

NEPA AND TRANSPORTATION/AIR QUALITY CONFORMITY

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ABSTRACT

The Conformity Rule, adopted in November 1993, by the U.S. Environmental Protection Agency under the requirements of Section 176(c)(4) of the Clean Air Act, establishes strict procedures for determining conformity of transportation plans to state air quality management plans. Conformity requirements apply to all transportation plans, programs, and projects, funded or approved under title 23 U.S.C. or the Federal Transit Act. The Conformity Rule requires that transportation planning agencies apply transportation demand and emissions models to demonstrate that transportation plans and all projects contained in a plan will not exceed the allowable emissions budget established in the air quality management plan and will not cause a violation of local air quality standards.

This paper addresses the relationships among the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), and the new conformity requirements. The need to make concurrent NEPA [CEQA] and conformity determinations is supported by five arguments: 1) the legislative history of conformity indicates that project conformity determinations be made during the NEPA process; 2) general NEPA requirements specify coordination between environmental processes; 3) the level of technical detail required for NEPA [CEQA] and conformity are similar; 4) unless conformity is taken into account during the NEPA [CEQA] analysis, the alternatives and mitigation measures generated may result in a negative conformity determination; and 5) public comment periods, unless coordinated, could run consecutively rather than concurrently, potentially delaying project implementation. This paper also includes a discussion of two additional issues pertinent to NEPA [CEQA] and to conformity: 1) interagency consultation and 2) the potential for citizen suits.

INTRODUCTION

The problems associated with transportation are no longer limited to traffic congestion and auto accidents. The consequences of a more mobile populace also include air pollution, greenhouse gas emissions, poor visibility, ill health effects, and ozone layer depletion. In recognition of these problems, the United States has developed legislation to regulate transportation activity in consideration of the environment. Some legislation is focused directly on reducing the environmental impacts of the transportation system, such as the mobile source provisions for cleaner vehicles and the implementation of transportation control measures (TCMs) under the Clean Air Act (CAA) of 1970 and its subsequent amendments. Other legislation focuses on transportation planning and development processes. This ensures that when transportation development plans and decisions are made, the environmental consequences of these decisions are assessed, and mitigation is considered and incorporated into project proposals when feasible. The National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) are examples of planning oriented laws.

When Congress passed the amendments to the Clean Air Act in 1990, Section 176(c)(4)(A) required the Administrator of the U. S. Environmental Protection Agency (U.S. EPA), with the concurrence of the Secretary of Transportation, to adopt criteria and procedures for demonstrating conformity of transportation plans, programs, and projects. On November 24, 1993, the U.S. EPA and the U.S. Department of Transportation (U.S. DOT) promulgated the conformity requirements in response to the mandates of the 1990 CAA; the Conformity Rule (Rule) is found at 40 CFR Parts 51 and 93.

Conformity requirements are applicable to all transportation plans, programs, and projects, funded or approved under title 23 U.S.C. or the Federal Transit Act. The Conformity Rule requires that transportation planning agencies employ transportation demand and emissions models to ensure that transportation plans and all projects contained in a plan will not cause exceedances in the allowable emissions budget established in the air quality management plan or violate local air quality standards. The Conformity Rule is designed to affect the planning and decisionmaking process.

This paper explains the role of three major environmental acts (e.g., NEPA, CEQA, and the 1990 CAA) in implementing conformity and the requirements of each. In addition, the authors present several arguments to support their conclusion that the most efficient and effective method of transportation planning is concurrent NEPA [CEQA]/conformity process completion. Although the Conformity Rule does not specifically require concurrent NEPA [CEQA]/conformity analyses, there are a number of reasons why these processes should be undertaken concurrently: 1) the legislative history of conformity indicates that project conformity determinations be made during the NEPA process; 2) general NEPA requirements specify coordination between environmental processes; 3) the level of technical detail required for NEPA [CEQA] and conformity are similar; 4) the alternatives and mitigation measures generated by the NEPA [CEQA] process may result in a subsequent negative conformity determination; and 5) public comment periods, unless coordinated, would run consecutively rather than concurrently, potentially delaying project implementation. Integration of the planning processes under NEPA [CEQA] and conformity satisfies the need for thorough environmental analysis and comprehensive planning, while addressing the public participation requirements. A

concurrent approach should assist planners in obtaining positive conformity determinations from the Federal Highway Administration (FHWA) and Metropolitan Planning Organizations (MPOs) as well. In the final section of the paper, the authors highlight two additional areas pertinent to the application of the NEPA [CEQA] and conformity processes: interagency consultation and the potential for citizen suits.

CLEAN AIR THROUGH CONFORMITY

In the 1970 CAA, Congress established the National Ambient Air Quality Standards (NAAQS) to protect the health and well being of citizens (42 U.S.C.A. §7409(a)). Not surprisingly, Congress intended the NAAQS to be the ultimate regulatory goal and measure of programmatic success of the CAA (Schoenbaum & Rosenberg, 1991). The 1970 CAA required that the U.S. EPA Administrator establish primary and secondary standards for "each air pollutant for which air quality criteria have been issued prior to such date" (42 U.S.C.A. §7409(a)). Primary standards were set to protect public health. Secondary standards, which are less stringent, protect the public from "any known or anticipated adverse effects associated with the presence of [air pollutants] in the ambient air" (42 U.S.C.A. §7409(b)(2)). In the 1977 amendments to the CAA, Congress adopted the initial conformity provisions to emphasize that air quality and transportation agencies must strive to achieve conformance with the NAAQS commitments that are established in state implementation plans (SIPs). These provisions, however, consisted of only 13 lines and did little to actually define conformity. Throughout the 1980s, the many ambiguities in the provisions led to disagreements between the U.S. DOT and the U.S. EPA (Hawthorn, 1991), which ultimately produced few substantive changes in the planning procedures.

Due to the failure of many regions in achieving the NAAQS commitments established in the SIPs, the 1990 Amendments strengthened the demands of the CAA by tasking the U.S. EPA and U.S. DOT to develop a regulation to implement the general conformity language of Section 176. In November 1993, the U.S. EPA published the Conformity Rule, which is titled "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" to enforce the CAA mandates and comply with the requirements of Section 176(c)(4).

The new Conformity Rule prescribes the processes to be followed by FHWA, the Federal Transit Administration (FTA), and MPOs in making conformity determinations for highway and transit projects. The requirements of the Conformity Rule work to ensure the integrity of a state's implementation plan by requiring transportation projects, plans, and programs to conform to the state or federal implementation plan (FIP) for the area. SIPs and FIPs establish an emissions budget that prescribes the allowable emissions for stationary and mobile sources within a state. To be in conformity, a transportation plan, program, or project must "conform" to this budget (Guensler et al., 1994(a)).

The conformity regulations generated by the 1990 CAA include several requirements reminiscent of the NEPA [CEQA] process. For example, the conformity regulations include explicit public participation requirements as do NEPA and CEQA. NEPA [CEQA] provide(s) fairly detailed guidelines for managing the environmental assessment of proposed project actions. In addition, these regulations require that agencies work cooperatively with other agencies, disclose agency decisions to the public, and offer an opportunity for public involvement.

Conformity Determinations

Conformity determinations, as prescribed by the 1993 Conformity Rule, are required for demonstrating and assuring conformity of transportation plans, programs, and projects to the applicable state implementation plan. The Conformity Rule applies to transportation-related pollutants including: ozone, carbon monoxide, nitrogen dioxide (NO₂), and particulate matter in nonattainment and maintenance areas. Conformity also applies to certain precursor pollutants in nonattainment and maintenance areas including: volatile organic compounds and nitrogen oxides in ozone areas, nitrogen oxides in nitrogen dioxide areas and, in certain cases, volatile organic compounds, nitrogen oxides, and PM₁₀ in PM₁₀ areas (40 CFR §51.394).

In developing the Final Rule, the U.S. EPA received many comments which expressed the opinion that the Rule should be applicable to attainment areas as well as nonattainment and maintenance areas. In their response to these comments, contained in the preamble of the 1993 Conformity Rule, the U.S. EPA argued against the implementation of a broader scope of applicability "given the significant burden associated with making conformity determinations relative to the risk of NAAQS violations in clean areas" (58 FR 62190). In recognition of the differing opinions on conformity scope, the U.S. EPA intends to request further comments and to subsequently issue a supplemental notice of proposed rulemaking to address conformity requirements in attainment areas in the near future (58 FR 62190).

For areas in which the Conformity Rule now applies, determinations are required for the adoption, acceptance, approval, or support of transportation plans and TIPs and for the approval, funding, or implementation of FHWA or FTA projects. Conformity determinations are also required for non-FHWA or non-FTA projects, if they are regionally significant (40 CFR §51.394). It is important for project sponsors to note that the definition of 'regionally significant' is pivotal to conformity applicability (Guensler et al., 1994(a)). Regionally significant projects are defined in the transportation conformity regulations (40 CFR §51.392) and the final rules for statewide and metropolitan planning (23 CFR §450.104). These definitions describe a 'regionally significant' project as a transportation project located in a facility that serves regional transportation needs and would normally be included in the modeling of a metropolitan area's transportation network.

Once it is determined that a project is subject to a conformity determination, it must be demonstrated that the project will not cause or contribute to any new violations of air quality standards, exacerbate existing violations, or interfere with the timely attainment or the required interim emissions reductions necessary for attainment (58 FR 62188). These demonstrations are achieved through the use of the latest planning assumptions, emissions analysis techniques, and U.S. EPA-approved models that predict the emissions levels of proposed projects.

A positive conformity determination requires that a conforming transportation plan and TIP exist at the time of project approval.

If a project is not addressed in a conforming plan and program, it must be consistent with the motor vehicle emissions budgets in the applicable SIP or SIP submission (Guensler et al., 1994(a)). Local MPOs, in consultation with the appropriate air quality planning agencies, must work to prepare conformity analyses for plans and local projects (Guensler et al., 1994(a)). When the MPO and U.S. DOT conclude that the plan or program complies with the SIP, then a plan, program, or project may be adopted, approved, and implemented.

Conformity and the SIP

The CAA requires states to adopt and submit SIPs to provide for the implementation, maintenance, and enforcement of primary air quality standards. SIPs serve three primary functions: 1) assessing the nature of air quality within a jurisdiction, 2) determining the air quality improvements needed to meet or maintain the NAAQS, and 3) assigning air pollution control responsibilities to a wide variety of sources in a state (Schoenbaum & Rosenberg, 1991). The set of criteria to be included in a SIP is listed at 42 U.S.C.A., Section 7410(2).

Designing a SIP involves several steps. First, states must develop a comprehensive emissions inventory and undertake regional modeling to determine the amount of emissions reductions that are needed to attain the standards. Second, states must analyze emissions control strategies for their reduction potential by emission source category. Third, states must develop a phased plan to implement a combination of emissions control strategies to minimize the social costs of obtaining the emissions reductions necessary to meet the ambient air quality standards (Guensler, et al., 1992).

The new Conformity Rule requires that states revise their SIPs to include conformity criteria and procedural guidelines consistent with the Rule. In addition, the Rule requires that SIP revisions be submitted to the U.S. EPA by November 25, 1994.

The SIP revisions, mandated by the 1990 amendments, require U.S. EPA approval. The review process provides EPA with an opportunity to correct serious conformity deficiencies and to ensure that state air agencies will be more involved in the conformity process (Hawthorn, 1991). Not surprisingly, conformity determinations must satisfy the requirements of the Conformity Rule, the guidelines that are adopted in the revised SIP, and any applicable court orders (40 CFR §51.410(a)).

Emissions Budgets

In developing a SIP, emissions budgets must establish motor vehicle emissions estimates over time and provide the emissions reductions necessary for attaining the national standards. Emissions budgets are estimated for the current year, the SIP attainment year, and any interim SIP milestone year. Under conformity, budgets must be prepared for each transportation planning horizon year (Guensler et al., 1994(a)).

To obtain a positive conformity determination, transportation plans and programs must demonstrate consistency with the motor vehicle emissions budget for each pollutant and precursor identified in the SIP (57 FR 62193 and 62194). For a TIP to obtain a positive conformity determination, each program year of the TIP must demonstrate the availability of expected federal funds and state and local matching funds; in addition, the regional emissions analysis for the current transportation plan must be applicable to the proposed TIP (Guensler et al., 1994(a)). If these criteria are not satisfied, the motor vehicle emissions budget of the SIP must go through additional regional emissions analysis to demonstrate TIP conformity. Federal projects and regionally significant non-federal projects must be included in conforming transportation plans and TIPs, unless specific criteria for "projects not from a conforming plan and TIP" are satisfied (Guensler et al., 1994(a)).

Emissions budget demonstrations, which support the consistency of SIPs with transportation plans and programs, require the use of emissions models. In addition, quantitative analysis must be based on databases and U.S. EPA modeling guidelines, unless the interagency consultation process determines that the specified tools are inappropriate for particular circumstances (Guensler et al., 1994(a)). Not surprisingly, conformity requires that all emissions models and data are timely and accurate, and the agency modeling assumptions are reasonable. In general, achieving conformity through modeling demonstrations is a complex process, which requires accurate information from a number of different sources. Further discussions of technical modeling issues are included in Guensler et al. (1994(b)).

THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

NEPA is one of the most significant pieces of environmental legislation in U.S. history. Passed by Congress in 1969 and signed into law in 1970, NEPA requires federal agencies to consider the environmental consequences of their actions before executing them. In preparing and passing NEPA, Congress recognized "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances" (42 U.S.C. §4331(a)). The language of NEPA recognizes the importance of several things: 1) preserving the environment for future generations; 2) maintaining the safety, health, productivity, and well being of the American people; 3) using the products and materials of

the natural environment of the country without diminishing them to the point of destruction; and 4) maintaining a balance between the growing population of the United States and the country's natural resources.

NEPA requires all agencies of the federal government to assess the possible adverse environmental impacts of proposed actions and legislation. NEPA applies to actions where FHWA, FTA, or agencies delegated the authority for such decisions have control over project approval. Consequently, NEPA applies to many of the projects to which conformity applies (Guensler et al., 1994(a)). In addition, it should be noted that if NEPA provides a categorical exclusion for a particular transportation project, a conformity analysis may still be required, unless the project is specifically exempt under the conformity regulations (Guensler et al., 1994(a)).

If a federally proposed project has the potential to yield a significant environmental impact, compliance with the NEPA mandates is accomplished through the preparation of an environmental impact statement (EIS). Under NEPA, all EISs must include: 1) a detailed statement on the environmental impact of the proposed action, 2) a description of any adverse environmental effects that cannot be avoided should the proposal be implemented, 3) a discussion of alternatives to the proposed action, 4) a treatment of the relationship between local short-term uses of the environment and long-term productivity of the area, and 5) a discussion of any irreversible commitments of resources to be involved in a proposed action (42 U.S.C. §4332(c)).

In Title II of NEPA, Congress established the Council on Environmental Quality (CEQ) as the administering agency of the Act. NEPA required that CEQ develop a set of regulations for implementing the NEPA mandates. These Regulations are contained at 40 CFR Parts 1500 to 1508. Under the CEQ regulations, federal agencies are required to adopt procedures to ensure that applicable project-related decisions are made in accordance with the policies and purposes of the Act. The U.S. DOT's FHWA and FTA NEPA regulations are contained at 23 CFR Part 771.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Although NEPA regulates many actions, it does little to address proposed projects on a statewide or local level. Consequently, California and thirteen other states have enacted environmental legislation to govern activities affecting their respective territories (Mandelker, 1984). "For most state programs, the points that must be covered in environmental impact documents are similar to those in Section 102(2)(C) of NEPA" (Ortolano, 1984). Nevertheless, a few states include additional environmental assessment requirements (Ortolano, 1984). For example, California requires "an assessment of the 'growth-inducing impact' of proposed actions and a description of 'mitigation measures' that could be taken to minimize adverse impacts" (Ortolano, 1984).

In 1970, the California legislature passed the California Environmental Quality Act (CEQA), which requires that environmental analyses be performed by state and local governments before proposed actions are undertaken. CEQA recognizes several key goals for the state of California: 1) maintaining a quality, healthy environment for the future as well as the present; 2) maintaining the capacity of the environment well beyond minimal thresholds of health and safety; and 3) regulating the activities of citizens of the state to safeguard the environment, while preserving the lifestyles and living environment for the citizens of California (Public Resources Code (PRC) §21000).

In general, CEQA's intent is to require "all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment [to] regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian" (PRC §21000(g)). In comparison to other state programs, California has the broadest environmental-planning coverage (Ortolano, 1984). For instance, CEQA "applies to state-initiated actions, such as highway projects, as well as a variety of decisions made by cities, counties, and regional agencies. The local agency actions, which include the granting of building permits and zoning variances, have made the California impact assessment requirements applicable to proposals made by private parties. Environmental impact reports (EIRs) have been written for virtually thousands of private land development projects in California" (Ortolano, 1984).

When NEPA and CEQA are applicable to a proposed project, both regulations may be satisfied with the preparation of a joint EIS/EIR document. To help agencies fulfill the requirements of CEQA, the State Office of Planning and Research has prepared a set of CEQA guidelines. "Arrangements for administering environmental impact requirements vary from state to state. In some cases, the EIS program is managed by the state department of natural resources. Other states rely on their environmental protection agencies" (Ortolano, 1984).

SUMMARY OF REFERENCES TO NEPA IN THE CONFORMITY RULE

NEPA is defined in the Conformity Rule as "the National Environmental Policy Act of 1969, as amended (42 U.S.C. §4321 et seq)" at 40 CFR Section 51.392. In this same section of the Rule, 'NEPA process completion' is defined as "the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact [FONSI], or to issue a Record of Decision [ROD] on a Final EIS under NEPA" (40 CFR §51.392). The term 'NEPA process completion' is defined primarily because project proposals that have already received a categorical exclusion or have been issued a FONSI

or ROD may be grandfathered as existing projects and exempted from the conformity determination process.

In reference to transportation plans and TIPs, the Conformity Rule states that "the degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA [/CEQA] process or other project development studies" (40 CFR §51.406). If the NEPA [/CEQA] process results in a final project with a design concept and scope significantly different from that in the transportation plan or TIP, the project must meet the conformity criteria for projects not from a plan and TIP (40 CFR §51.410 through 51.446) prior to NEPA process completion (i.e., before the NEPA process can be deemed complete and the final EIS can be approved).

Overall, none of the NEPA references in the Conformity Rule explicitly state that conformity determinations for individual projects must be made within the NEPA [/CEQA] process. Nevertheless, the conformity requirements are intertwined with the requirements of NEPA [/CEQA]. As will be discussed in the next section of this paper, conformity determinations can and should be made during the process of preparing an EIS under NEPA or an EIR under CEQA or both. Given the findings outlined in the next section, the authors believe that it makes no practical sense to make conformity determinations outside of the NEPA [/CEQA] process.

FIVE ARGUMENTS FOR CONCURRENT NEPA/CEQA/CONFORMITY ANALYSIS

With respect to transportation projects, the conformity regulations do not require that NEPA [/CEQA] and conformity determinations be made concurrently. However, the specific requirements of the NEPA [/CEQA] and conformity processes result in a *de facto* requirement that the determinations be made concurrently (Guensler et al., 1994(a)). Below follows a discussion of five basic arguments, which support this conclusion.

Argument One: The legislative history indicates that project conformity determinations be made during the NEPA process. As mentioned previously, conformity requirements already existed with the passage of the 1977 amendments to the CAA. In June 1980, the U.S. EPA and U.S. DOT jointly released a conformity guidance document entitled: "Procedures for Conformance of Transportation Plans, Programs, and Projects with Clean Air Act State Implementation Plans" (58 FR 62189). This guidance document required that conformity determinations be documented as a necessary element in all certifications, TIP reviews, and EIS findings in nonattainment areas (58 FR 62189). At the time of this publication, however, conformity was defined differently; it was defined in the context of TCM implementation, rather than in terms of emissions budgets and air quality impact analysis (58 FR 62189). Notwithstanding the current U.S. EPA interpretation that an emissions budget for mobile sources is a precise

estimable quantity, which is enforceable and may not be exceeded, the concept of undertaking conformity analyses as a part of the NEPA process has clear historical precedent (Guensler et al., 1994(a)).

In addition, the Background of the Conformity Rule provides guidance on NEPA/conformity analyses in Section V, number 7 (40 CFR Parts 51 and 93, Background, V(A)(7)). The Background states that the process for making U.S. DOT conformity determinations is similar to the way NEPA analyses are conducted, and the U.S. EPA expects that most project-level conformity determinations will be made as a part of the NEPA process.

Argument Two: General NEPA [/CEQA] requirements specify coordination between environmental processes.

To begin, federal agencies are required to integrate the NEPA process with other planning regulations at the earliest possible time (40 CFR §1501.2). Hence, the general requirements of NEPA can be interpreted to require the coordination of conformity under the CAA with the NEPA process. Second, under CEQA, an EIR must discuss inconsistencies between a project and applicable general and regional plans (Cal. Code Regs., tit. 14 §15125(b)). In *State of California v. Watt* (520 F. Supp. 1359(1981)), for example, the Secretary of the Interior was required by the court to determine if a proposed oil lease was consistent with the Coastal Zone Management Act before the EIS/EIR could receive final approval (Guensler et al., 1994(a)). Logically, the CEQA precedent established in *California v. Watt* could be extended to the reconciliation of a proposed project with long-range transportation, air quality plans, and the requirements of conformity.

Argument Three: The level of technical detail required for NEPA [/CEQA] and conformity are similar.

In comparison, the level of technical detail required by conformity and NEPA [/CEQA] are generally similar; nevertheless, the requirements of conformity are clearly more stringent. First, the Conformity Rule stipulates specific modeling methodologies deemed as the best practice that must be employed to support conformity analyses and determinations. Deviations from these modeling practices prescribed in the Conformity Rule are not allowed unless agreement is reached through the interagency consultation process. Second, the Conformity Rule requires a level of technical analysis for projects that is unprecedented in previous environmental legislation (Guensler, et al., 1994(a)). Comparatively, the analytical requirements of the Conformity Rule are much more specific than those outlined by the NEPA and CEQA regulations. And, in practice, the minimum level of technical detail required to support NEPA [/CEQA] analyses is generally less exhaustive than the minimal requirements of conformity.

Under CEQA, project sponsors are required to provide "a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences"

(Cal Code Regs., tit. 14, §15151). In addition, if there is a 'disagreement among experts' regarding the technical detail presented in the EIR, it is expected that "the EIR should summarize the main points of disagreement among the experts" (Cal Code Regs., tit. 14, §15151). When a court reviews the technical sufficiency of an EIR, the court "will not expect perfection but will focus instead on adequacy, completeness, and a good faith effort at full disclosure...[i.e.,] a sufficient degree of analysis to allow a decisionmaker to make intelligent judgments" (Duggan, et al., 1988; Cal. Code Regs., tit. 14, §15151).

The California Department of Transportation (Caltrans) also mimics the CEQA language in their implementing regulations by requiring that "[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment based, to the extent possible, on scientific and factual data" (Cal. Code Regs., tit. 21, §1509.3(a)). Clearly, the level of detail required to meet the court's criteria is less than the level required by the Conformity Rule. However, because the Conformity Rule is in place and the modeling methods are codified as reasonable practice, the CEQA language (i.e., "to permit full assessment of significant environmental impacts by reviewing agencies and members of the public" (Cal. Code Regs., tit. 14, §15147)) could be stringently interpreted to require a level of technical detail comparable to conformity analyses.

Although many NEPA requirements are similar to those of CEQA, most professionals would consider the required level of analytical depth under NEPA somewhat less stringent than that required by CEQA (Guensler, et al., 1994(a)). Under NEPA, agencies shall insure that professional integrity and scientific integrity (40 CFR §1502.24) are incorporated into the discussions and analyses of environmental impact statements. Thus, the modeling requirements under conformity, CEQA, and NEPA may be considered as decreasing in the level of technical depth and analytical stringency required. Since the transportation demand modeling requirements of the Conformity Rule reflect the findings of a recent technical assessment of modeling approaches (Harvey and Deakin, 1993), conformity analyses should more than satisfy NEPA [CEQA] air quality requirements. In addition, recent court decisions, ruling on the accuracy of transportation demand models, support the assertion that the technical analyses required by conformity will satisfy the current level of detail requirements for air quality analyses for both NEPA and CEQA (Guensler et al., 1994(a)).

Nevertheless, it should be noted that many courts have found EISs inadequate because of poor writing, despite scientifically adequate analysis. In fact, the CEQ regulations specifically require that NEPA documents be clearly written (40 CFR §1502.8). The EIS must be written in language that is understandable to non-technical minds and yet contain enough scientific reasoning to alert specialists to the particular problems within their field of expertise ((40 CFR §1502.24)

and *Environmental Defense Fund, Inc. v. Corps. of Engineers of the U.S. Army* (470 F2d 289(1972)). Consequently, a balance should be struck during the NEPA process to ensure that accurate technical analyses are performed (i.e., analyses that include detailed methodologies, data, and assumptions and are made available for scientific peer review) and technical summaries are clearly written and understandable to decisionmaking bodies and the general public.

Argument Four: Unless conformity is taken into account during the EIS/EIR process, the alternative and mitigation analyses may change the scope of the project and later result in a negative conformity determination.

Alternatives Analysis and Mitigation Under NEPA

Under NEPA, the alternatives section of the EIS is to be based on the information and analyses provided in the Affected Environment (Section 1502.15) and Environmental Consequences (Section 1502.16) sections of the EIS and should comparatively present the environmental impacts of a proposed action and a reasonable range of alternatives, including the proposed project. In the heart of an EIS, agencies must: 1) rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that are eliminated from detailed study, briefly discuss the reasons for their elimination; 2) substantially treat each alternative considered in detail, including the proposed action so that reviewers may evaluate their comparative merits; 3) consider reasonable alternatives not within the jurisdiction of the lead agency; 4) include the no action alternative; 5) identify the agency's preferred alternative or alternatives (i.e., if one or more exist(s)) in the draft statement and present such an alternative in the final statement, unless another law prohibits this preference; and 6) include appropriate mitigation measures, which are not already included in the proposed action or alternatives (40 CFR §1502.14(a)-(f)).

In the CEQ NEPA guidance titled: *Forty Most Asked Questions Concerning CEQ's NEPA Regulations* (46 FR 18026, 18027 (1981)), the Council addresses the meaning of an 'appropriate range of alternatives to be considered' in its response to Questions 1(a) and (b): "What is meant by 'range of alternatives' as referred to in Section 1505.1(e)?" and "How many alternatives have to be discussed when there is an infinite number of possible alternatives?" In its response to this two-part question, CEQ advises agencies to consider a 'full spectrum of alternatives,' not necessarily a large number; CEQ states that a 'reasonable number' will suffice.

Not surprisingly, the courts have reviewed the adequacy of NEPA alternatives analyses for over twenty years. For instance, in *Town of Mathews v. Department of Transportation* (527 F. Supp. 1055 (1981)), an EIS prepared by the U.S. DOT was invalidated because the agency's discussion of a bypass alternative to a proposed highway was held inadequate by the court. In general, it is not unusual for NEPA documents to be invalidated by the courts for unsatisfactory alternatives analysis. Consequently, it is

important that agencies strive to conduct and demonstrate thoughtful alternatives analysis in all EISs.

In comparison to the alternatives analyses required under NEPA, mitigation has received little attention in the courts. Nevertheless, projects have been delayed by the courts because an EIS has failed to provide mitigation measures to offset the impacts of a proposed action. In CEQ's NEPA regulations, mitigation includes: 1) avoiding the impact altogether by not taking a certain action or parts of an action; 2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; 3) rectifying the impact by repairing, rehabilitating, and restoring the affected environment; 4) reducing or eliminating the impact over time through preservation and maintenance operations during the life of an action; and 5) compensating for the impact by replacing or providing substitute resources or environments (40 CFR §1508.20).

Alternatives Analysis and Mitigation Under CEQA

Under CEQA, the requirements for alternatives analysis and mitigation are quite similar to NEPA. For example, the California legislature specifies in CEQA that "[EIRs] omit unnecessary descriptions of projects and emphasize feasible mitigation measures and alternatives to a proposed project" (PRC §21003(c)). In addition, EIRs must consider all feasible alternatives (Cal. Code Regs., tit. 14, §15126), including the consideration of economic, environmental, legal, social, and technological factors (Cal. Code Regs., tit. 14, §14021(b)). Project alternatives are to be developed early in the interagency consultation process (i.e., prior to the publication of the draft [EIS/] EIR). Also, the no action alternative must be included as one of the alternatives analyzed (Cal. Code Regs., tit. 14, §15126(d)(2)). If public comment requirements are to be met, project alternatives analysis requires early coordination.

If project alternatives are rejected, the EIR must explain why the alternatives were discarded in favor of the proposed action (Cal. Code Regs., tit. 14, §15126(d)(1)). In addition, the alternatives analysis must be documented. If the project alternatives are ruled out, significant documentation must be provided to demonstrate good decisionmaking and to support the elimination of alternatives. Clearly, the alternatives analysis is a critical component of the [NEPA/] CEQA process and should be considered carefully.

Alternatives and Mitigation Under Conformity

Not surprisingly, the Conformity Rule supports the alternatives analysis requirements of NEPA [CEQA]. The Rule indicates that "the degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA [CEQA] process or other project development studies" (40 CFR §51.406). If the NEPA [CEQA] process results in a final project with a design concept and scope that is significantly different from that in the transportation plan or TIP, the Conformity Rule requires

that the revised project undergo a new conformity determination. The revised project must meet the criteria in 40 CFR §51.412 through §51.446 for projects not from a TIP before NEPA process completion (40 CFR §51.406).

Because projects must be consistent with the emissions budget(s) in the applicable attainment plan or implementation plan submission (40 CFR §51.432), analysts must ensure that emissions from the project, in combination with the emissions from all other regionally significant projects planned for an area, do not exceed the motor vehicle emissions budget. Not surprisingly, the only method that can realistically be used to assess compliance with this criteria is to re-run the regional model with the final modified project included in the action scenario.

Lastly, it is important that project sponsors remember that projects can be mitigated for impacts other than air quality (e.g. wetlands, cultural resources, etc.). However, not every mitigated alternative will necessarily receive a positive conformity determination. Unless the alternatives and mitigation components of the NEPA [CEQA] process are conducted concurrently with the conformity requirements, it is possible that projects may enter a circular approval process in which a project must iteratively pass through NEPA [CEQA] analyses and conformity assessments (i.e., a mitigated project fails conformity and returns to the NEPA mitigation phase).

Argument Five: Public comment periods, unless coordinated, would run consecutively rather than concurrently potentially delaying project implementation.

Most of the input into the NEPA [CEQA] process is provided by the lead and responsible agencies along with any trustee agency, federal agency, and any party directly affected by a proposed project. There are specific provisions in the respective regulations to incorporate all affected agencies and individuals who may have special expertise with regard to the proposed project and its possible environmental effects. However, NEPA [CEQA] also provide(s) for input from members of the general public. Under NEPA [CEQA], the general public may review and comment on decisions that are made during the environmental assessment process. Not surprisingly, there are significant benefits that can arise from active public involvement. For instance, valuable input can be gained from members of the public who have an interest in the proposed project. Second, agencies may avoid future legal battles if the public has an opportunity to participate in a decision that may affect their future.

Public Participation Under NEPA

Clearly, the NEPA process has been designed to assist federal agencies in determining the potential environmental effects that a project may have on an area by facilitating public participation in project scoping and document review. To begin, the NEPA regulations specify that there shall be an early and open process for determining the scope of an issue to be addressed (40 CFR §1501.7). After a draft EIS is prepared, agencies should obtain comments from other federal

agencies with an interest in the project or that have special expertise. The CEQ regulations also require agencies to invite the participation of: 1) the appropriate state and local agencies; 2) Native American tribes, i.e., if project effects may impact reservation; 3) any agency that requests environmental documents on actions of the kind proposed by the EIS; 4) the applicant; and 5) the public, especially those individuals and organizations that may be affected or interested in the action on environmental grounds (40 CFR §1503.1(a)). In general, if a community may be affected by an agency action, the community should be notified. If the potential impacts of an action will be substantial, specific individuals in the community should be contacted. And, if the impacts are likely to be indirect or insubstantial, newspaper notification is often considered sufficient. Preparation of the draft and final EIS must be followed by document circulation.

In addition, agencies preparing the final EIS must respond to comments that are received after draft EIS circulation.

Although the CEQ regulations are fairly detailed, they do not prescribe specific time periods for the public and other interested parties to comment on either the lead agency's decision or any of the prepared documents. For instance, the CEQ regulations state: "the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible" (40 CFR §1501.8). Because every project is different, neither NEPA nor agency implementing regulations can specify a particular level of public review. Hence, the courts rely on tests of 'reasonableness' or 'good faith' for determining adequate time periods for public participation. This allows courts to test an agency's actions according to subjective criteria for determining 'reasonable' treatment.

The U.S. DOT's FHWA and FTA NEPA regulations provide few guidelines for public comment timeframes in the environmental assessment process, but the regulations do encourage timely proceedings. "Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements" (23 CFR §771.111). If an applicant prepares an environmental assessment (EA), the EA does not have to be circulated, but it must be made available for public inspection. The minimum time period for public comment on an EA is 30 days from when the EA was made available for written comment (23 CFR §771.119(e)).

The draft EIS should be circulated for comment by the applicant on behalf of FHWA or FTA. If a public hearing is held during the circulation period, the draft EIS should be available at least 15 days before the hearing and at the meeting itself. Comment periods on the draft EIS must last for a minimum of at least 45 days from the public notice, which is usually listed in the *Federal Register* (23 CFR §771.123(i)). The FHWA and FTA NEPA regulations also provide for public review of the final EIS; this requires that the document be made available in the applicant's office and

at the appropriate FHWA or FTA offices at the time the final EIS is filed with the U.S. EPA (23 CFR §771.125(g)).

In contrast, while the CEQ regulations address specific timeframes for public review of relevant documents before the issuance of a decision to prepare an EIS or ROD, the U.S. DOT's FHWA and FTA timeframe requirements focus specifically on public participation for the draft EIS. Again, this lack of specificity offers agencies flexibility in determining the length of time required for public participation on other NEPA processes.

Lastly, it is important for agencies to note that public involvement is really an on-going activity for offices involved in the NEPA process. If an agency has routinely notified the public of upcoming projects through a newsletter (e.g., small-scale projects included in a TIP), such notification may suffice as an acceptable form of public involvement for site-specific projects that have no direct effects on any agency or person. Consequently, agencies should continually notify the public of their activities, although this may not be specifically required by NEPA or the Conformity Rule.

Public Participation Under CEQA

In comparison to the U.S. DOT's FHWA and FTA NEPA regulations, the CEQA public participation requirements for EIRs are quite similar with respect to length of notification times and other implementing guidelines. The CEQA Guidelines (California Code of Regulations, title 14) provide specific public comment periods for some steps in the environmental review process and offer a statute of limitations period for public actions on other steps in the process. However, CEQA does provide more guidelines than NEPA for implementing the public participation process. CEQA offers guidance for a majority of the steps in the environmental assessment process. CEQA also requires consultation between agencies to ensure the adequate participation of all parties who have an interest or expertise or both in a proposed project.

If an agency concludes that a project is exempt from CEQA, there is no specific provision for public review of a Notice of Exemption. However, the CEQA Guidelines specify that the filing of a Notice of Exemption commences a 35-day statute of limitations period for legal challenges to an agency decision. This period is extended to 180 days, if no Notice of Exemption is filed (Cal. Code Regs., tit. 14, §15062(d)). The lead agency has 30 days from the submission of a project application to determine if the project is ministerial or discretionary or if it will have a potentially significant environmental effect. As soon as the lead agency has determined that an initial study is required, it must consult informally with all affected agencies to obtain their recommendations on whether to prepare an EIR [EIS] or to issue a negative declaration (i.e., a finding of no significant impact).

It is the lead agency's obligation to provide public notice that it intends to adopt a negative declaration to all organizations and individuals who have requested notice. The lead agency must also provide notice of its intent to publicize the decision either: 1) in a newspaper of general circulation in the area affected by the proposed project, 2) through on and off-site postings in the area where the project will be located, or 3) through a posting on property contiguous to the project (Cal. Code Regs., tit 14, §15072). When a negative declaration is prepared and submitted to the State Clearinghouse, the public must be provided with a 30-day period to submit comments, which requires agency response (PRC §21091, §21092), unless a shorter time period is approved by the Clearinghouse (Cal. Code Regs., tit. 14, §15073).

In the Caltrans' implementing CEQA regulations, Caltrans extends the public comment period such that "[a]ny substantive comments received within 45 days of the public notice and circulation of the negative declaration as provided in Section 1509.7(b) will be considered" (Cal. Code Regs., tit. 21, §1509.7(c)). If there is no substantial evidence in the record, indicating that the project will have a significant effect on the environment, then the negative declaration can be certified (Cal. Code Regs., tit. 14, 15074(b)). However, if there is a disagreement between experts over the 'significance' of an environmental effect, the lead agency will be required to treat the impact as significant (Cal. Code Regs., tit. 14, §15064(h)(2), Duggan et al., 1988), which will require an EIR.

Under CEQA, the lead agency must provide public notice of the availability of the draft EIR after the document has been prepared. Public notice must be given at the same time the agency sends a Notice of Completion to the Office of Planning and Research (i.e., using at least one of three methods for the publication of a negative declaration--discussed earlier). A minimum public comment period of 30 days must then be undertaken (PRC §21091). A 45-day period is required, if the draft EIR is prepared by a state agency that is also the lead agency or the trustee for the agency preparing the EIR or if the document serves as a NEPA document as well (Cal. Code Regs., tit. 14, §15205). Under CEQA, there is no provision for public review of the final EIR. Under the Caltrans' CEQA regulations, Caltrans requires that "[r]eviewers shall be given a reasonable length of time to submit their comments. Forty-five days, plus mailing time, is considered to be reasonable. If at all possible, requests for time extensions of up to fifteen days shall be granted" (Cal. Code Regs., tit. 21, §1512).

Lastly, CEQA requires that lead agencies solicit and respond to comments from the public and other affected agencies regarding draft EIRs (PRC §§21104, 21153, 21092; Cal. Code Regs., tit. 14, §§15068, 15087). A candid response to all comments from agencies and responsible parties must be included in the final EIR (Cal. Code Regs., tit. 14, §15088). Good faith and reasoned analysis must be evident in the lead agency's response to comments; responses that are

unsupported by fact are considered to be inadequate (Cal. Code Regs., tit. 14, §15088; Duggan et al., 1988).

Public Participation Under the Conformity Rule

As discussed previously, the Conformity Rule requires that public comments be solicited through the conformity process.

In summary, there are three types of public participation requirements addressed either directly or indirectly in the Conformity Rule. First, the Rule indirectly requires public participation as a result of the SIP revisions mandated under conformity. Second, there are several requirements for agencies making conformity determinations outlined at 40 CFR §51.402(e). Finally, there are the public participation requirements of other relevant laws that are incorporated in the Rule by reference, including 23 CFR Part 450.

Under the Conformity Rule, states must submit conformity SIP revisions to the U.S. EPA and U.S. DOT for review. All of the SIP revisions must satisfy the requirements listed at 40 CFR Part 51 (i.e., "Requirements for preparation, adoption, and submittal of implementation plans"). Under the Rule, states must submit their conformity program criteria and procedures to the U.S. EPA as SIP revisions (40 CFR §51.396). These revisions must satisfy public involvement requirements, which are incorporated by reference to 40 CFR §51.102, "Public hearings." Under these requirements, states must hold a public hearing and release a public notice at least 30 days in advance of the meeting to announce the hearing and the availability of the proposed SIP revisions. Not surprisingly, state submittals that do not satisfy the public participation and other SIP revision requirements will not be approved by the U.S. EPA.

The public participation requirements included in the Conformity Rule are outlined in the section titled: "Public consultation procedures" (40 CFR §51.402(e)). First, the Conformity Rule requires that "agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides the opportunity for public comments prior to taking formal action on a conformity determination for all transportation plans and TIPs, consistent with the requirements of 23 CFR 450" (40 CFR §51.402(e)). Second, agencies must "provide [an] opportunity for public involvement in conformity determinations for projects where otherwise required by law," e.g., NEPA and CEQA (40 CFR §51.402(e)). In addition, agencies must address all public comments in writing for regionally significant projects even if these projects have not received FHWA and FTA funding or if these projects have not yet been properly reflected in the emissions analysis to support a proposed conformity finding for a transportation plan or TIP (40 CFR §51.402(e)).

The Conformity Rule also incorporates the public participation requirements of 23 CFR Part 450 (i.e., the final rules for statewide and metropolitan planning) by reference (40 CFR §51.402(e)). Under 23 CFR Part 450, a public review period for all transportation plans and TIPs in

nonattainment areas is required. Responsible agencies must: 1) provide public notice of the public involvement process, 2) hold open public meetings, and 3) provide time for public review and comment on pertinent documentation. Further, "in nonattainment areas, classified as serious and above, the comment period shall last at least 30 days for the plan, TIP, and major amendments" (23 CFR 450.316(b)(1)(iv)). Significant written and oral comments received on a draft transportation plan or TIP, resulting from the public involvement process or the conformity interagency consultation process, must be summarized with an accompanying response as a part of the final plan or TIP (23 CFR §450.316(b)(1)(vii)). If the transportation plan or TIP changes significantly between the draft plan or if the TIP is released for public notice, the modified plan or TIP must undergo another public hearing/comment period.

In addition, the transportation planning regulations require that the MPO public participation process "shall be coordinated with other statewide public involvement processes wherever possible to enhance public consideration of the issue, plans, and programs, to reduce redundancies and costs" (23 CFR §450.316(b)(1)(xi)). The authors interpret this requirement to include coordination with the NEPA/[CEQA] process (Guensler et al., 1994(a)). If the NEPA [or CEQA] provisions can be interpreted to require that project conformity determinations be made during the EIS [EIR] process, then the NEPA [CEQA] public comment requirements should apply to conformity.

Lastly, the consultation procedures, which must be included in the SIP revision, do not explicitly require the incorporation of public involvement procedures. In fact, the Conformity Rule language only indicates that "[t]he implementation plan revision[s] required under [40 CFR §]51.396...will include procedures for interagency consultation (federal, state, and local) and [the] resolution of conflicts" (40 CFR §51.402(a)).

Nevertheless, the authors recommend that specific public comment procedures should be developed in the consultation process and incorporated into the SIP; this would render these procedures enforceable through the SIP (Guensler, et al., 1994(a)).

Coordination of NEPA/CEQA and Conformity Public Comment Periods

As a result of the extensive public comment requirements of the NEPA [CEQA] and conformity programs, the authors recommend that the conformity process be implemented concurrently with the EIS process so that conformity determinations can be made during the final EIS [EIR] stage (Guensler et al., 1994(a)). Unless the NEPA [CEQA] and conformity processes are coordinated, the 45-day to 60-day NEPA/CEQA public comment periods (i.e., 60 days with 15-day extensions granted to the standard 45-day period granted by the Caltrans' CEQA implementing regulations) may be followed by the conformity public involvement requirements, if the NEPA [CEQA] process leads to a negative conformity determination (Guensler et al., 1994(a)). In addition, if a

negative conformity determination follows NEPA process completion, the NEPA process must begin again. Hence, the authors recommend that the NEPA [CEQA] and conformity processes be implemented concurrently. Also, in the rare event that a transportation plan or program changes significantly from the final plan or program, public participation (under 23 CFR Part 450) will likely be required for the revised plan or program. In this case, the authors advise the coordination of the public participation requirements for all of the applicable regulations, including those contained in the Conformity Rule, (23 CFR Part 450), and NEPA [CEQA].

OTHER ISSUES PERTINENT TO NEPA [CEQA] PROCESS APPLICATION TO CONFORMITY

Although the previous section of this paper explored many of the issues pertinent to a discussion of NEPA [CEQA] and conformity, two other issues relevant to this subject were not addressed: interagency consultation and citizen suits. Interagency consultation is an important part of the NEPA/conformity process because it involves agency cooperation at the state, local, and federal levels. Consequently, it is critical that policymakers understand the dynamics and requirements of interagency cooperation from both a conformity and NEPA [CEQA] perspective. Second, citizens suits have played and continue to demonstrate an important role in agency planning. Both the conformity regulations and the NEPA [CEQA] processes allow for citizens suits; clearly, these provision should offer planners and policymakers an incentive to carefully prepare documents and promote citizens participation. In summary, both of these areas warrant the consideration of individuals involved in conformity and NEPA [CEQA] documentation.

Interagency Consultation

The final Conformity Rule requires that conformity SIP revisions establish detailed interagency consultation procedures (40 CFR §51.402). In their SIP revisions, each state identifies the agencies that should be involved in interagency consultation.

In making conformity decisions, MPOs must follow the consultation procedures established by the SIP (40 CFR §51.416). It is the responsibility of the states to provide well defined procedures for consultation (40 CFR §51.402). At a minimum, these consultation procedures must outline the: 1) roles and responsibilities of participating agencies for each stage in the SIP and transportation planning processes, 2) level of consultation required for each participant, 3) organization and management of consultation groups, 4) frequency of group meetings, 5) circulation mechanism for review and comment on draft analyses, 6) process for responding to agency comments, and 7) procedures for developing a list of applicable TCMs that are included in the SIP (40 CFR §51.402(b)(2)-(c)). In California, the Air Resources Board and the state DOT are producing two sets of consultation procedures for transportation and air agencies to use in developing transportation plans, TIPs, and SIPs (Thompson, 1994).

In addition to establishing guidelines for interagency cooperation, the consultation process should be used by cooperating agencies to reach agreements on several conformity requirements. For example, local project analysis requires consulting agencies to determine which projects: 1) meet the exemption criteria, 2) qualify as regionally significant, and 3) require re-analysis due to significant changes in project design concept or scope (40 CFR §51.402(c)). The interagency determination process must include: 1) modeling methods, 2) regionally significant project evaluation criteria, 3) PM-10 hot spot analysis, 4) cooperative planning methods for metropolitan planning areas that do not include the entire nonattainment area, 5) project consultation procedures, and 6) document circulation guidelines (40 CFR §51.402(c)).

As specified at 40 CFR §51.402(d), any conflicts that arise through interagency consultation are to be resolved by the heads of agencies (i.e., state agencies and MPOs) or by the governor if all else fails. After the state DOT or MPO has notified the state air agency of the resolution, the agency has 14-calendar days to file an appeal with the governor. The SIP guidelines must stipulate the criteria for commencing the 14-day clock (e.g., the postmark date of the conformity determination). The resolved, final conformity determination must have the concurrence of the governor. After 14 days, if the state air agency fails to file an appeal with the governor, the MPO or state DOT may proceed with the final conformity determination. In this process, the governor may delegate the authority to resolve appeals. However, the governor may not delegate this role to any staff members of the state or local air agency; MPO; or state DOT, transportation commission, or board.

Under NEPA, the CEQ regulations recommend that federal agencies "cooperate with state and local agencies to reduce duplication between NEPA and state and local requirements" (Mandelker, 1984). In CEQ's *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, CEQ recommends that full cooperation should include "joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant 'little NEPA' state laws, so that one document will satisfy both laws" (Question 22, 46 FR 18026-18038). In addition, CEQ recognizes that there is a potential for agency conflicts; hence, in the *Forty Most Asked Questions*, CEQ states that "participating agencies should adopt a flexible, cooperative approach" to their differences and "acknowledge and describe the extent of those conflicts" in the EIS, as well as any possibility for resolution (Questions 22 and 23, 46 FR 18026-18038). Finally, CEQ explains that "a federal agency may go forward with its proposal despite an identified conflict" (Mandelker, 1984), unless the conflict is prohibited by law.

Although the interagency consultation process may result in agency conflicts, it is likely that participants will find the consultation process useful for resolving project-related

questions and concerns. For example, interagency consultation may be helpful to agencies addressing modeling issues. Not surprisingly, modeling uncertainty is an area for serious consideration because conformity relies heavily on the use of mandated modeling methods, which frequently yield questionable results (Guensler et al., 1994(a)). And, although conformity determinations do not require uncertainty assessments, the U.S. EPA has indicated that these concerns can be addressed through the consultation process (Brucker, 1994).

Under CEQA, however, agencies are required to acknowledge any inherent project uncertainties in an EIR. Not surprisingly, most EIRs will involve forecasting and uncertainty. Nevertheless, the CEQA regulations require that agencies must render their best effort to reasonably qualify, quantify, and disclose all project uncertainties (Cal. Code Regs., tit. 14, §15142, 1544). In contrast to CEQA, the CEQ NEPA regulations do not address project uncertainty directly. Nevertheless, EISs must be prepared when there is thought to be a potential for significant environmental impact, regardless of uncertainty. Consequently, agencies should do their best to identify project uncertainties under NEPA [CEQA] and conformity, even if the regulations do not require this directly.

In summary, the interagency cooperation requirements of these regulations clearly provide a useful opportunity for participating agencies to address their project questions and concerns (e.g., modeling uncertainties). Consequently, the authors recommend that cooperating agencies make an effort to use the interagency consultation process to resolve conflicts and address project concerns.

Citizen Suits

As a result of several statutory provisions, citizen suits clearly have a role in planning today. These provisions grant private citizens the power to seek enforcement of the NEPA [CEQA] and conformity mandates through the courts. There are citizen suit provisions included in Section 304 of the CAA that are relevant to conformity. In addition, citizens may file NEPA law suits under the Administrative Procedures Act (APA). Increasingly, citizens groups throughout the United States are using the courts to halt the projects that they oppose by obtaining declaratory or injunctive relief or both. Clearly, legal battles are costly and time consuming to all of the involved parties, and ultimately they may lead to the rejection of a proposed project (Guensler et al., 1994(a)). Nevertheless, these battles are a vital part of the democratic process afforded to U.S. citizens (Guensler et al., 1994(a)).

Unlike NEPA, CEQA provides a statute of limitations period for citizen suits so that CEQA challenges are addressed in a timely fashion. If a citizens group wants to bring a law suit against a CEQA project exemption, it has 35 days to do so from the date the exemption is filed (Cal. Code Regs., tit. 14 §15062(d)). If no notice of project exemption is filed, the group has 180 days from the date of project approval to commence legal action (PRC §21167). In the case of an EIR, if an agency files a Notice of Determination, citizens groups

have a 30-day time period to file a law suit, alleging that the agency has improperly determined whether a project may have a significant effect on the environment (Cal. Code Regs., tit. 14 §15094(d)). This time period is extended to 180 days, if no Notice of Determination is filed (Cal. Code Regs., tit. 14 §15112(c)(5)). In addition, citizens groups can file a law suit after a final EIR has been approved.

In California, citizen groups can seek judicial review in accordance with the provisions of the Code of Civil Procedure or they may also use the review process under APA. The Public Resources Code Sections 21168 (i.e., Review of Determination) and 21168.5 (i.e. Prejudicial Abuse of Discretion Test) govern the standard of review applied by courts in CEQA actions; Section 21168 incorporates the standards of Section 1094.5 of the Code of Civil Procedure (Remy et al., 1993). In general, the courts have applied liberal standards of review for establishing standing in CEQA cases (Remy et al., 1993). However, the courts are often more stringent in their review of evidence. In fact, courts frequently limit their review of evidence to information gathered or presented during draft comment periods only (Duggan, et al., 1988). Generally, a court's examination focuses on determining whether or not: 1) the public has been defrauded, 2) decisionmakers have been deprived of any critical information, or 3) any adverse environmental impacts have been ignored, understated, or underestimated (Duggan, et al., 1988).

In summary, one of the most important reasons for preparing a thorough and accurate EIS is the potential for civil litigation. Since legal challenges may occur months or even years after a NEPA [CEQA]/conformity determination is actually made, it is important to have all decisions well documented (Guensler et al., 1994(a)). Lastly, it is important that project sponsors recognize that even though thoughtful documentation and public involvement may fail to prevent citizens groups from pursuing legal action, public participation is likely to ameliorate some of the friction that exists between opposing citizens groups and the agencies responsible for proposed actions.

CONCLUSION

In this paper, the authors focused on the role of three significant pieces of environmental legislation, in particular the Conformity Rule, NEPA, and CEQA, in lessening the environmental impacts of new transportation projects. In November 1993, Congress promulgated the Conformity Rule in response to the mandates of Section 176(c) of the 1990 CAA. The Conformity Rule focuses on the approval of transportation plans, programs, and projects that are funded and approved under title 23 of the United States Code or the Federal Transit Act. Although the conformity regulations were adopted much more recently, the NEPA and CEQA regulations continue to play an important role in environmental conservation through federal, state, and local agency planning.

After careful study of these regulations, the authors have concluded that the most effective method of planning for transportation projects under the conformity regulations is to complete the NEPA [CEQA] and conformity processes concurrently. Although the Conformity Rule does not require the concurrent preparation of NEPA [CEQA] and conformity analyses, the authors assert that there is a fundamental necessity to complete these processes simultaneously. Integration of the planning processes under NEPA [CEQA] and conformity would satisfy the need for thorough environmental analysis and comprehensive planning, while addressing the public participation requirements. A concurrent analytic process would assist planners in achieving the dual goals of obtaining positive conformity determinations from FHWA and MPOs and project approval under NEPA [and CEQA].

In this paper, the authors emphasized several points with respect to concurrent regulatory analysis. First, time and budget savings may be achieved by coordinating environmental processes. Second, since much of the same data and information are required for technical analyses under NEPA [CEQA] and conformity, it is advisable to implement these regulations simultaneously. Third, concurrent analysis would help to prevent delays that could result from independent regulatory implementation. Finally, the authors highlighted two additional areas that are pertinent to NEPA [CEQA] and conformity: interagency consultation and citizen suits. The authors addressed these issues because they both provide an incentive for agencies to consider methods for improving their interactions with other agencies and the public, i.e., improved communication and opportunities for conflict resolution. Although project sponsors may be unable to dispel all project opposition through public involvement, the conformity and NEPA[CEQA] public participation requirements can assist planners in establishing lines of communication with the public that may ultimately reduce the risk of conflicts during project planning and implementation.

In conclusion, environmental regulations are playing a more active role in national planning and decisionmaking, largely because state and federal legislators have recognized that the environment is vulnerable to human activity. In fact, many policymakers throughout the nation have acknowledged that pollution prevention is a much more efficient method of conservation than is environmental remediation. Consequently, it is critical that planners make a concerted effort to apply all the relevant environmental regulations to their proposed actions, mitigating impacts whenever possible. Computer models and planning methodologies, for instance, provide decisionmakers with planning tools that emphasize both prevention and mitigation. An example of such a planning tool is the 1993 Conformity Rule, which offers air and transportation planners guidelines for coherent decisionmaking. If conformity is implemented in concert with other environmental regulations (e.g., NEPA [CEQA]), it can provide communities with a comprehensive planning method that incorporates public participation, alternatives analysis, and mitigation. Although coordination between these processes is not a specific

requirement of the Conformity Rule, the authors argued in this paper that project sponsors can develop an efficient strategy for transportation/air quality planning by adopting a streamlined process that integrates the requirements of NEPA [CEQA] and conformity. In fact, one of the primary objectives of this paper was to provide arguments and suggestions for integrating the requirements of these regulations. In summary, the new Conformity Rule, if implemented in conjunction with other applicable regulations, offers the country the potential for a greatly improved transportation and air quality planning system.

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Disclaimer

The conclusions, findings, and recommendations presented in this paper reflect the views of the authors who are responsible for the facts and the accuracy of the information presented herein. The contents do not necessarily reflect the official views or policies of the State of California or Caltrans. Lastly, this paper does not constitute a standard, specification, or regulation.

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