



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# Memorandum

Subject: **ACTION:** Exemption Criteria During Highway Sanctions Date: March 11, 1996

From: Rodney E. Slater  
Administrator

Reply to  
Attn. of: HEP-40

To: Regional Administrators  
Federal Lands Highway Program Administrator

This policy memorandum defines the exemption criteria that will be used to determine which projects can go forward and which grants can be awarded in the event EPA imposes highway sanctions under Section 179(a) or Section 110(m) of the CAA. This policy memorandum contains a description of the criteria for exemptions and clarification of the types of projects and programs that are exempt. Projects for which exemptions cannot be granted are also included in this policy memorandum.

## General Description

Highway sanctions, when applied, halt the approval of projects and the award of any grants funded under Title 23, U.S.C., except as defined in Section 179(b) and as clarified by this policy memorandum. This applies to the following major funding programs:

1. Surface Transportation Program (STP).
2. National Highway System.
3. Interstate Maintenance.
4. Bridges.
5. Interstate Construction.
6. Interstate Substitution.
7. Congestion Mitigation and Air Quality Improvement Program (CMAQ).

Projects funded under all other Title 23 programs and other authorizations are also subject to sanctions, including demonstration projects identified by Congress and specified in the ISTEA of 1991 under Sections 1103-1108 or in other laws, unless they meet the criteria set forth in this policy memorandum. Additionally, other Title 23 projects to be funded under previously authorized programs (prior to passage of the ISTEA, such as the Federal-aid Urban, Federal-aid Secondary Programs, etc.) may also be subject to certain highway funding restrictions under highway sanctions.

Projects funded under Title 49, U.S.C. chapter 53, the Federal Transit Act, as amended, are categorically exempt from sanctions by law as are other transportation programs authorized by statutes other than Title 23.

### **Typical Nonexempt Projects**

The following types of projects generally do not meet the exemption criteria in Section 179(b)(1) and would not be allowed to be federally funded or approved under Title 23 unless it is demonstrated that they meet one or more of the exemption criteria. These include projects that expand highway or road capacity, nonexempt project development activities, and any other project that does not explicitly meet the criteria in this policy memorandum. These may include activities for:

1. The addition of general purpose through lanes to existing roads.
2. New highway facilities on new locations.
3. New interchanges on existing highways.
4. Improvements to, or reconfiguration of existing interchanges.
5. Additions of new access points to the existing road network.
6. Increasing functional capacity of the facility.
7. Relocating existing highway facilities.
8. Repaving or resurfacing except for safety purposes, as defined by section 179(b).
9. Project development activities, including NEPA documentation and preliminary engineering, right-of-way purchase, equipment purchase, and construction solely for non-exempt projects.
10. Transportation enhancement activities associated with the rehabilitation and operation of historic transportation buildings, structures, or facilities not categorically exempted.

### **Project Exemptions**

Under Section 179(b)(1) of the CAA, once EPA imposes highway sanctions, the FHWA may not approve or award any grants in the sanctioned area except those which generally meet the criteria within this memorandum. Congress specifically exempted projects which fall under three categories: (1) safety programs and projects (under Section 179(b)(1)(A)); (2) seven congressionally-authorized activities (under Section 179(b)(1)(B)(i-vii)); and, (3) air quality improvement projects that would not encourage single occupant vehicle (SOV) capacity (under Section 179(b)(1)(B)(viii) of the CAA). This policy memorandum further interprets and clarifies these statutory exemption provisions.

#### **1. Safety Programs and Projects**

Safety projects are those for which the principal purpose is an improvement in safety but the projects may also have other important benefits. These projects must resolve a

demonstrated safety problem with the likely result being a significant reduction in or avoidance of accidents as determined by the FHWA. Such demonstration must be supported by accident or other data submitted by the State or appropriate local government.

Four general types of categories of safety-based programs and projects potentially meet the exemption criteria: grant programs and related activities; Emergency Relief (ER) projects; statewide safety improvement programs; and specific projects outside of a statewide safety program. Each category calls for varying levels of justification.

- a. Programs administered by NHTSA qualify for blanket exemptions, on the basis that their principal purpose is to improve safety and do not include any capital improvements. Programs that fall within this category include but are not limited to: (1) Use Safety Belts and Motorcycle Helmets (23 U.S.C. 153); (2) Highway Safety Programs (23 U.S.C. 402); (3) Highway Safety Research and Development (23 U.S.C. 403); and (4) Alcohol-Impaired Driving Countermeasures (23 U.S.C. 410).
- b. The ER projects funded by Title 23 to repair facilities damaged or destroyed by natural disasters, civil unrest, or terrorist acts are exempt without further justification, provided that such projects do not involve substantial functional, locational, or capacity changes.
- c. Statewide safety improvement programs include specific safety projects that can be justified on the basis of State or national level data, which will be additionally supported by data and analysis stemming from the State (or ISTEA) management system requirements once the systems are fully operational. Projects meeting this exemption category would come out of the Highway Safety Improvement Program (23 CFR Part 924) and the Highway Bridge Replacement and Rehabilitation Program (23 CFR Part 650, Subpart D). The Highway Safety Improvement Program also includes the Hazard Elimination Program (23 U.S.C. 152).
- d. Specific projects for which justification is needed to show that the project is related to safety, unless the project is drawn out of a statewide safety program and would be likely to reduce accidents, would include capital projects such as:
  - Elimination of, and safety features for, railroad-highway grade crossings.
  - Changes in vertical or horizontal alignment.
  - Increasing sight distance.
  - Elimination of high hazard locations or roadside obstacles.
  - Shoulder improvements, widening narrow pavements.
  - Adding or upgrading guardrail, medians and barriers, crash cushions, fencing.
  - Pavement resurfacing or rehabilitation to improve skid resistance.
  - Replacement or rehabilitation of unsafe bridges.
  - Safety roadside rest areas, truck size and weight inspection stations.

- Addition and upgrading of traffic control devices, (traffic signals, signs, and pavement markings).
- Lighting improvements.
- Truck climbing lanes.

Justification for an exemption on the grounds of safety must be based on accident or other data such as the data derived from a State's safety and bridge management system, the Highway Safety Improvement Program, or the Highway Bridge Replacement and Rehabilitation Program. Such data need not be specific to the proposed project's location, but may be based on accident or other data from similar conditions, including national experience where such projects have been implemented to remove safety hazards. For example, rigid highway sign posts were identified in the past as a safety hazard causing unnecessary deaths and injuries. The identification of this hazard led to national policy requiring rigid posts to be replaced with breakaway poles.

Projects exempted under the safety provision may not involve substantial functional (such as upgrading major arterial to freeways), locational, or capacity changes except when the safety problem could not otherwise be solved.

## 2. Congressionally Authorized Activities

Seven project types are identified specifically in the CAA section 179(b)(1) as exempt from highway sanctions. Essentially, these are projects that generally do not result in increased SOV capacity, or improve traffic flow (e.g., intersection improvements or turning lanes) in ways that reduce congestion and emissions:

- a. Capital programs for public transit. These include any capital investment for new construction, rehabilitation, replacement, or reconstruction of facilities and acquisition of vehicles and equipment.
- b. Construction or restriction of certain roads or lanes solely for the use of passenger buses or High Occupancy Vehicles (HOV). Exempt projects include construction of (or conversion of existing lanes to) new HOV lanes, if those lanes are solely dedicated as 24-hour HOV facilities.
- c. Planning for requirements for employers to reduce employee work-trip related vehicle emissions. This includes promotional and other activities associated with this type of program that are eligible under Title 23.
- d. Highway ramp metering, traffic signalization, and related programs that improve traffic flow and achieve a net emission reduction.
- e. Fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit operations (this includes the construction of new facilities and the maintenance of existing facilities).

- f. Programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration, particularly during periods of peak use, through road use charges, tolls, parking surcharges, or other pricing mechanisms, vehicle restricted zones or periods, or vehicle registration programs. Exempt projects include all activities of these types that are eligible under existing funding programs.
- g. Programs for breakdown and accident scene management, non-recurring congestion, and vehicle information systems, to reduce congestion and emissions.

The FHWA will consult with EPA on any project claimed to reduce emissions (e.g., with projects falling under paragraphs c, d, and g above). However, the final authority to determine whether a project meets the criteria in this memorandum and is exempt from highway sanctions rests with the FHWA.

- 3. **Air Quality Improvement Programs that Do Not Encourage SOV Capacity**  
Transportation programs not otherwise exempt that improve air quality and which would not encourage SOV capacity (as determined by EPA in consultation with DOT) are also exempt from highway sanctions. For example, projects listed in section 108(f) of the CAA and projects funded under 23 U.S.C. 149, the CMAQ program, are projects which EPA and DOT may, after individual review of each project, find to be exempt from highway sanctions. For these projects to advance while highway sanctions are in place, the State must submit to DOT an emissions reduction analysis similar to that required under the CMAQ program. Upon receipt, DOT will forward it to EPA. The EPA will complete its review and make its finding regarding air quality and SOV capacity within 14 days of receipt of such information.

The EPA and DOT have agreed that the following projects will be categorically exempt from highway sanctions, and will not require additional EPA review or an individual finding by EPA:

- a. The TCMs contained in an EPA-approved SIP or FIP which have emission reduction credit and will not encourage SOV capacity.
- b. I/M facilities and activities eligible for CMAQ funding.
- c. Bicycle and pedestrian facilities and programs.
- d. Carpool/Vanpool programs.
- e. Conversion of existing lanes for HOV use during peak-hour periods, including capital costs necessary to restrict existing lanes (barriers, striping, signage, etc.).

In considering exempt projects, States should seek to ensure adequate access to downtown and other commercial and residential areas, and should strive to avoid increasing or relocating emissions and congestion.

4. **Projects That Have a “De Minimis” Air Quality Impact and Provide Other Environmental or Aesthetic Benefits**

The following projects are likely to have “de minimis” environmental or environmentally beneficial impacts, provide other aesthetic benefits, do not promote SOV capacity, and are, therefore considered exempt from highway sanctions:

- a. Wetland Mitigation.
- b. Planting Trees, Shrubs, Wildflowers.
- c. Landscaping.
- d. Purchase of Scenic Easements.
- e. Billboard and Other Sign Removal.
- f. Historic Preservation.
- g. Transportation Enhancement Activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).
- h. Noise Abatement.

**Planning and Research Activities:** Planning and research activities for transportation and/or air quality purposes are exempt from highway sanctions (except as noted in the **Project Development Activities** section). Such planning and research is critical for the development of projects that improve safety and address an area's transportation/air quality needs. Planning and research activities may include development of an Environmental Impact Study or Environmental Assessment (under NEPA) in conjunction with a major investment study. Major investment studies are planning studies which normally take a multimodal approach in considering transportation alternatives, and are therefore exempt from sanctions under this criteria.

Research activities also include those research, development, testing, and planning projects involving the National Intelligent Transportation Systems (ITS) Program funded by Part B of Title 6 of the 1991 ISTEA. The goal of the ITS Program is to use advanced technology to improve travel and roadway safety without expanding existing infrastructure. The ITS activities are generally done under seven broad categories: (1) transportation management and traveller information; (2) travel demand management; (3) public transportation operations; (4) electronic payment; (5) commercial vehicle operations; (6) emergency management; and (7) advanced vehicle control and safety systems. Therefore, planning and research activities associated with the ITS Program are also exempt from sanctions under this criteria.

**Project Development Activities:** Development and completion of studies to meet requirements under NEPA are exempt from highway sanctions as long as consideration of projects that would be exempt under this policy memorandum, such as transit or other Transportation Demand Management (TDM) measures, are actively pursued as reasonable independent alternatives. Once all alternatives that could be considered exempt from highway sanctions under this policy memorandum are eliminated, project development activities for NEPA or other purposes are no longer exempt and can no longer be

approved or funded under Title 23. For example, if prior to completion of NEPA documentation, all TDM measures are eliminated from consideration and the sole remaining question is the determination of an alignment for a highway capacity-expanding project (which may include TDM), subsequent project development activities are not exempt from highway sanctions.

The FHWA may not approve preliminary engineering for final design of a project, nor can approval be granted for a project's plans, specifications, and estimates after initiation of highway sanctions for projects that are not exempt under this policy memorandum. Neither right-of-way nor any necessary equipment may be purchased or leased with Federal funds for nonexempt projects while an area is under sanction. Federally-funded construction may not in any way begin on a project that does not meet the exemption criteria described in this policy memorandum while an area is under sanction.

Highway sanctions apply to those projects whose funds have not yet been obligated by FHWA by the date the highway sanction applies. Those projects that have already received approval to proceed and had obligated funds before EPA imposes the prohibition may proceed even while the area is under sanction, if no other FHWA action is required to proceed. In the case of a phased project, only those phases that have been approved and had obligated funds prior to the date of sanction application may proceed. For example, if preliminary engineering for a project was approved and funds were obligated prior to application of sanctions, but no approval was secured for later project phases (such as right-of-way acquisition, construction, etc.), preliminary engineering could proceed while the highway sanction applies, but no subsequent phases of the project could proceed with FHWA funds unless the total project meets the exemption criteria in this policy memorandum. These restrictions pertain only to project development activities that are to be approved or funded by FHWA under Title 23. Activities funded under Title 49, U.S.C., or through State or other funds, may proceed even after highway sanctions have been imposed unless: (1) approval or action by FHWA under Title 23 is required; and (2) they do not meet the exemption criteria of this policy memorandum.

### **Other Environmental Requirements**

Exemption of a transportation project from Section 179(b)(1) highway sanctions does not waive any applicable requirements under NEPA (e.g., environmental documents), section 176(c) of the CAA (conformity requirement), or other Federal law.