applying conformity after attainment designations in this case would be to judge conformity without any certainty that the 8-hour standard would become enforceable Federal policy.

Section 176 is explicit in requiring conformity to be judged against implementation plans. Until plans are required to be submitted describing how an area intends to attain a newly promulgated standard, it is impossible to determine conformity against that plan.

The bill would prohibit the application of the conformity test for the new standard until a year after the emission estimates contained in the relevant implementation plan are determined to be adequate by the Administrator.

HEARINGS

The Committee on Environment and Public Works held no hearings on S. 1053. On July 14, 1999, the Committee on Environment and Public Works held a hearing on conformity under the Clean Air Act. Testimony was given by Robert Perciasepe, Assistant Administrator, Office of Air and Radiation, Environmental Protection Agency; Kenneth R. Wykle, Administrator, Federal Highway Administration, Department of Transportation; Gordon J. Linton, Administrator, Federal Transit Administration; Dean E. Carlson, Secretary of Transportation, Kansas Department of Transportation; Jacob L. Snow, General Manager, Clark County, Nevada, Regional Transportation Commission; Jack Stephens, Jr., Executive Vice President, Customer Development, Metro Atlanta Rapid Transit Authority; Jack Kinstlinger, Vice Chairman, American Road and Transportation Builders Association; Mark Pisano, Executive Director, Southern California Association of Governments; Michael Replogle, Federal Transportation Director, Environmental Defense Fund. Also, a number of statements were submitted for inclusion in the record.

LEGISLATIVE HISTORY

On May 14, 1999, S. 1053 was received in the Senate, read twice, and referred to the Committee on Environment and Public Works. On September 29, 1999 the committee held a business meeting to consider the bill. An amendment offered by Senators Chafee and Bond was agreed to by a a roll call vote of 10 ayes and 8 nays. Voting in favor were Senators Bennett, Bond, Chafee, Crapo, Hutchison, Inhofe, Smith, Thomas, Voinovich, and Warner. Voting against were Senators Baucus, Boxer, Graham, Lautenberg, Lieberman, Moynihan, Reid, and Wyden. An amendment offered by Senator Inhofe was agreed to by a a roll call vote of 10 ayes and 8 nays. Voting in favor were Senators Bennett, Bond, Chafee, Crapo, Hutchison, Inhofe, Smith, Thomas, Voinovich, and Warner. Voting against were Senators Baucus, Boxer, Graham, Lautenberg, Lieberman, Moynihan, Reid, and Wyden. S. 1053 was ordered reported by a voice vote with Senator Baucus voting nay.

REGULATORY IMPACT STATEMENT

Section 11(b) of rule XXVI of the Standing Rules of the Senate requires publication in the report of the committee's estimate of the regulatory impact of the bill as reported. S. 1053, as reported, is expected to impose no new regulatory impact. This bill will not affect the personal privacy of individuals.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the committee makes the following evaluation of the Federal mandates contained in the reported bill. S. 1053, as reported, imposes no Federal intergovernmental mandates on State, local, or tribal governments.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of a reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 27, 1999.

Hon. JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1053, a bill to amend the Clean Air Act to incorporate certain provisions of the transportation conformity regulations, as in effect on March 1, 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are James O'Keeffe (for Federal costs), who can be reached at 226–2860, and Lisa Cash Driskill (for the State and local impact), who can be reached at 225–3220.

Sincerely,

DAN CRIPPEN.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 1053, A bill to amend the Clean Air Act to incorporate certain provisions of the transportation conformity regulations, as in effect on March 1, 1999, as ordered reported by the Senate Committee on Environment and Public Works on September 29, 1999

S. 1053 would permit highway and mass transit construction projects that have been halted by certain requirements of the Clean Air Act (CAA) to resume. CBO expects that allowing these projects to continue would not significantly affect Federal spending. Generally, funds for highway and mass transit projects can be switched from halted to unaffected projects. That is not the case, however, for a small amount of the funds that have been specified for some individual projects. Since S. 1053 would allow a number of such specified projects to resume construction, enacting the bill could result in some money being spent sooner than it would be under current law, but we estimate that any shift in the timing of outlays would be less than $500,000 a year.

The CAA requires the Department of Transportation (DOT) to approve regional transportation plans and programs in certain areas to assure that they conform with air quality standards contained in States' implementation plans. If an area transportation plan does not conform with the implementation plan—known as a conformity lapse—then certain federally funded projects cannot proceed. In implementing this provision of the CAA, the Environmental Protection Agency (EPA) issued a rule with a provision allowing DOT to fund projects under certain circumstances during a conformity lapse. A March 1999 court decision, however, over-

turned this provision of the rule. S. 1053 would effectively reinstate this provision of the rule for one year and would direct the EPA to issue a new rule allowing transportation projects to proceed under certain conditions during a conformity lapse.

If enacted this fall, S. 1053 would accelerate the spending of some funds already made available in the DOT appropriation act for fiscal year 2000 (Public Law 106–69), because work on a few projects is currently halted. Because that change would not be subject to further appropriation action, it would constitute a change in direct spending, and thus, pay-as-you-go procedures would apply to the bill. Based on information from DOT and from State departments of transportation, CBO estimates that relatively few projects would be affected. We estimate that enactment of the bill would increase spending in 2000 by less than $500,000, and that this would be offset by an equivalent reduction in outlays over the next few years.

S. 1053 also would direct EPA to issue new CAA regulations as described in this bill. Based on information from the agency, we estimate that implementing this provision would cost less than $250,000 and would be subject to the availability of appropriated funds.

S. 1053 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments. It would make it easier for State and local governments to continue construction on transportation projects that might otherwise be halted because of certain CAA requirements.

The CBO staff contacts are James O'Keeffe (for Federal costs), who can be reached at 226–2860, and Lisa Cash Driskill (for the State and local impact), who can be reached at 225–3220. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

MINORITY VIEWS OF SENATORS BAUCUS, MOYNIHAN, LAUTENBERG, REID, GRAHAM, LIEBERMAN, BOXER, AND WYDEN

We agree that, as the report says, we must strike a balance between assuring that transportation plans conform to clean air emission reduction plans and doing so in a way that facilitates efficient transportation planning, design, and construction.

However, we believe that this bill undermines, rather than promotes, that balance. We also believe that the bill needlessly undermines progress toward reducing ozone and other pollutants.

Turning first to transportation conformity, we repeat the words of this committee's report (S. Rept. 101–228, 101st Cong., 1st Sess. 29 (1989)) on the bill that became the Clean Air Act Amendments of 1990: "[T]he transportation conformity requirements [of the Act] are to encourage medium- and long-range planning that takes into account air quality concerns and *does not defer to a late date decisions about the air quality impacts of a particular project.*" (Emphasis added.)

Unfortunately, in some cases, that is precisely what has happened. The situation in Atlanta (which is alluded to in the report) is an example. Through a combination of poor coordination, slow implementation, and lax enforcement, conformity decisions were deferred to a late date. Federal agencies exacerbated the situation by issuing regulations that went well beyond the scope of section 176 of the Clean Air Act, such as by allowing certain projects to be exempt from conformity forever, as long as a NEPA analysis had been conducted at some point. That practice was particularly harmful when multi-part projects were approved *in toto* based on analysis of only the first segment. As the court of appeals said, in invalidating the regulations, the regulation is "unlawful because [it] departs from the criteria for demonstrating conformity established in . . . the Clean Air Act" (Environmental Defense Fund v. Browner, 167 F. 3rd 641, 651 (D.C. Cir. 1999)).

We agree with the majority that the court's decision created a practical problem because of uncertainty about when current projects would be protected from a conformity lapse. However, since the court decision, the Department of Transportation and the Environmental Protection Agency have issued a guidance that provides clarification, by allowing projects that have been funded for construction to proceed without further challenge. At our July 14 hearing, we heard substantial testimony that the guidance is workable and will allow projects to continue. Further, as EPA Assistant Administrator Robert Perciasepe testified, this approach "avoids creating a large pipeline of projects that could be built even when we know that they may contribute to an air quality problem and further prevent an area from demonstrating conformity."

Although we agree that it is appropriate to codify the guidance, to provide legal certainty, the reported bill goes much further. It effectively reinstates the invalidated regulation for a year and allows projects to proceed for a year after a conformity lapse, regardless of the impact on air quality, as long as a NEPA analysis has been conducted within 2 years. This threatens to create the very pipeline of projects that Assistant Administrator Perciasepe warned against. Alternatively, it could create an incentive to rush

through an inadequate NEPA analysis in anticipation of a looming conformity lapse. Either result would be contrary to the Act's goals.

Turning to ozone standards, section two of the bill comprises an amendment offered during the committee markup by Senator Inhofe. It is largely unrelated to the underlying bill. And it threatens to start another skirmish in the long struggle over the Administration's 1997 8-hour ozone standard.

After that standard was promulgated, Congress included a provision, in the "TEA-21" highway bill that was enacted last year, that requires EPA to designate the communities that do not meet the standard (that is, are in nonattainment) in July 2000. Since then, a court of appeals has held that the standard is unenforceable, but indicated that EPA retains the authority to designate areas as nonattainment under an 8-hour ozone standard. The government has sought a rehearing of the decision, and the litigation is likely to continue for a long time, perhaps years.

In response, the bill suspends the conformity requirement for the new 8-hour ozone standard until 1 year after States are required to submit State implementation plans for that standard. In effect, this delays the application of the conformity requirement for areas everywhere that would have been designated as nonattainment for that standard until approximately 4 years after the current litigation is finally resolved, whenever that may be. This is an unnecessary and irresponsible delay that weakens the public health purpose of designation.

The decision by the court of appeals does create a problem. But it is a limited problem, requiring a limited legislative solution. The only communities that will be faced with a sudden need to demonstrate conformity are ones that have never been in nonattainment before, but find themselves in nonattainment with the 8-hour standard. They may lack the data and expertise to submit a SIP or a vehicle emissions budget by July 2000. We support targeted legislation protecting these communities, but believe that conformity must apply where air quality is deemed to be unhealthy.

On the other hand, communities that are already in nonattainment with the current 1-hour ozone standard generally already have the needed information and experience on hand to demonstrate conformity. For example, their current vehicle emissions budgets most likely can be used to demonstrate conformity until such time as a new 8-hour standard becomes effective. For these communities, technical nonconformity, if any occurs, will be brief and will not have a significant practical consequence.

Nevertheless, the reported bill provides these communities with an open-ended exemption, which could delay the implementation of measures to further reduce ozone pollution by many years, denying millions of Americans the benefits of healthier air. This is unacceptable.

We disagree with the approaches that the Majority has taken in both section one and section two of this bill. However, we remain willing to discuss both issues to attempt to find a targeted solution that will protect public health and provide certainty for States, highway contractors, and communities.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in *italic*, existing law in which no change is proposed is shown in roman:

CLEAN AIR ACT [1]

[As Amended Through Public Law 104–89, January 4, 1996]

* * * * * * *

LIMITATIONS ON CERTAIN FEDERAL ASSISTANCE

SEC. 176.

[Subsections (a) and (b), repealed by Public Law 101–549, sec.110(4), 104 Stat. 2470.]

(c)(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 110. No metropolitan planning organization designated under section 134 of title 23, United States Code, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 110. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

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. *For the purpose of this subsection, estimates of emissions from motor vehicles and necessary emissions reductions contained in a submitted implementation*

[1] The Clean Air Act (42 U.S.C. 7401-7626) consists of Public Law 159 (July 14, 1955); 69 Stat. 322) and the amendments made by subsequent enactments.

plan may be used in lieu of an approved implementation plan if no approved implementation plan is available. If the Administrator does not determine the adequacy of any estimates of emissions submitted to the Administrator for use under the preceding sentence within 90 days after the date of submission of the estimates, the estimates shall be deemed to be adequate.

(2) Any transportation plan or program developed pursuant to title 23, United States Code, or the Urban Mass Transportation Act shall implement the transportation provisions of any applicable implementation plan approved under this Act applicable to all or part of the area covered by such transportation plan or program. No Federal agency may approve, accept or fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this Act. In particular—

(A) no transportation plan or transportation improvement program may be adopted by a metropolitan planning organization designated under title 23, United States Code, or the Urban Mass Transportation Act, or be found to be in conformity by a metropolitan planning organization until a final determination has been made that emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan, and that the plan or program will conform to the requirements of paragraph (1)(B);

(B) no metropolitan planning organization or other recipient of funds under title 23, United States Code, or the Urban Mass Transportation Act shall adopt or approve a transportation improvement program of projects until it determines that such program provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan;

(C) a transportation project may be adopted or approved by a metropolitan planning organization or any recipient of funds designated under title 23, United States Code, or the Urban Mass Transportation Act, or found in conformity by a metropolitan planning organization or approved, accepted, or funded by the Department of Transportation only if it meets either the requirements of subparagraph (D) or the following requirements—

(i) such a project comes from a conforming plan and program;

(ii) the design concept and scope of such project have not changed significantly since the conformity finding regarding the plan and program from which the project derived; and

(iii) the design concept and scope of such project at the time of the conformity determination for the program was adequate to determine emissions.

(D) Any project not referred to in subparagraph (C) shall be treated as conforming to the applicable implementation plan only if it is demonstrated that the projected emissions from such project, when considered together with emissions projected for the conforming transportation plans and programs within the nonattainment area, do not cause such plans and programs to exceed the emission reduction projections and schedules assigned to such plans and programs in the applicable implementation plan.

(E) EXTENSION OF CONFORMITY DETERMINATION AFTER APPROVAL OF CERTAIN TRANSPORTATION PROJECTS.—

(i) IN GENERAL.—Notwithstanding subparagraphs (C) and (D), any transportation project that received an approval described in clause (iii), after compliance with subparagraph (C) or (D), may be implemented even if the Administrator subsequently determines that the conformity of the applicable transportation plan and program to the applicable implementation plan has lapsed (referred to in this subsection as a 'conformity lapse').

(ii) TRANSITION PROVISION.—Notwithstanding subparagraphs (C) and (D), any transportation project that received an approval described in clause (iii) before March 2, 1999, may be implemented without any additional conformity determination.

(iii) TYPES OF APPROVAL.—An approval described in this clause is—

(I) an approval of plans, specifications, and estimates under title 23, United States Code;

(II) a full funding grant agreement under chapter 53 of title 49, United States Code; or

(III) an approval or authorization equivalent to an approval or agreement under subclause (I) or (II).

(F) EXTENSION OF CONFORMITY DETERMINATION FOR REVIEWED PROJECTS.—Notwithstanding subparagraphs (C) and (D), any transportation project for which a review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) has been completed within the 2-year period preceding a conformity lapse may be implemented for a period ending not later than 1 year after the date of commencement of the lapse.

(3) Until such time as the implementation plan revision referred to in paragraph (4)(C) is approved, conformity of such plans, programs, and projects will be demonstrated if—

(A) the transportation plans and programs—

(i) are consistent with the most recent estimates of mobile source emissions;

(ii) provide for the expeditious implementation of transportation control measures in the applicable implementation plan; and

(iii) with respect to ozone and carbon monoxide nonattainment areas, contribute to annual emissions

reductions consistent with sections 182(b)(1) and 187(a)(7); and

(B) the transportation projects—

(i) come from a conforming transportation plan and program as defined in subparagraph (A) or for 12 months after the date of the enactment of the Clean Air Act Amendments of 1990, from a transportation program found to conform within 3 years prior to such date of enactment; and

(ii) in carbon monoxide nonattainment areas, eliminate or reduce the severity and number of violations of the carbon monoxide standards in the area substantially affected by the project.

With regard to subparagraph (B)(ii), such determination may be made as part of either the conformity determination for the transportation program or for the individual project taken as a whole during the environmental review phase of project development.

[(4)(A) No**]**

(4) CRITERIA AND PROCEDURES FOR DETERMINING CONFORMITY.—

(A) PROMULGATION.—

(i) INITIAL PROMULGATION.—Not later than one year after the date of enactment of the Clean Air Act Amendments of 1990, the Administrator shall promulgate criteria and procedures for determining conformity (except in the case of transportation plans, programs, and projects) of, and for keeping the Administrator informed about, the activities referred to in paragraph (1). No later than one year after such date of enactment, the Administrator, with the concurrence of the Secretary of Transportation, shall promulgate criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects. A suit may be brought against the Administrator and the Secretary of Transportation under section 304 to compel promulgation of such criteria and procedures and the Federal district court shall have jurisdiction to order such promulgation.

(ii) SUBSEQUENT PROMULGATION.—

(I) IN GENERAL.—Not later than 1 year after the date of enactment of this clause, the Administrator shall promulgate criteria and procedures for demonstrating and ensuring conformity in the case of transportation plans, programs, and projects.

(II) EFFECTIVE DATE OF PRIOR REGULATIONS.—Regulations promulgated under clause (i) and in effect before March 2, 1999, shall be in effect as originally promulgated, notwithstanding the decision of the court in Environmental Defense Fund v. Environmental Protection Agency, 167 F.3d 641 (D.C. Cir. 1999)—

(aa) beginning on the date of enactment of this clause; and

(bb) ending on the earlier of the effective date of regulations promulgated under this clause or 1 year after the date of enactment of this clause.

(III) APPLICABILITY OF REGULATIONS.—

(aa) INITIAL REGULATIONS.—The regulations described in subclause (II) shall apply to any conformity lapse that occurs before the effective date of regulations promulgated under subclause (I) but only until the date of promulgation of the regulations under subclause (I).

(bb) SUBSEQUENT REGULATIONS.—The regulations promulgated under subclause (I) shall apply to any conformity lapse that occurs on or after the effective date of regulations promulgated under subclause (I).

(IV) ACTION TO COMPEL PROMULGATION.—A civil action may be brought against the Administrator under section 304 to compel promulgation of regulations under this clause.

(B) The procedures and criteria shall, at a minimum—

(i) address the consultation procedures to be undertaken by metropolitan planning organizations and the Secretary of Transportation with State and local air quality agencies and State departments of transportation before such organizations and the Secretary make conformity determinations;

(ii) address the appropriate frequency for making conformity determinations, but in no case shall such determinations for transportation plans and programs be less frequent than every three years; [and]

(iii) address how conformity determinations will be made with respect to maintenance plans[.] *; and*

(iv) provide for a period of 90 days between—

(I) the date on which a State implementation plan under section 110 is disapproved; and

(II) the effective date of the prohibition on approval, acceptance, or funding under this subsection.

(C) Such procedures shall also include a requirement that each State shall submit to the Administrator and the Secretary of Transportation within 24 months of such date of enactment, a revision to its implementation plan that includes criteria and procedures for assessing the conformity of any plan, program, or project subject to the conformity requirements of this subsection.

(5) APPLICABILITY.—This subsection shall apply only with respect to—

(A) a nonattainment area and each pollutant for which the area is designated as a nonattainment area; and

(B) an area that was designated as a nonattainment area but that was later redesignated by the Administrator as an attainment area and that is required to develop a maintenance plan under section 175A with respect to the

specific pollutant for which the area was designated nonattainment.

(6) ACTIVITY DURING A CONFORMITY LAPSE.—

(A) ATTRIBUTION OF NON-FEDERAL FUNDS.—In the case of a project for which a review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) has been completed, non-Federal funds applied toward right-of-way acquisition or design activities during a period of conformity lapse may be attributed to a State's obligated share of project funding under title 23 or title 49, United States Code, at such time as a transportation plan or transportation improvement program that includes the project is determined to conform to the implementation plan.

(B) MASS TRANSPORTATION PROJECTS.—During a period of conformity lapse, the prohibition on approval, acceptance, or funding under this subsection shall not apply to the funding of any project for mass transportation (as defined in section 5302 of title 49, United States Code).

(7) EFFECT OF REVISED OZONE STANDARD.—

(A) IN GENERAL.—Until the date described in subparagraph (B), notwithstanding any other provision of law, an area shall not be considered to be out of conformity with an implementation plan under this Act for the sole reason that the area is a nonattainment area under section 107 with respect to a revised national ambient air quality standard for ozone promulgated after January 1, 1997.

(B) DATE.—For any area, the date referred to in subparagraph (A) is the date that is 1 year after the date on which the Administrator determines to be adequate, with respect to the area, the estimates of emissions from motor vehicles and necessary emissions reductions contained in an implementation plan, regardless of whether the implementation plan itself has been approved.

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