Transportation Conformity and NEPA Assumption Questions and Answers

1. Who will make the project-level conformity determination?

Under section 6004(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) states are allowed to assume responsibilities for Class II actions, or categorical exclusions (CEs), that have been listed by the U.S. Department of Transportation Secretary, including project-level conformity determinations, for federal-aid highway projects. As part of the assumption of these responsibilities, Caltrans will make project-level conformity determinations as part of the categorical exclusion determination and documentation for CEs listed in 23 CFR 771.117(c), the examples listed in 23 CFR 771.117(d), and actions listed in Appendix A of the Section 6004 Memorandum of Understanding.

Under section 6005 of SAFETEA-LU, five pilot states may also be assigned responsibilities for *Class III* (environmental assessments) and *Class I* (environmental impact statements) actions required under the National Environmental Policy Act (NEPA) and those CE actions not qualifying for assumption under section 6004. It does not, however, allow the states to assume project-level conformity responsibilities for these actions. Therefore, FHWA will have to make the project-level conformity determinations independent of these environmental review processes.

2. What projects are subject to project-level conformity determinations?

All non-exempt projects (i.e. projects that are not exempt per 40 CFR 93.126 or 93.128) in federal nonattainment and maintenance areas require a project-level conformity determination prior to the completion of the NEPA process.

3. When will FHWA begin making project-level conformity determinations, independent of the environmental review process, on actions requiring a CE, an EA or an EIS pursuant to the Section 6005 Pilot Program?

This process will become effective once the Memorandum of Understanding (MOU) for the Section 6005 Pilot Program between FHWA and Caltrans is executed and will remain in place until such time as the MOU is terminated. The section 6005 Pilot Program will remain in effect until August 10, 2011, which is six years from the enactment of SAFETEA-LU, however, California's necessary waiver of sovereign immunity currently sunsets on January 1, 2009. Caltrans is working with the Legislature to extend the waiver.

4. When, in the project development process for actions requiring a CE, an EA or an EIS pursuant to the Section 6005 Pilot Program, will FHWA make the project-level conformity determination?

The project-level conformity determination must be completed by FHWA prior to, and included in, the final EA or EIS. Caltrans cannot issue a finding of no significant impact or record of decision without the project-level conformity determination from FHWA. For CEs under the Section 6005 Pilot Program, FHWA must make the conformity determination prior to the approval of the CE classification by Caltrans.

5. What information does FHWA need to make the project-level conformity determination?

FHWA prefers that the air quality conformity documentation be a stand alone report. The air quality conformity documentation must include adequate summary information such that a conformity determination can be made on the preferred alternative without having to refer to the environmental document. For additional information regarding documentation, please refer to the updated project-level conformity determination checklist in Attachment 2. The conformity documentation should not include air quality issues that are not required for transportation conformity purposes (e.g. air toxics, asbestos, etc.).

6. How should local project sponsors request a project-level conformity determination from FHWA?

Local project sponsors must submit the conformity documentation to Caltrans' Local Assistance. Local Assistance will submit all requests for project-level conformity determinations to FHWA. Local project sponsors should incorporate this require into their project development schedules.

7. How should the conformity determination be documented in the final environmental document?

The air quality conformity documentation should be included in the technical studies. The environmental consequences section of the environmental document should disclose that FHWA made a conformity determination and to which alternative the conformity determination applies. Additionally, a copy of the FHWA conformity determination letter should be included in the final EA or EIS.

8. How should interagency consultation be carried out for project-level conformity determinations?

Interagency consultation should be carried out as it was prior to NEPA assumption, and should be documented in the conformity documentation.

9. How should public involvement be carried out for project-level conformity determinations?

Public involvement should be carried out as it was prior to NEPA assumption. Generally, public involvement for transportation conformity is carried out as part of the public involvement process for the environmental document. Project sponsors should make it clear in the circulation information that public comment is being accepted on the conformity determination, as well as the environmental document. Additionally, the conformity documentation should disclose that FHWA will make a conformity determination on the preferred alternative prior to finalizing the environmental document. Finally, the conformity documentation sent to FHWA should note if there were or were not public comments. If public comments were received, responses to those comments should be provided.