



Memorandum

U.S. Department
of Transportation
**Federal Transit
Administration**

Subject: INFORMATION: Revised FTA Procedures
for a Conformity Lapse

Date: APR 9 2003

From: Jennifer L. Dorn
Administrator

Reply to
Attn. of:

To: Regional Administrators
Regions 1-10

In January 2002, FHWA and FTA issued revised guidance for implementing a March 1999 court decision which overturned certain provisions in EPA's transportation conformity regulation (40 CFR Part 93). Among other things, the court decision overturned a key provision in the regulation that had allowed us to 'grandfather' a non-exempt project when the National Environmental Policy Act process was completed. In response to the court ruling, the January 2002 joint guidance set forth the policy that non-exempt project phases cannot be implemented during a conformity lapse unless a federal approval or funding commitment for that project phase was made prior to the lapse.

Based on recent experiences with conformity lapse situations, we have identified two instances which require revision or clarification of our project development procedures in the event of a conformity lapse. The first instance concerns the final design stage for New Start projects. If FTA has approved a project into final design while a conforming plan/TIP existed, the project sponsor can incur costs for final design under pre-award authority should a conformity lapse occur. However, in keeping with the court ruling, FTA is precluded from approving a grant for final design or further project development until conformity is reestablished.

The second instance concerns the point at which FTA makes a commitment to construct a project. The joint guidance states that after a construction commitment is made, the project will not be delayed in the event of a conformity lapse. For a New Start project, the construction commitment is made when we approve a full funding grant agreement (FFGA) while a conforming plan/TIP is in place. For projects not handled with FFGAs, the guidance stipulated that a commitment to construction involved not only an FTA construction grant but a local contract for construction or vehicle acquisition as well. After reviewing the court decision again, it is our view that if the federal grant for construction was approved prior to a conformity lapse, that is sufficient to demonstrate full compliance with the court decision. The second condition for demonstrating a

federal construction commitment--the award of a local contract for construction or vehicle acquisition--is simply not necessary, thus, we are eliminating it.

Following is the current FTA policy on advancing federally-funded projects during a conformity lapse. For the most part, this supplements the January 2002 joint guidance which remains in effect:

Because preliminary engineering is exempt from the conformity requirements, FTA may approve entry into preliminary engineering and may approve a grant for preliminary engineering regardless of whether a conforming plan/TIP exists. During a conformity lapse, FTA is prohibited from approving entry into final design. Without this approval, any local funds expended for final design during the lapse will not be eligible for federal reimbursement or use as local share after conformity is reestablished. If a conformity lapse occurs after FTA's approval, the project sponsor is allowed to proceed with final design using its own funds under pre-award authority. However, FTA is prohibited from approving a grant for final design or subsequent stages of project development until conformity is reestablished. FTA is also precluded from issuing a letter of no prejudice for further project development during a conformity lapse.

Federally-funded projects are protected from the consequences of a conformity lapse after FTA makes a commitment to construction. For a New Start project, the construction commitment is made when a full funding grant agreement (FFGA) is approved while a conforming plan/TIP is in place. An FFGA cannot be approved during a conformity lapse. If the FFGA was not completed by the date of the lapse, the project sponsor may only complete the current phase of project development (e.g., final design or land acquisition). Transit projects not handled with FFGAs may proceed during a lapse if FTA approved a grant for construction or vehicle acquisition prior to the lapse. If a construction grant was not approved before the lapse, the project sponsor may only complete the current phase of project development. If the project sponsor begins a subsequent phase of development with local funding, any expenditures during the lapse will not be eligible for reimbursement or use as local share after conformity is reestablished.

We have coordinated these revisions with FHWA and EPA and the revisions are acceptable to them. EPA will be amending the conformity regulation to incorporate all elements of the 1999 court decision into the regulation. This policy change will be reflected in their rule amendments.

Please contact Abbe Marner (202-366-4317) in the Office of Planning or Scott Biehl (202-366-0748) in the Office of the Chief Counsel with any questions or issues that arise.