

### *B. Why Are We Proposing These Changes?*

Today's proposal is necessary to make the conformity regulation consistent with the March 1999 court decision. The court held that § 93.102(c)(1) of the 1997 conformity rule was inconsistent with the Clean Air Act since it allowed transportation projects that had previously been found to conform and had completed the NEPA process ("grandfathered" projects) to receive further federal approvals or funding commitments and advance towards construction during a lapse. In effect, this provision allowed project phases that weren't approved prior to a lapse to proceed during the lapse. The D.C. Circuit Court ruled that Clean Air Act section 176(c)(2)(C) prohibits FHWA and FTA from approving or funding new project phases in nonattainment and maintenance areas in the absence of a currently conforming transportation plan and TIP. Clean Air Act section 176(c)(2)(C)(i) states that project approvals can only occur if "such a project comes from a conforming plan and program."

EPA believes that its proposal to allow previously authorized project phases to be implemented during a lapse is a reasonable interpretation that is consistent with Clean Air Act section 176(c)(2)(C), since no federal approvals or funding commitments could be made for new project phases during a lapse. The court did not explicitly rule on the issue of how previously authorized right-of-way (ROW) acquisition, final design, or construction projects are affected during a lapse, but its decision leads EPA to the conclusion that a project phase that has previously received all federal approvals and funding commitments can be implemented during a conformity lapse.

Therefore, today's proposal provides consistency in implementing all federal authorizations, as described in DOT's **Federal Register** notice for its January 2, 2002, guidance. The proposal consistently applies the principle that to "fund" a project actually means the point at which DOT commits to funding a particular project phase (e.g., ROW acquisition).

This interpretation differs from what was outlined in DOT's June 18, 1999, guidance, which asserted that when the Clean Air Act states that DOT cannot "fund" a project unless it conforms, "fund" actually meant only the point at which DOT committed to fund a project for final construction. As a result, only projects that had received funding commitments for final construction prior to a conformity lapse could

proceed during a lapse. However, under the 1999 guidance, reimbursements for previously authorized ROW acquisition and final design activities could not proceed during a lapse, resulting in the federal government suspending its previously authorized commitments to these activities. As explained in DOT's January 2, 2002, revised guidance, EPA and DOT now believe that suspending such authorized commitments is not required by the Clean Air Act as interpreted in the court's decision, and therefore, this proposal does not incorporate the superseded June 1999 guidance.

### *C. What Is the Practical Impact of the Proposal?*

This proposal would only affect those areas that are unable to meet a conformity deadline and as a result enter into a conformity lapse. Although even short-term conformity lapses can affect transportation planning and project development processes, EPA anticipates that this proposal would primarily affect areas that are in a conformity lapse for a significant period of time. In contrast, this proposal would have no impact in areas where a lapse is short or in lapsed areas that have few transportation projects if no new FHWA/FTA non-exempt projects are pending in these cases.

When an area has a conformity lapse, no new FHWA/FTA approvals or funding commitments for subsequent or new project phases (i.e., NEPA, final design, ROW acquisition, or construction) could be made. The only projects that can receive further FHWA/FTA approvals or funding during a plan and TIP conformity lapse are: (1) Projects exempt from the conformity process; and (2) transportation control measures (TCMs) that are specifically included in an approved state implementation plan (SIP). Exempt projects are FHWA or FTA projects that are listed in § 93.126, § 93.127, or § 93.128 of the conformity rule. A conformity lapse ends when DOT makes a new transportation plan and TIP conformity determination.

For FHWA-funded non-exempt projects, project phases (i.e., final design, ROW acquisition, or construction) that received funding commitments or an equivalent approval or authorization prior to a conformity lapse may continue during the lapse. The execution of a project agreement (which includes Federal approval of the plans, specifications, and estimates) indicates funding commitment.

For FTA-funded non-exempt projects, the largest projects are handled with a full funding grant agreement (FFGA). If

an FFGA was executed prior to a conformity lapse, the project can continue to utilize all federal grant funds during the lapse. If the FFGA was not completed by the date of the lapse, the project sponsor may only complete the current phase of project development (e.g., final design or land acquisition). Transit projects not handled with FFGAs may proceed during a lapse if FTA approved a grant for construction or vehicle acquisition prior to the lapse. If a construction grant was not approved before the lapse, the project sponsor may only complete the current phase of project development.

Subsequent phases of a project for which FHWA or FTA has not taken an approval action or awarded a funding commitment may not proceed in the absence of a conforming plan and TIP. For federal transportation project phases not requiring a project specific project agreement/authorization approval, the State or local transportation agency should not take any action committing the State or local agency to proceed with the project phase during a lapse unless the project phase has already received full approval or authorization for funding before the lapse.

Highway projects using design-build contracting can proceed with all project phases that were included in the design-build contract if FHWA authorized the contract and determined conformity before the lapse (23 CFR 635.309). Similarly, transit projects using design-build contracting can proceed with design and construction if a grant for design and construction was made by FTA prior to the lapse.

Highway projects that require federal approval but no federal funding can proceed during a lapse if all necessary approvals occurred before the lapse. For example, consider a proposed regionally significant state toll road that connects to a federal interstate highway. The proposed road has received a conformity determination, federal NEPA approval, FHWA approval of the new interstate access point, and the project does not require FHWA approvals or funding commitments for subsequent project phases. In this case where no further FHWA actions are required, the project could proceed to construction during a conformity lapse, as long as no additional approvals by recipients of federal funds are needed. As always, the project would continue to be considered in the regional emissions analysis for the nonattainment or maintenance area. See Section IV. "Non-Federal Projects" of today's proposal for more information on how non-federal project approvals are affected during a conformity lapse.