

GAO

Report to the Chairman, Subcommittee
on Oversight and Investigations,
Committee on Energy and Commerce,
House of Representatives

March 1990

AIR POLLUTION

EPA Needs More Data From FHWA on Changes to Highway Projects



RESTRICTED—Not to be released outside the
General Accounting Office unless specifically
approved by the Office of Congressional
Relations.

548045

**Resources, Community, and
Economic Development Division**

B-217221

March 20, 1990

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

Your May 31, 1988, letter expressed concern that the Environmental Protection Agency (EPA) and the Department of Transportation were inadequately addressing the impacts of transportation and highway programs on air pollution and that these impacts were becoming greater, particularly in cities such as Denver, Colorado; Phoenix, Arizona; and Los Angeles, California. In response to your request and subsequent discussions with your office, this report addresses the implementation of the Clean Air Act requirement that federally funded highway projects conform to state implementation plans (SIPs) designed to reduce air pollution. Specifically, we examined how conformity was determined and the roles of the Department's Federal Highway Administration (FHWA) and EPA in making this determination.

Results in Brief

The Clean Air Act prohibits FHWA from approving any activity that does not conform to EPA-approved SIPs, but it does not specify how conformity should be determined. EPA and FHWA disagree on whether air quality analysis of individual highway projects is needed to determine conformity.

An air quality analysis of the total highway system, including existing roads and planned projects is performed during SIP development. FHWA believes this analysis is sufficient and that subsequent analyses of individual projects are not necessary to determine conformity. It maintains that highway programs conform if they appropriately schedule and implement SIP measures designed to control transportation-related pollution. On the other hand, EPA believes that in addition to the analysis made when the SIP is developed, more air quality analysis of major individual highway projects should be performed before construction begins when the projects are better defined.

Although our review of the act indicates that FHWA is acting within its authority when it declines to perform the additional air quality analysis,

EPA's assurance that Clean Air Act goals are achieved could be enhanced if it had information on the extent to which plans and assumptions made during the SIP formulation have held true. However, the local planning agencies did not consistently provide EPA with information on changes in plans and assumptions, such as changes to construction projects or progress in implementing transportation control measures, which may have affected air quality. Reporting program information to EPA is not part of the conformity determination, per se. However, we discussed our observations with EPA and FHWA officials, and EPA officials agreed that such information would be useful, and FHWA officials were willing to provide more information to EPA.

Background

The Clean Air Act required states to prepare SIPs detailing the strategies to attain and maintain health-related primary air quality standards for six pollutants. Carbon monoxide and ozone—two of the six—are by-products of motor vehicle use. The SIP process is a cooperative effort involving EPA, state governments, and local jurisdictions. Elements of the process include inventorying emission sources, identifying needed control measures, adopting and enforcing these measures, and reporting and evaluating progress. Clean Air Act amendments currently under consideration by the Congress include provisions for additional state-implemented measures and strategies to be included in EPA-approved SIPs to attain Clean Air Act goals.

Metropolitan planning organizations, which are responsible for urban transportation planning, also participate in the SIP development process at the local level. Since motor vehicles are a significant source of hydrocarbons, which contribute to ozone pollution, and of carbon monoxide, the planning organizations help compile emission inventories of these pollutants by estimating vehicle travel for their areas. They also identify SIP control measures which, if implemented, would reduce pollution from transportation sources. These measures can include increasing transit ridership, improving traffic signalization, constructing bus and car pool lanes, and other steps to reduce vehicle travel and traffic congestion.

The transportation planning responsibilities of metropolitan planning organizations include preparing a comprehensive local transportation plan and an annual transportation improvement program. The annual program identifies and schedules highway and transit projects that local officials agree could be federally assisted. These annual programs include proposed funding for highway construction projects, but they

may also include funding to implement SIP transportation control measures. For example, an annual program may include funding for a ridesharing program to accomplish a SIP transportation control measure goal of increasing vehicle occupancy levels and reducing traffic congestion.

Appendix II discusses the SIP and transportation planning processes in more detail, and Appendix III lists selected transportation control measures included in SIPs for the metropolitan areas included in our review.

EPA and FHWA Disagree on Whether Air Quality Analysis Is Needed for Highway Projects

Section 176(c) of the Clean Air Act provides that no federal entity may support any activity and that no metropolitan planning organization may approve any project that does not conform to the applicable SIP, but it does not indicate specifically how conformity is determined. This is important because EPA and FHWA have a long-standing and unresolved disagreement over whether air quality analysis of individual highway projects after SIP development is needed to ensure conformance or whether transportation plans as a whole can be found to conform.

EPA believes that in addition to the analysis performed during SIP development, FHWA should require more air quality analysis of highway projects and programs to comply with section 176(c). An EPA official told us that FHWA should require further analysis of major projects before construction, particularly for carbon monoxide impacts. He also told us that highway agencies should determine the areawide hydrocarbon impact of transportation improvement programs each year and that EPA is concerned that changes in project scope, such as adding lanes, are not adequately assessed.

FHWA believes that the overall highway system operation and total vehicle use and their air quality impacts should be considered when SIPs are developed or revised. Under the current FHWA regulations, individual projects are not required to be analyzed or approved for conformity if the transportation plan and annual improvement program conform. The act gives FHWA the ultimate authority to determine whether the activity conforms to the applicable SIP or not. Appendix V discusses the authority for determining conformity in more detail.

During our review, we found that the planning organizations for Denver, Phoenix, and Los Angeles considered the impact of highway projects on emissions in developing the regional elements of their SIPs. According to organization officials, the physical characteristics of existing and

planned highways, such as the number of lanes, along with other data, such as estimates of future population and employment, were used in complex models to forecast future traffic levels. These estimates were, in turn, included with a variety of data in other models that estimated areawide emission levels.

The impacts on air quality of individual projects were not identifiable because project data was just one of many factors considered in the models used in SIP development. However, we found some indication of the impact of highway projects on an area's air quality. For example, a 1979 Los Angeles planning organization study reported that over 500 planned highway and other transportation projects would reduce both hydrocarbons and carbon monoxide by less than 1 percent. We also spoke with Connecticut highway officials because they are required by their SIP to determine annually how planned highway projects will affect state hydrocarbon levels. They told us that the analyses they have conducted over a 9-year period have consistently indicated that highway projects improve state air quality by reducing congestion.

Conceding that projects may temporarily reduce emissions by relieving traffic congestion, EPA officials are concerned that, in the long run, the increased capacity resulting from highway construction will encourage more driving, which could increase pollution. However, according to FHWA officials, project traffic forecasts do not show induced travel to be a significant factor.

EPA Not Aware of Changes to Highway Projects

EPA officials also were concerned that highway projects might have changed or expanded after SIPs were developed, so their most recent impact on air quality would not have been considered. Our analysis of planned projects in the three metropolitan areas indicated that some changes, involving both project expansion and construction delays, in fact occurred. Since project changes were not systematically tracked and reported to EPA, it had no basis to identify the changes and their effect on SIP clean air objectives.

Five of 23 major highway projects considered in the 3 cities' 1982 SIP revisions were constructed on a larger scale than planned. In addition, two major projects were constructed that were not considered in the SIP analyses. Of these seven projects, five increased highway capacity by adding freeway lanes, one extended a lane project by one mile, and one involved the construction of an unplanned freeway segment. On the

other hand, 13 of the other projects included in the SIPs were not completed by 1987 as planned because, according to planning organization officials, of funding and other problems.¹ Appendix IV compares planned and actual highway projects for the three areas.

With one exception, the planning organizations did not track and report to EPA on the status of highway projects, and none of the organizations had data on the effect that project modifications might have had on the 1987 ozone and carbon monoxide levels estimated in their SIPs. The Los Angeles planning organization reported the status of some major projects but did not discuss scope changes or measure air quality impacts. Although the impacts of the changes were not quantified, some highway officials told us that expanding construction projects generally relieved traffic congestion and reduced emissions, while not completing planned projects may contribute to congestion and increased vehicle emissions.

Recognizing that the disagreement over air quality analysis had not been resolved and that more information on highway projects could serve as a basis for discussions concerning actions to achieve clean air goals, we discussed with EPA and FHWA officials the usefulness of obtaining information on changes to projects and other SIP assumptions. Although reporting such information is not part of the conformity determinations, per se, EPA officials agreed that such information could be useful, and FHWA officials told us they were willing to provide project status information to EPA.

Better Information on Implementing Transportation Control Measures Needed

FHWA's regulations, based on a June 12, 1980, agreement between the Department of Transportation and EPA, establish several criteria for determining whether transportation plans and programs conform to SIPs, including whether they appropriately schedule and implement SIP transportation control measures. These measures include the construction of bus and car pool lanes, programs to form van pools, projects to synchronize traffic signals, or projects to increase transit ridership. They are important because they are part of a state and local strategy for achieving clean air by mitigating the pollution caused by motor vehicles.

¹ A Denver planning organization official pointed out that while they were not completed, significant progress had been made on some projects by the end of 1987.

While certifying that their annual transportation improvement programs conformed to SIPs, the planning organizations for the three cities did not always provide enough information in the programs to demonstrate their progress in implementing transportation control measures. For example, the Denver organization certified that its 1989-93 highway program conformed to their SIP but did not assess the adequacy of funding for control measures or the progress made in implementing them.

Although the Los Angeles and Phoenix programs included information on budgeted funding levels and planned actions, they usually did not discuss past progress in carrying out the control measures. Budgeting funds to implement control measures does not guarantee that they will be spent or that the measures will succeed. In fact, we found that some measures may not have been fully funded or successfully implemented.

For example, the 1987 Los Angeles annual program for fiscal years 1988-92 indicated that funds were being budgeted at planned target levels for a ridesharing program. However, the agency's subsequent progress report to EPA indicated that the ridesharing program had not successfully increased the average number of passengers per car as planned. Based on state highway observations, the average had decreased, resulting in an estimated daily increase of 10 tons of hydrocarbons that contribute to ozone pollution instead of a planned 8-ton decrease.

A Los Angeles planning organization official told us that his agency encounters several problems in trying to ensure progress in implementing transportation control measures. He said, for example, that target funding for the ridesharing program was set at a minimal level that might not accomplish SIP objectives. He also said that his agency is unaware of actual program expenditures since it does not receive that information from highway officials. This official said it is often difficult to translate SIP transportation control measure objectives—such as increasing the number of passengers per car—into highway funding or other measurable program goals. Finally, factors beyond an organization's control may affect progress in achieving objectives. The price of gasoline, for example, may have a significant impact on people's willingness to participate in ridesharing.

For other control measures, such as a Denver car pool lane project, progress is more easily tracked. While Denver's annual transportation improvement program did not assess progress, we found that the project's completion had been postponed beyond the 1987 date specified in

the SIP, primarily because of funding problems. In 1986, the state highway agency reallocated a substantial amount of the project's funding to a construction project with higher priority because federal highway funding was less than had been anticipated. At the planning organization's request, the state agency later agreed to provide the funds needed to complete the car pool lane project by 1992 if planned funding from federal and other sources was received.

After we discussed our analysis of control measures with them, metropolitan planning organization officials told us they could provide EPA more information in their annual programs on actual progress in implementing the control measures. However, they also pointed out that information on progress in implementing control measures is already required in annual SIP progress reports to EPA.

FHWA officials also told us they were willing to provide information on actual progress in implementing control measures but believed that such information, as well as information on the status of construction projects, would be more appropriately included in annual progress reports submitted to EPA. An EPA official told us that more information on control measures and construction projects would be useful, regardless of how it was conveyed.

However, we found that progress reports sometimes were not submitted or were submitted late. The Denver air quality agency did not submit a 1987 progress report according to an EPA official, and the Los Angeles agency submitted its report in January 1989, six months after it was due. We discussed our observations with EPA regional officials but did not pursue the matter further because more extensive oversight changes will likely result from legislation currently before the Congress.

Conclusions

Our review of section 176(c) indicates that while it does not specify the timing or degree of detail of air quality analysis needed to determine conformity, it gives the funding agency, FHWA, the authority to make those determinations. An air quality analysis of the highway system is performed during the SIP planning process. FHWA is acting within its authority in declining to perform additional air quality analysis as part of the conformity determination. However, EPA retains a vital interest in ensuring clean air goals are not compromised after SIPs are developed as a result of changes in highway construction or transportation control measures not being completely supported. FHWA officials told us they

understand EPA's need for more information on projects and control measures and were willing to provide it.

Recommendations

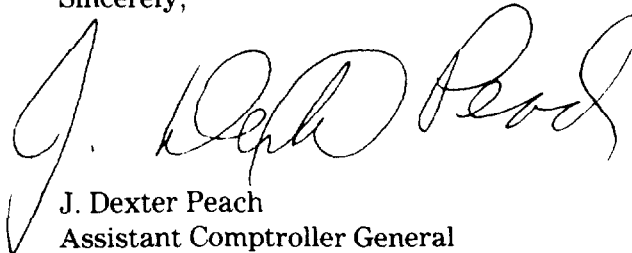
We recommend that the EPA Administrator (1) work with the Administrator, FHWA, to develop procedures for reporting on the status of major highway projects and (2) take actions to assure the timely receipt of information on progress in implementing transportation control measures.

As requested, we conducted much of our work in the metropolitan areas of Denver, Colorado; Phoenix, Arizona; and Los Angeles, California. We reviewed legislation, regulations, SIPS, transportation plans and programs, progress reports and other relevant information. We also discussed conformity issues with officials of EPA, FHWA, and local agencies. Our work was performed between January and October 1989 in accordance with generally accepted government auditing standards. Appendix I contains more details on our objectives, scope, and methodology. We discussed our findings with EPA and FHWA officials and have included their comments where appropriate. However, as you requested, we did not obtain written comments on a draft of this report.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the date of this letter. At that time we will send copies to the Secretary of Transportation; the Administrator, Environmental Protection Agency; other interested parties; and make copies available to others upon request.

This work was performed under the direction of Richard L. Hembra, Director for Environmental Protection Issues, (202) 275-6111. Other major contributors to this report are listed in Appendix VI.

Sincerely,



J. Dexter Peach
Assistant Comptroller General

Contents

Letter	1
Appendix I Objectives, Scope, and Methodology	12
Appendix II Air Quality and Transportation Planning Process	14
Appendix III Selected Transportation Control Measures Planned to Be Implemented by 1987 With Transportation Program Funds	16
Appendix IV Major Highway Construction Included in State Plans and Completed by December 1987 for Three Metropolitan Areas	17

Appendix V Analysis of Conformity Requirement in 1977 Clean Air Act Amendments	18
Appendix VI Major Contributors to This Report	22

Abbreviations

DOT	Department of Transportation
EPA	Environmental Protection Agency
FHWA	Federal Highway Administration
MPO	Metropolitan Planning Organization
NPRM	Notice of Proposed Rulemaking
SIP	State Implementation Plan
TCM	Transportation Control Measure

Objectives, Scope, and Methodology

In a letter dated May 31, 1988, the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce expressed concern that EPA and the Department of Transportation were not adequately addressing the impacts of transportation and highway programs on air pollution. In subsequent discussions with the Chairman's office, we agreed to address these concerns by reviewing how these agencies administered Sec 176(c) of the Clean Air Act requiring federally funded highway projects to conform to state implementation plans. More specifically, we examined how conformity is determined and the roles of the Department's Federal Highway Administration (FHWA) and EPA in making this determination.

To examine how conformity is determined, we reviewed section 176(c) of the Clean Air Act, its legislative history, FHWA regulations and agreements between EPA and the Department for carrying out the section. We also reviewed correspondence between EPA and FHWA outlining their positions on the issue and discussed these positions with FHWA and EPA headquarters as well as with regional officials and the metropolitan planning organizations for the three areas.

As suggested by the Chairman, we focused on the Denver, Colorado; Los Angeles, California; and Phoenix, Arizona, metropolitan areas to assess how section 176(c) was implemented. These areas were experiencing increasing transportation-related air pollution and had not met the national ambient air quality standard for ozone or carbon monoxide by the date required by the act. Also, in order to obtain information on an annual air quality analysis of their state's highway program, we met with Connecticut highway officials.

To identify the roles of the respective agencies, we reviewed the act and FHWA regulations and guidelines. We also discussed agency responsibilities with EPA and FHWA headquarters and regional officials and with the metropolitan planning organizations for the three areas.

To determine how the metropolitan planning organizations were carrying out their responsibilities, we reviewed their air quality analyses and other actions they took to comply with the statute, focusing on how highway projects were considered in developing SIPs. We identified the project and other assumptions used to determine vehicle travel and related emissions levels for the 1982 SIP revisions. Then through reviews of annual highway programs and discussions with agency officials, we

identified major projects approved by metropolitan planning organizations and constructed between 1982 and 1987, to determine if they were the same as those considered in the 1982 SIP revisions.

We also reviewed the three planning organizations' annual highway programs and discussed with organization officials how they determined that reasonable progress was being made in programming and implementing transportation control measures, as required by the Department's conformity policy. Finally, we discussed with FHWA division officials and EPA regional officials for Colorado, Arizona, and California their procedures and controls to ensure that these highway programs conformed with the SIPs. We conducted our audit work between January and October 1989 in accordance with generally accepted government auditing standards.

Air Quality and Transportation Planning Process

Transportation planning for urban areas is the responsibility of metropolitan planning organizations, in cooperation with state and local governments. Their activities include the preparation of long-term comprehensive local transportation plans that must conform to EPA-approved SIPs. They also prepare annual transportation improvement programs that identify highway construction, transit operations, and other projects which local officials agree could be federally assisted. The programs, which also must conform to EPA-approved SIPs, are submitted for federal-funding approval to the FHWA.

Motor vehicles contribute significantly to urban pollution problems. They are the primary cause of carbon monoxide emissions in urban areas and a major source of hydrocarbon emissions—a key component in the creation of ozone pollution. In recent years, vehicle travel in many urban areas has been steadily increasing. For example, from 1979 to 1987 vehicle travel in Maricopa County, which includes Phoenix, grew from 22 million to 45 million miles a day.

To date, the air quality impact of increasing traffic has been largely offset by stricter federal emissions requirements for new cars and by state inspection and maintenance programs to control vehicle pollution. In Maricopa County, for example, while traffic was doubling, carbon monoxide emissions increased only 3 percent. Nevertheless, according to an EPA official, the continued growth in vehicle travel and congestion will eventually overwhelm the emissions reductions achieved by more tightly controlled and cleaner-fueled cars. The official predicts that by the late 1990's the amount of vehicle travel, as opposed to tailpipe or evaporative emissions rates, will increasingly become the key determinant of air quality problems. Increasing congestion levels and vehicle use are therefore important considerations in the development of SIPs.

The Clean Air Act Amendments of 1977 required states to prepare SIPs for each area which had not yet attained clean air standards. The amendments established a final deadline of December 31, 1987, for attaining the air quality standards for ozone and carbon monoxide. The SIP process is a cooperative effort involving EPA, state governments, and local jurisdictions. Elements of the process include inventorying emissions sources, identifying needed control measures, adopting these measures, and evaluating progress.

The act also requires SIPs to include procedures for future revision when EPA finds that the plan is substantially inadequate to achieve clean air

standards. It further establishes the concept of reasonable further progress and defines it as annual emissions reductions which would, in the judgment of the Administrator, EPA, provide for attainment of the standard by the required date. EPA rules for the 1979 and 1982 SIP revisions require states to submit annual reports by July 1 outlining the prior year's progress toward achieving the standards. These reports are to include the status of implementation of control measures as well as reductions achieved in emissions.

In Los Angeles, Phoenix, and Denver, the designated metropolitan planning organizations developed or were the co-lead agencies for developing the local elements of the SIPs, including final 1982 revisions for achieving clean air by the end of 1987.¹ Their responsibilities included developing the transportation portions of the plans that estimated future vehicle travel and identified measures to reduce emissions from transportation sources.

An important factor in determining vehicle emissions used in developing the 1982 SIP was the amount of vehicle travel anticipated for 1987. For example, the Denver planning organization estimated that 1987 vehicle travel would be about 29 million miles per day. From this estimate, it was calculated that 79 tons of hydrocarbon and 1372 tons of carbon monoxide emissions would result. These figures represented about 56 and 89 percent, respectively, of the Denver area's projected 1987 emissions of those pollutants.

One assumption the planning organizations made in estimating travel was about the road system. According to organization officials, the physical characteristics of highways, such as the number of lanes, were included along with other data in complex traffic forecasting models. For example, Denver officials included data on existing highways and on three major highway projects and other less significant projects they believed would be constructed by 1987. Other key data used to project travel were estimates of future population and employment and other demographic information from residential surveys that were used to predict travel patterns. Forecasted traffic levels were then included with a variety of data in other models that estimated areawide emissions levels.

¹Los Angeles' 1982 ozone plan stated that it could not demonstrate attainment of the clean air standards by Dec. 31, 1987. As a result, EPA disapproved the plan in the January 22, 1988, Federal Register. According to an EPA official, Los Angeles has since developed and proposed a new plan under consideration by EPA.

Selected Transportation Control Measures Planned to Be Implemented by 1987 With Transportation Program Funds

Measure	Denver	Los Angeles ^a	Phoenix
Increase transit ridership	X		X
Maintain transit service			X
Replace buses		X	
Increase auto occupancy	X	X	X
Implement bicycle plan	X	X	
Improve pedestrian facilities		X	
Construct high occupancy vehicle lanes	X		
Construct park and ride lots	X		
Meter freeway ramps	X		X
Construct exclusive bus ramps	X		
Improve traffic signalization	X	X	X
Remove on street parking			X
Designate a reversible lane			X

^aIn addition to those listed, Los Angeles planned other transportation system management and traffic improvements not specifically identified as SIP control measures requiring transportation program funding.

Major Highway Construction Included in State Plans and Completed by December 1987 for Three Metropolitan Areas

Project type	Projects planned	Planned projects completed	Planned projects expanded	Unplanned projects completed
New highway construction				
Denver	2	0	0	0
Los Angeles	8	6	3	0
Phoenix	2	1	0	1
Widening of existing highways				
Denver	1	0	1	0
Los Angeles	7	1	0	0
Phoenix	3	2	1	1
Total	23	10	5	2

Analysis of Conformity Requirement in 1977 Clean Air Act Amendments

The Clean Air Act Amendments of 1977 require all federal entities to insure that projects they approve or finance are in conformity with all requirements under the applicable SIP. At present, the Federal Highway Administration (FHWA) carries out that responsibility by reviewing the local government planning process to insure that SIP requirements are taken into account, rather than by reviewing individual projects. Recently, in commenting on proposed regulations, the Environmental Protection Agency (EPA) recommended to FHWA that it revise the standards for determining conformity for highway construction projects. In our view, FHWA's current and proposed actions in determining conformity are in accord with its statutory responsibility.

Background

Almost immediately after enacting the 1970 Clean Air Act, Congress moved to alleviate potential conflict over the relative priorities that should be placed on new highway construction and achieving clean air goals. In the Federal-Aid Highway Act of 1970, Congress required that the Secretary of Transportation consult with the EPA Administrator and issue guidelines to assure that future highway construction would be "consistent with any approved plan for the implementation of any ambient air quality standard" (23 U.S.C. 109(j)).

Joint guidelines were issued by DOT and EPA pursuant to this requirement in April 1975. The guidelines were directed to the transportation plans and programs under development by the metropolitan planning organizations (MPOs).¹ The guidelines provided that, to be consistent with the applicable SIP, an MPO's transportation plan should not: 1) exacerbate existing violations of the standards; 2) cause new violations to occur; 3) delay attainment of the standards beyond the final statutory deadline; or 4) interfere with maintaining the standards. Finally, MPO transportation plans were required to incorporate any commitments made in the prevailing SIP to specific projects (such as establishing car pool lanes) to reduce vehicle miles traveled. While not expressly stated, the guidelines appeared to apply to the transportation plan considered as a whole, and not to specific projects recommended in the plan.

When Congress enacted the 1977 Amendments to the Clean Air Act, Congress included in Part D a specific provision, section 176(c), to insure the continued primacy of air quality concerns as embodied in approved SIPs. This provision also extended the SIP's priority beyond its original

¹Subject to title 23, section 134. MPOs review and pass on every aspect of local transportation requirements including road construction and mass transit.

transportation context to encompass all federal activities. The new section 176(c) provides that no federal entity may approve or financially support any activity "which does not conform to" the applicable approved SIP.²

On June 12, 1980, DOT and EPA executed an agreement promulgating joint procedures to carry out the new statutory requirement. Under the agreement DOT and EPA concurred that a finding of conformity under new section 176(c) of the Clean Air Act as amended would satisfy the continuing requirement for consistency under the 1970 Highway Act. The agreement thus permitted the agreed upon conformity procedures to supersede the consistency procedures contained in the 1975 Joint Guidelines (23 CFR 770.7). Regulations implementing the agreement were promulgated as interim final regulations on January 26, 1981 (46 Fed. Reg. 8429).

The regulations call for an overall evaluation of an MPO's transportation control plans resulting in a finding of conformity for the general plan, rather than focusing on specific projects. According to the regulations, conformity exists where an MPO's transportation plans and programs:

"do not adversely affect the TCM's [Transportation Control Measures] in the SIP, and . . . contribute to reasonable progress in implementing the TCM's contained in the SIP" (23 CFR 770.9(a)).

Certain procedural prerequisites must also be met under the regulations as a part of the conformity determination. For example, the MPO's transportation plan must have appropriately considered and integrated both air quality objectives and urban transportation needs. Further, to be found in conformity, transportation plans must schedule and carry out the transportation control measures listed in the SIP, subject to funding availability (23 CFR 770.9(b)(1)).

If FHWA finds nonconformance, the regulations state that it will first discuss the situation with EPA and affected state and local officials, and

²Codified at 42 U.S.C. 7506(c), the full text of section 176(c) reads as follows:

"No department, agency, or instrumentality of the Federal Government shall (1) engage in, (2) support in any way or provide financial assistance for, (3) license or permit, or (4) approve, any activity which does not conform to a plan after it has been approved or promulgated under section 110. No metropolitan planning organization designated under section 134 of title 23 shall give its approval to any project, program, or plan which does not conform to a plan approved or promulgated under section 110. The assurance of conformity to such a plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality."

then, if the problem is not corrected, severely restrict all construction funding within the MPO planning area. The only items FHWA would allow in such circumstances would be nonconstruction activities, such as preliminary engineering and environmental impact studies. Even in nonconformance, however, FHWA would continue to finance construction of items exempt from the funding sanctions of section 176(a) of the Clean Air Act (safety, mass transit, and transportation improvement projects related to air quality improvement) (42 U.S.C. 7506(a); 23 CFR 770.9(b)(3)).

Under the regulations, conformity findings for individual projects are abbreviated. First, a specific transportation control measure listed in a SIP will automatically be found in conformity. Additionally, the regulations establish a presumption that individual projects identified in a conforming transportation plan are themselves in conformity. The regulations also exempt safety improvements and certain other limited types of projects from the conformity requirement. Finally, with limited exceptions, the regulations suspend any further conformity review for projects that have completed an Environmental Impact Statement (EIS) or reached a formal Finding of No Significant Impact.³

Discussion

Under the conformity regulations, the focus of the air consequences review is an evaluation of the quality of the process by which local transportation decisions are made, rather than a review of the individual and collective impact of various projects on air quality. The difference between the supposed outcomes under the regulation's conformity determination and the previous consistency determination under the 1975 Joint Guidelines has engendered a continuing disagreement between DOT and EPA.

The disagreement was highlighted on September 9, 1988, when DOT published a Notice of Proposed Rulemaking (NPRM) consolidating and simplifying all of its Clean Air Act review requirements including the conformity procedures (53 Fed. Reg. 35178). The NPRM, which has not yet been made final, would schedule MPO transportation plan conformity review on an annual or biennial basis. The NPRM retains the same basic principle of conformity review as the current regulation—assuring the transportation planning process is properly carried out, rather than

³The regulations still provide for an additional conformity review where (a) a supplemental EIS significantly related to air quality considerations is being done; (b) where a SIP revision is being prepared for the area; or (c) where the project has not moved toward implementation within 3 years of the final EIS (23 CFR 770.9 (c), (d)).

focusing on reviews of individual projects. With regard to conformity specifications for individual projects, it adds a new group of "categorical exemptions" from conformity review. In addition, it limits the TCMS included in FHWA's conformity reviews to those having to do with urban transportation planning rather than the full range of TCMS in the SIP. Finally, the NPRM deletes the provision in the current regulation that suspends conformity determinations when a SIP revision is in process.

In comments on the NPRM, EPA recommended that DOT return to the principle of the 1975 Joint Guidelines, which evaluated the plans' impact on attainment and maintenance of the national primary ambient air quality standards. EPA also restated its position that DOT should analyze individual projects in making conformity determinations. (See letter from Jennifer Joy Wilson and Don R. Clay to Robert E. Farris (Nov. 8, 1988) transmitting EPA's comments on FHWA Docket #88-13.)

Despite the difference of opinion between DOT and EPA, we do not believe that there is any lack of clarity in the law. Neither conformity nor consistency is defined in the statute. However in both cases, the legislation gives responsibility for administering its requirements to DOT. In the case of section 109(j), Congress directed DOT to consult with EPA but left the final decision with DOT to develop guidelines to assure consistency. In fact, DOT secured EPA's agreement, and the guidelines that were published were a joint undertaking. The content of those guidelines and, hence, the "meaning" of consistency was an agency determination, not a statutory one.

In enacting section 176(c), Congress gave responsibility for assuring conformity to the program agencies, including DOT, and not to EPA. However, as in the case of consistency, DOT and EPA conferred and came to agreement on the meaning of conformity. That agreement is embodied in the current regulations, key features of which EPA now would like DOT to change.

As we see it, in neither case is there any statutory requirement or any other indication of overriding congressional intent to adopt any specific standard of review. Either a narrow or broad-based standard would satisfy either statutory requirement. In both cases, there is a clear intent to allow the administering agency to work out the meaning of the terms. Accordingly, when defining the term conformity in its regulations, DOT was carrying out the statutory responsibility assigned to it under section 176(c), and the resulting definition is legally unobjectionable.

Major Contributors to This Report

Resources,
Community, and
Economic
Development Division
Washington, D.C.

Peter F. Guerrero, Associate Director
William F. McGee, Assistant Director
Charles R. Grissinger, Assignment Manager

Office of General
Counsel

Margie Armen, Senior Attorney

San Francisco
Regional Office

Steve Reed, Regional Management Representative
Dennis Day, Evaluator-in-Charge
Brad Dobbins, Evaluator
Bruce Engle, Evaluator

Requests for copies of GAO reports should be sent to:

**U.S. General Accounting Office
Post Office Box 6015
Gaithersburg, Maryland 20877**

Telephone 202-275-6241

The first five copies of each report are free. Additional copies are \$2.00 each.

There is a 25% discount on orders for 100 or more copies mailed to a single address.

Orders must be prepaid by cash or by check or money order made out to the Superintendent of Documents.