

and attainment demonstrations) without a protective finding; and,

(5) the use of submitted safety margins in areas with approved SIPs that were submitted prior to November 24, 1993.

In response to the court decision, the EPA and U.S. Department of Transportation (DOT) issued guidance¹ to address the provisions directly affected by the court decision. DOT subsequently modified its June 18, 1999, guidance and replaced it with revised guidance issued on January 2, 2002, and announced in the **Federal Register** on February 7, 2002, (67 FR 5882).² DOT issued supplemental guidance³ in May 2003 to clarify the conformity requirements as they relate to FHWA/FTA's approval of a final environmental impact statement and the National Environmental Policy Act (NEPA) process completion. In addition, FTA issued guidance on April 9, 2003, that further clarified which approvals are necessary for transit projects to proceed during a lapse.⁴ The EPA and DOT memoranda serve as the basis for today's proposed amendments to the transportation conformity rule. EPA and DOT consulted with each other on the development of all guidance documents implementing the March 2, 1999, court decision. See EPA's transportation conformity web site listed in section

I.B.2. to download an electronic copy of these guidance documents.

In addition to addressing the impact of the court decision, today's proposal would also amend several other provisions of the conformity rule. These proposed rule amendments include: New definitions for "donut areas" and "isolated rural nonattainment and maintenance areas"; streamlining of the current requirements affecting frequency of conformity determinations; EPA's revised interpretation of the requirements for using the latest planning assumptions; clarification of the appropriate horizon years for hot-spot analyses; a minor update to the current list of exempt projects; and, several minor clarifications to § 93.118 of the conformity rule ("Criteria and procedures: Motor vehicle emissions budget.") that are aimed at improving the implementation of this section of the conformity regulation. Additional background information and rationale for these proposed rule changes are included in our discussion below.

III. Federal Projects

A. What Are We Proposing?

Today's proposal would modify 40 CFR 93.102(c) so that no new federal approvals or funding commitments for non-exempt projects can occur during a transportation conformity lapse. A conformity lapse generally occurs if transportation plan and TIP conformity determinations are not made within specified time frames. During a conformity lapse no new conformity determinations for FHWA or FTA non-exempt projects may be made.

Section 93.102(c)(1) of the 1997 conformity rule (62 FR 43780) allowed a highway or transit project to receive additional federal approvals and funding commitments during a lapse if the project came from a previously conforming plan and TIP, a conformity determination for the project had been made and the NEPA process was completed before the lapse. Section 93.101 of the rule defines "NEPA process completion" as "the point at which there is a specific action to make a determination that a project is categorically excluded [CE], to make a Finding of No Significant Impact [FONSI], or to issue a record of decision on a Final Environmental Impact Statement [FEIS] * * *" In its March 2, 1999, decision, the court held that § 93.102(c)(1) was unlawful and remanded this section to EPA for further rulemaking.

To address the court decision, EPA is eliminating the current § 93.102(c)(1) provision and proposing new regulatory

language under § 93.102(c). Under this proposed provision, non-exempt transportation project phases that have received all required FHWA or FTA approvals or funding commitments and that have met associated conformity requirements before a lapse could be implemented during the lapse; however, no new federal approvals or funding commitments for subsequent or new phases could be made during the lapse.

Today's proposal would also move § 93.102(c)(2) requirements to § 93.104(d) to limit redundancy and improve organization of the conformity rule. This proposed organizational change would not change the substantive requirements of § 93.102(c)(2). The conformity rule would continue to require a new conformity determination when a significant change in a project's design concept and scope has occurred, a supplemental environmental document for air quality purposes is initiated, or three years have elapsed since the most recent major step to advance a project. A major step is defined in the conformity rule as "* * * NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of plans, specifications and estimates * * *" (40 CFR 93.104(d)).

Today's proposed changes are consistent with the latest EPA and DOT guidance issued to implement the court decision. EPA and DOT consulted on the development of these guidance documents. On January 2, 2002, DOT revised its guidance on how most projects that receive federal approval or funding are affected during a lapse, and announced the release of the new guidance in the **Federal Register** on February 7, 2002 (67 FR 5882). DOT issued supplemental guidance in May 2003 to clarify the conformity requirements as they relate to FHWA/FTA's approval of a final environmental impact statement and the NEPA process completion. In addition, FTA issued guidance on April 9, 2003, that further clarified which approvals are necessary for transit projects to proceed during a lapse. DOT's revised guidance and memoranda supersede previous guidance issued on June 18, 1999. The revised guidance clarifies that only project phases that have met conformity requirements and received federal approval or funding commitments before a lapse can proceed during a lapse. See EPA's conformity website listed in section I.B.2. to download an electronic copy of these guidance documents.

¹ May 14, 1999, Memorandum from Gay MacGregor, then-Director of the Regional and State Programs Division of EPA's Office of Transportation and Air Quality, to Regional Air Division Directors, "Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision"; and, June 18, 1999, Memorandum from Kenneth R. Wykle, then-Administrator, Federal Highway Administration (FHWA), and Gordon J. Linton, then-Administrator, Federal Transit Administration (FTA), to FHWA Division Administrators, Federal Lands Highway Division Engineers, and FTA Regional Administrators, "Additional Supplemental Guidance for the Implementation of the Circuit Court Decision Affecting Transportation Conformity."

² January 2, 2002, Memorandum from Mary E. Peters, Administrator, Federal Highway Administration (FHWA), and Jennifer L. Dorn, Administrator, Federal Transit Administration (FTA), to FHWA Division Administrators, Federal Lands Highway Division Engineers, and FTA Regional Administrators, "Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity"; February 7, 2002, Notice, Issuance of Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity, **Federal Register**, 67 FR 5882.

³ May 2003, Memorandum from Federal Highway Administration and Federal Transit Administration, "INFORMATION: Clarification of Transportation Conformity Requirements for FHWA/FTA Projects Requiring Environmental Impact Statements."

⁴ April 9, 2003, Memorandum from Jennifer L. Dorn, Administrator, Federal Transit Administration, to Regional Administrators, Regions 1-10, "INFORMATION: Revised FTA Procedures for a Conformity Lapse."