

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

FORM #7

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Filing Date
FILED

SEP 2 1 12 PM '98

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

Oct 9, 1998

NOTICE OF AN EMERGENCY RULE

AGENCY: Division of Environmental Protection, Office of Air Quality TITLE NUMBER: 45

CITE AUTHORITY: W. Va. Code §§22-5-1 et seq.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 36

TITLE OF RULE BEING AMENDED: "Requirements for Determining Conformity of Transportation
Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or The Federal Transit
Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)"

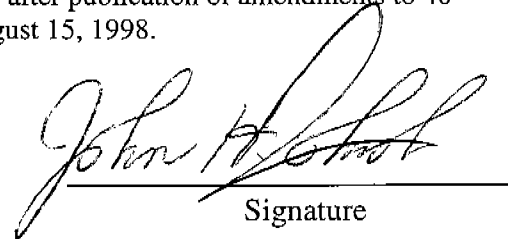
IF NO, SERIES OF NUMBER OF RULE FILED AS AN EMERGENCY: _____

TITLE OF RULE BEING FILED AS AN EMERGENCY: _____

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME
EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY
AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE
AS FOLLOWS: 40 CFR 51.390 requires that states adopt criteria and procedures for making transportation
conformity determinations that are consistent with the federal transportation conformity rule. Section 51.390
specifies that such adoption be submitted to U.S. EPA by 12 months after publication of amendments to 40
CFR Part 93, Subpart A (last revised August 15, 1997) which is August 15, 1998.

Use additional sheets if necessary


Signature

\$17.50



BUREAU OF ENVIRONMENT
10 McJunkin Road
Nitro, WV 25143-2506

CECIL H. UNDERWOOD
GOVERNOR

MICHAEL P. MIANO
COMMISSIONER

September 2, 1998

Ms. Judy Cooper
Director
Administrative Law Division
Capitol Complex
Charleston, WV 25305

RE: 45CSR36 - "Requirements for Determining Conformity of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)" -- Emergency Rule

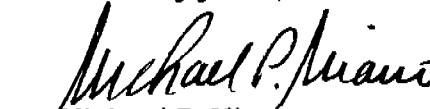
Dear Ms. Cooper:

This is to advise that I am giving approval to file the above-referenced rule with your office and the Legislative Rule-Making Review Committee as an agency-adopted emergency rule.

The identical rule was filed as a proposed legislative rule with your office and the Committee on July 31, 1998.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Carrie Chambers in my office at 759-0515.

Sincerely yours,


Michael P. Miano
Commissioner

MPM:cc

Attachment

cc: Carrie Chambers
Karen Watson, OAQ

Questionnaire
Emergency

DATE: September 2, 1998

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (AGENCY NAME, ADDRESS & PHONE NUMBER) Division of Environmental Protection
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311-2599
Phone: 304-558-4022

EMERGENCY RULE TITLE: "Requirements for Determining Conformity of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or The Federal Transit Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)"

1) DATE OF FILING September 2, 1998

2) STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:
W. Va. Code §§22-5-1 et seq.

3) DATE OF FILING OF PROPOSED LEGISLATIVE RULE:
July 31, 1998

4) DOES THE EMERGENCY RULE ADOPT NEW LANGUAGE OR DOES IT AMEND OR APPEAL A CURRENT LEGISLATIVE RULE?
Amends current 45CSR36

- 5) HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND EXPIRED?

A similar emergency rule was filed in 1994 to adopt the original, mandatory, federal transportation conformity provisions.

- 6) STATE, WITH PARTICULARITY, THOSE FACTS AND CIRCUMSTANCES WHICH MAKE THE EMERGENCY RULE NECESSARY FOR THE **IMMEDIATE** PRESERVATION OF PUBLIC PEACE, HEALTH, SAFETY OR WELFARE.

N/A

- 7) IF THE EMERGENCY RULE WAS PROMULGATED IN ORDER TO COMPLY WITH A TIME LIMIT ESTABLISHED BY THE CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN.

40CFR51.390 requires that states adopt criteria and procedures for making transportation conformity determinations that are consistent with the federal transportation conformity rule. Section 51.390 specifies that such adoption be submitted to U.S. EPA by 12 months after publication of amendments to 40 CFR Part 93, Subpart A (last revised August 15, 1997) which is August 15, 1998.

- 8) STATE, WITH PARTICULARITY, THOSE FACTS AND CIRCUMSTANCES WHICH MAKE THE EMERGENCY RULE NECESSARY TO PREVENT SUBSTANTIAL HARM TO THE PUBLIC INTEREST.

Failure to adopt the transportation conformity provisions in a timely manner
would probably lead to U.S. EPA issuing a "finding of deficiency" on W. Va.'s air
quality State Implementation Plan (SIP). If the deficiency were left uncorrected,
then U.S. EPA would also impose sanctions including withholding federal
highway funds.

**BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION**

BRIEFING DOCUMENT

Rule Title: 45CSR - 36 "Requirements for Determining Conformity of Transportation Plans, Programs, and Projects Developed, Funded or Approved under Title 23 U.S.C. or the Federal Transit Laws, to Applicable Air Quality Implementation Plans" (Transportation Conformity)

A. AUTHORITY: W. Va. Code §§22-5-1 et seq.

B. SUMMARY OF RULE:

The purpose of this rule is to adopt by reference the requirements of 40 CFR Part 93, Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws" as effective on September 15, 1997. This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such transportation-related activities to applicable air quality implementation plans developed pursuant to Section 110 and Part D of the Clean Air Act, as amended (42 U.S.C. 7401 et seq.).

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

40CFR51.390 requires that states adopt criteria and procedures for making transportation conformity determinations that are consistent with the federal transportation conformity rule. This rule must be adopted as an emergency rule because section 51.390 specifies that such adoption be submitted to U.S. EPA by 12 months after publication of amendments to 40 CFR Part 93, Subpart A (last revised August 15, 1997) which is August 15, 1998.

In addition, this rule must be adopted as an emergency rule since failure to adopt the transportation conformity provisions in a timely manner would probably lead to U.S. EPA issuing a "finding of deficiency" on W. Va.'s air quality State Implementation Plan (SIP). If the deficiency were left uncorrected, then U.S. EPA would also impose sanctions including withholding federal highway funds.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

A federal counterpart to this proposed rule exists. In accordance with the Director's recommendation, and with limited exception, the Office of Air Quality proposes that the rule incorporate by reference the federal counterparts.

The sole exception to full adoption of the provisions in 40 CFR Part 93, Subpart A is §93.102 (d) "Grace Period for new nonattainment areas" which is expressly excluded because it has been invalidated by a federal court. Although the exclusion of this section technically makes the proposed rule more stringent than the federal rule as promulgated, the proposed rule comports with federal law as interpreted by a federal court

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c.) the Director has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR36 - Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)

Type of Rule: X Legislative Interpretive Procedural

Agency: Office of Air Quality

Address: 1558 Washington Street, East
Charleston, WV 25311-2599

1. Effect of Proposed Rule	Annual		Fiscal Year		
	Increase	Decrease	Current	Next	There-after
Estimated Total Cost	\$-0-	\$-0-	\$-0-	\$-0-	\$-0-
Personal Services	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates: This revision to the rule is not expected to increase costs significantly over current rule expenses.

3. Objectives of these rules: The purpose of this rule is to adopt by reference the requirements of 40 CFR Part 93, "Determining the Conformity of Federal Actions to State or Federal Implementation Plans", Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. Or the Federal Transit Laws" as effective on September 15, 1997. The original federal rule (58 FR 62188, November 24, 1993) was promulgated

by the U.S. Environmental Protection Agency (USEPA) to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.).

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

See Note 2 above.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

The federal rule could negatively impact certain industries such as the construction industry and material suppliers as well as political subdivisions if transportation projects were canceled under a finding of non-conformity. The continued adoption of the federal Transportation Conformity Rules as state rules, as required by the Clean Air Act, would not necessarily impose additional impacts beyond the federal requirements. In fact, the revised federal rule allows more flexibility and should be less burdensome than present requirements.

C. Economic Impact on Citizens/Public at Large.

Minimal impacts should result with respect to the public at large.

Date:

June 16, 1998

Signature of Agency Head or Authorized Representative

[Handwritten Signature]

SEP 2 1 13 PM '98

TITLE 45
LEGISLATIVE RULE
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 36
REQUIREMENTS FOR DETERMINING CONFORMITY OF
TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS DEVELOPED,
FUNDED OR APPROVED UNDER TITLE 23 U.S.C. OR THE FEDERAL TRANSIT
~~ACT~~LAWs, TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS
(TRANSPORTATION CONFORMITY)

§45-36-1. General.

1.1. Scope. -- The purpose of this rule is to adopt by reference the requirements of 40 CFR Part 93, "~~Determining the Conformity of Federal Actions to State or Federal Implementation Plans~~"; Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. ~~Or~~ the Federal Transit ~~Act~~Laws". This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such transportation-related activities to applicable air quality implementation plans developed pursuant to Section 110 and Part D of the Clean Air Act, as amended (42 U.S.C. 7401 et seq.). ~~The federal rule was promulgated by the U.S. Environmental Protection Agency (USEPA) to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.), and the related requirements of 23 U.S.C. Section 109(j), with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under Title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.). This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to applicable air quality implementation plans developed pursuant to Section 110 and Part D of the CAA.~~

1.2. Authority. -- W.Va. Code ~~§22-1-3 and §§22-5-1~~§22-5-1 et seq.

1.3. Filing Date. -- ~~April 28, 1995.~~

1.4. Effective Date. -- ~~May 1, 1995.~~

1.5. Incorporation by Reference -- Federal Counterpart Regulations - The Director has determined that a federal counterpart regulation exists, and in accordance with the Director's recommendation, with limited exception, this rule incorporates by reference 40 CFR Part 93, Subpart A, effective July 1, 1997, as amended by the Federal Register through June 1, 1998.

§45-36-2. Definitions.

For the purpose of this rule, the following definitions shall be used:

2.1. Unless specified or added below, all terms used but not defined shall have the meaning given them, or referred to, by 40 CFR §93.101, "Definitions".

2.2. "Applicable State Implementation Plan" (SIP), [also referred to as "applicable air quality implementation plan(s)", "applicable implementation plan(s)", or "applicable SIP"] specifically means the West Virginia State Implementation Plan, including the most current revisions approved by the United States Environmental Protection Agency (USEPA) and any Federal Implementation Plan implemented in the State of West Virginia.

2.3. "Director" means the Director of the West Virginia Division of Environmental Protection or such other person to whom the Director has delegated authority or duties pursuant to W. Va. Code §22-1-6 or §22-1-8.

2.4. "Division of Environmental Protection" (DEP) means the Division of Environmental Protection as defined in W. Va. Code §§22-1-1 et seq.

2.5. "Party" or "Parties" means the agencies and organizations expressly listed in the individual Memorandums of Understanding referred to in Section 7 of this rule.

2.6. "Person" means any and all persons, natural or artificial, including any municipal, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.7. "State Governor" or "Governor" means the Governor of West Virginia or his or her designated representative.

2.8. "State and Local Air Quality Agency(ies)" or "State Air Agency" means the West Virginia Division of Environmental Protection, Office of Air Quality.

§45-36-3. Adoption of Criteria, Procedures and Requirements.

3.1. The Director hereby adopts and incorporates by reference, ~~with the exceptions noted in Section 5 of this rule, the all provisions of 40 CFR Part 93, Subpart A, "Conformity to State or Federal Implementation Plans of 40 CFR Part 93, Subpart A Transportation Plans, including associated criteria Programs, and Projects Developed, procedures and requirements contained in 40 CFR Part 93, Subpart A, as in effect on December 27~~ Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws" effective July 1, 1997, as amended by the 1993 for the purpose of meeting requirements of 40 CFR Part 51 Subpart T, Section 51.396 Federal Register through June 1, 1998, with the exception of 40CFR§93.102(d).

§45-36-4. Requirements.

4.1. All transportation plans, programs, and projects developed, funded or approved in West

Virginia, under Title 23 U.S.C. or the Federal Transit ~~Act~~Laws, must conform to applicable air quality implementation plans in West Virginia. Any agency or organization charged with the responsibility to make transportation conformity determinations shall do so pursuant to the provisions of 40 CFR Part 93, Subpart A and this rule; and ~~will~~shall use the consultation procedures specified ~~below~~in Section 5.

§45-36-5. Consultation.

5.1. The consultation requirements of 40 CFR Part 93, Subpart A, Section 93.105 are hereby addressed and fulfilled by state-specific consultation agreements (Memorandums of Understanding) mutually established by and among the W. Va. Division of Environmental Protection (WVDEP), the W. Va. Department of Transportation (WVDOT), and the appropriate Metropolitan Planning Organizations (~~MPO's~~MPOs), which agreements are included in Appendix A and are hereby incorporated by reference into this rule. ~~These agreements address and comply with the requirements of 40 CFR Part 93, Subpart A, Section 93.105.~~

§45-36-6. Severability.

6.1. The provisions of this rule and associated memorandums of understanding are severable and if any provisions or part thereof shall be held invalid, unconstitutional, or inapplicable to any person or circumstance; such invalidity, unconstitutionality, or inapplicability shall not affect or impair any of the remaining provisions, sections, or parts of this rule and associated memorandums of understanding; or their application to any persons or circumstances.

45CSR36
APPENDIX A
EXAMPLE Memorandums of Understanding (MOU's)

I. MOU among WVDEP, WVDOT and the Brooke-Hancock-Jefferson Metropolitan Planning Commission (BHJ)

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING
Parties: WVDEP, WVDOT and BHJ

Federal regulations (40 CFR ~~§51.396~~§51.390) require submission to USEPA of a State Implementation Plan (SIP) revision adopting the provisions of 40 CFR Part 93, Subpart A, (Transportation Conformity), including procedures for interagency consultation (Federal, State and local) and resolution of conflicts. This document details procedures for meeting interagency consultation requirements set forth in 40 CFR §93.105. Parties to this Memorandum of Understanding (MOU) are: the West Virginia Division of Environmental Protection (WVDEP); the West Virginia Department of Transportation (WVDOT); and the Brooke-Hancock-Jefferson Metropolitan Planning Commission (BHJ), herein referred to as the "Metropolitan Planning Organization" or "MPO". BHJ will be considered the "primary responsible MPO" and, is the MPO referred to in this MOU, unless otherwise specified. Some provisions require interaction with other ~~MPO's~~MPOs and when necessary, the text will specify which procedures apply to the primary responsible MPO (BHJ), other responsible ~~MPO's~~MPOs or adjacent ~~MPO's~~MPOs.

In addition to the above mentioned parties, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Transportation (USDOT), through the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), have review and/or approval functions at various stages of the conformity determination process.

The parties herein mutually agree to adopt and abide by all provisions of 40 CFR Part 93, "Determining the Conformity of Federal Actions to State or Federal Implementation Plans", Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" as effective on September 15, 1997. The only exception is §93.102 (d) "Grace Period for new nonattainment areas" which is expressly excluded because it has been invalidated by a federal court. Furthermore, the parties agree to abide by the consultation procedures detailed below in order to meet the requirements of 40 CFR §93.105, "Consultation".

Consultation is required in at least three instances: 1) SIP revision relating, directly or indirectly, to mobile sources (transportation); 2) conformity analysis for new or amended Transportation Improvement Program (TIP); and 3) conformity analysis for new or revised Transportation Plan. Additional consultation requirements are specified below. SIP revisions are

initiated by WVDEP. TIP and Transportation Plan conformity determinations are initiated by the MPO, with the technical assistance of WVDOT.

a) General

- 1) WVDEP will prepare, and submit to USEPA, a SIP revision that adopts the provisions of the federal transportation conformity rule and which includes the consultation procedures below. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. WVDEP will provide reasonable opportunity for comment from the MPO and WVDOT and USDOT before submitting SIP revisions that directly impact transportation activities. Such revisions include, at a minimum, SIP revisions that establish or change the highway vehicle emissions budget, or specify Transportation Control Measures (~~TCMs~~TCMs) in nonattainment or maintenance areas.
- 2) The MPO and WVDOT, before making conformity determinations, must provide reasonable opportunity for consultation with WVDEP, USDOT and USEPA. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. Further, the USDOT (via FHWA and FTA) and the USEPA have review, comment and approval responsibilities at various stages of the conformity process.

b) Interagency consultation procedures - General factors

40 CFR §93.105(b)(2) requires that six general factors be addressed. The following procedures are numbered consistently with the federal rule and address each of the requirements found in 40 CFR §93.105(b):

- 1) The procedures to be included in the SIP revision are detailed below.
- 2) Interagency consultation procedures will include, at a minimum, the items listed below and the specific processes in paragraph (c) of this section:
 - i) When a SIP revision is proposed, it will be the responsibility of WVDEP to provide the MPO and WVDOT with copies of relevant documents at the earliest practical date, but no later than the initiation of a public comment/participation process. Should any party need additional information or desire a meeting it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

When the TIP or Transportation Plan requires conformity analysis, WVDOT Planning staff will notify the specified contact person in WVDEP, and utilizing mutually agreed upon technical procedures, will calculate the projected emissions for the Transportation Plan or TIP. This emissions information will be provided to the MPO and

WVDEP specified contact persons in a timely manner. The MPO will include a finding of conformity or non-conformity in the appropriate document. The MPO will provide a copy of the TIP; or Transportation Plan; or where applicable, individual project analyses; to WVDEP and WVDOT at the earliest practical date, but not later than the initiation of the public participation process. The MPO will maintain a public participation process consistent with the requirements of 23 CFR Part 450. Should any party need additional information or desire a meeting, it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

ii) Each party: WVDEP, WVDOT, and the MPO will designate a specific person or persons as the contact(s) for technical consultations. The specified person(s) may be assigned or reassigned this duty as necessary for the smooth running of the agency or organization involved. The other parties must be notified of such changes in a timely manner, to facilitate the consultation process.

To the extent possible, the initial consultation process will be on an informal basis between the specified contact persons ("Level One" Consultation). When an issue cannot be resolved through the routine interaction of the specified contact persons, then a more formal process will be required. This more formal process is described in the Conflict Resolution Section.

iii) As previously stated in subsection (i) above, relevant documents or copies will be provided by the appropriate party at the earliest practical date, but not later than the initiation of a public comment/participation process. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to the other parties at their request, in a timely manner.

iv) No regularly scheduled consultation meetings are established by this document. However, any party may initiate a meeting, by phone or in writing, when a need is perceived. The meeting may be conducted by telephone if all parties concur. The initiating party will have the responsibility to establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties will make reasonable efforts to help in selecting a suitable place and time for the meeting and provide representatives to participate in the meetings. If suitable meeting arrangements can not be made or if the issue(s) remain unresolved, the conflict resolution procedures may be initiated by any party.

v) If any party provides substantial written comments regarding any matter subject to the requirements of 40 CFR §93.105, it shall be the responsibility of WVDEP (in the case of a proposed SIP revision) or the MPO (in the case of a TIP or Plan revision) to provide a substantive written response to the party in a timely manner. If the response is not

satisfactory to the receiving party, the conflict resolution procedures may be initiated. The party responsible for generating the document will include both the comments and the response in the official record for the appropriate document.

vi) To date, there have been no Transportation Control Measures (~~TCMs~~TCMs) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, if WVDEP anticipates utilizing ~~TCMs~~TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes a SIP revision that includes ~~TCMs~~TCMs, the agency will notify WVDOT and the MPO, and provide each party the opportunity to provide input as soon as practical, but no later than the beginning of any public comment period.

c) Interagency consultation procedures - Specific processes

40 CFR §93.105(c)(1) specifies ~~six~~sixteen items which must be addressed by the consultation process. The process for handling each of these items, numbered in the same sequence as the federal regulation, is as follows:

1) i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

WVDEP, WVDOT, and the MPO will mutually agree on the model and methods for emissions ~~analysis~~analyses. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions ~~analysis~~analyses. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP;

WVDOT will make a determination, based on professional judgement, of which projects or project changes may potentially generate regionally significant emissions. Such determination will be included in the appropriate document(s) along with a brief justification. Upon request, WVDOT will provide copies of such documents to any party.

iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR ~~§§93.134~~§§93.126 and ~~93.135~~93.127) should be treated as non-

exempt in cases where potential adverse emissions impacts may exist for any reason;

It is expected that any project consistent with 40 CFR ~~§93.134~~§93.126 or 40 CFR ~~§93.135~~§93.127 will not have regional air quality impacts. However, any of the parties may initiate a review of the impact of a project if there is reason to believe that a particular project warrants closer scrutiny. Staff of the three parties will evaluate relevant information and attempt to reach a consensus using Level One consultation procedures. If the issue remains unresolved, the conflict resolution procedures may be initiated by any party.

iv) Making a determination, as required by §93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

Historically, there have not been any ~~TCMs~~TCMs pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of ~~TCMs~~TCMs are not applicable at this time. However, if WVDEP anticipates utilizing ~~TCMs~~TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes to include ~~TCMs~~TCMs in a SIP revision, the other parties must be notified as soon as practical, but no later than the start of the public comment period for the relevant document. Any such SIP revision must include consultation procedures that satisfy the requirements of 40 CFR §93.105(c)(1)(iv).

v) Identifying, as required by ~~§93.131~~§93.123 (d), projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis; and

WVDEP will notify the MPO of any areas within its planning region that are designated as PM₁₀ nonattainment/maintenance areas. WVDEP will also notify the MPO of any areas within its planning region that are proposed for such designation as soon as practical, but no later than the start of the public comment period related to such designation. Further, WVDEP will notify the MPO of any project sites that have PM₁₀ violations verified by monitoring. The MPO will be responsible for providing a summary to WVDEP of all projects in the area, in sufficient detail so that other similar projects may be identified. Using Level One consultation procedures, a determination of which projects require "hotspot" analysis will be made. If the issue can not be resolved at Level One, the conflict resolution procedures will apply.

vi) Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in ~~§93.134~~§93.126 or 93.127.

As soon as practical, but no later than the time of public notification of transportation plan or TIP revisions or amendments, the MPO will also provide a copy of the revision or amendment to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas as required by §93.109 (g) (2) (iii)

There are no rural areas designated nonattainment (as of May 1998) and only one rural maintenance area in the state. This area has a SIP approved emissions budget and therefore must meet the provisions of §93.118. However, in the event that other rural areas are designated nonattainment, the appropriate Level One contacts (MPO, WVDOT, WVDEP, as applicable) will meet to establish an appropriate protocol for the area(s).

2) Consultation process involving the MPO, WVDEP and WVDOT for the following:

i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR §93.104;

It is expected that most events which may trigger a new conformity determination are clearly established in 40 CFR §93.104. However, any of the parties may initiate a review of additional events which may trigger a new conformity determination if there is reason to believe that a particular event warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the event(s) warrant a new conformity determination. If the issue can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins;

The primary responsible MPO has the responsibility for notifying other responsible ~~MPO's~~MPOs; adjacent ~~MPO's~~MPOs; WVDOT; and WVDEP for transportation activities that cross the borders of ~~MPO's~~MPOs or nonattainment areas or basins. The parties of this agreement and any party so notified above, may request pertinent information or initiate a meeting, to examine and evaluate the impact on air-quality of such activities. It is the responsibility of the initiating party to contact the other parties, establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties must make reasonable efforts to provide requested information in a timely manner; assist in selecting a suitable place and time for requested meetings; and have representatives participate in the meetings. If appropriate information is not supplied in a timely manner, or suitable meeting

arrangements can not be made, or if the issue(s) remain unresolved, the conflict resolution procedures may be initiated by any party. In the event that such activities cross state lines, the primary responsible MPO will notify the other state's responsible MPO or adjacent MPO, which will then have the responsibility of coordinating those activities with that state's air agency and transportation department. If no other MPO has responsibility for such transportation activities, the primary responsible MPO will coordinate those activities directly with that state's air agency and transportation department.

3) Where the metropolitan planning area does not include the entire nonattainment/maintenance area, the parties will use Level One consultation procedures to achieve cooperative planning and analysis for determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area. If any issues can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

4) Regionally significant transportation projects which may be subject to this conformity rule, but which are not FHWA/FTA projects, will in almost all cases be WVDOT highway projects funded by state motor vehicle taxes. As such, these projects will be included in WVDOT program material which is regularly and routinely supplied to the MPO. Few, if any, such projects are anticipated. However, it will be the shared responsibility of WVDOT and the MPO to identify any such regionally significant projects, should they be programmed for implementation, and to initiate coordination with WVDEP to ensure that proper conformity procedures are followed. Once such projects are identified, WVDOT will be responsible for monitoring such projects carefully to identify any changes in concept, scope, or location which may require a new conformity determination, and for advising the MPO of such changes.

Non-FHWA/FTA projects which do not originate as state-funded WVDOT highway projects are expected to be disclosed to one or more of the parties at an early stage of proposal or development. In such cases, the party receiving such knowledge will be responsible for notifying the other parties in a timely manner, but no later than the receipt of any related permit applications, so that appropriate conformity procedures will be followed.

(5) In cases when a project sponsor discloses to the MPO that a regionally significant non-FHWA/FTA project is under consideration for development, the MPO shall have the following responsibilities:

- i) To determine whether the proposed project is sufficiently committed for implementation by the sponsor to warrant inclusion in the MPO's regional emissions analysis; and if so,
- ii) To determine, in consultation with the project sponsor, WVDEP, and WVDOT as

necessary, the most reasonably expected development scenario regarding project schedule, concept, scope, and location, in sufficient detail to permit conformity determination procedures to be applied to the proposed project.

(6) Consultation on the design, schedule, and funding of any research and data collection efforts and regional transportation model development by the MPO will occur under terms of Interagency Consultation- General [Section (b)(2)] of this Memorandum of Understanding.

(7) The process for providing final documents and supporting information to each party after approval or adoption shall be as described under terms of Interagency Consultation - General of this Memorandum of Understanding for parties designated under Section (b)(2)(ii) for regular consultation matters.

With regard to Federal agencies, the following additional steps apply: USEPA and USDOT will be asked to specify contacts for transportation conformity issues. The responsible party, or party which is initiating some action subject to the above consultation provisions, will notify these federal contacts as soon as practical but no later than the beginning of any public comment period associated with the action. The federal contact may request copies of the relevant document(s). The responsible party, or party which is initiating some action subject to the above consultation provisions will provide such requested copies as soon as practical, but no later than ten (10) days prior to the end of the associated public comment period. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to these federal contacts, at their request, in a timely manner. The federal contacts may specify conditions under which they will be notified prior to the consultation meetings called by the parties. The parties will do so in a timely manner and, if requested, will make reasonable efforts to allow the federal contacts to observe the proceedings and make comments during the meeting(s).

d) Resolving Conflicts

Level One Consultation is consultation that occurs among the specified contact person(s) in the WVDEP, WVDOT and the MPO. In any circumstance where an issue cannot be resolved through the previously identified routine consultation process, the issue may be moved to Level Two by any party. Level Two Consultation is consultation that occurs among the WVDOT Secretary of Transportation; the WVDEP Director; and the MPO's Executive Director or chief administrative officer. In any circumstance where an issue cannot be resolved through Level Two Consultation, the issue may be moved to a Level Three Consultation by any of these three persons. Upon receipt of the written response to comments generated from Level Two Consultation, the person initiating the Level Three Consultation procedure has 14 calendar days to appeal, in writing, to the Governor for resolution of the conflict. Level Three Consultation requires the Governor of the State of West Virginia, or his or her designated representative, to resolve any conflict that can not be resolved by Level Two consultation and negotiation. In no circumstance may the Governor's designated representative in this process be the head or staff of WVDEP, WVDOT, or the MPO.

e) Public Consultation Procedures

The MPO has established a public participation process which provides an opportunity for public review and comment prior to taking formal action on all transportation plans, TIPs, and associated conformity determinations, consistent with the requirements of 23 CFR Part 450. Any comment received during the comment period will be documented and resolved prior to formal approval. The MPO periodically reviews these procedures to ensure that the process is consistent with federal requirements. Any necessary revision in the public consultation procedures will be consistent with 23 CFR 450.

The undersigned, as authorized representatives of the agency or organization indicated, do hereby agree to the terms and conditions set forth above, and will ensure that said agency or organization will abide by the terms of this Memorandum of Understanding. This Memorandum of Understanding becomes effective on the date of the final signature below:

_____ Date: _____
~~David C. Callaghan~~ Michael P. Miano, Director
 WV Division of Environmental Protection

_____ Date: _____
~~Charles L. Miller~~, Cabinet Secretary
 WV Department of Transportation

_____ Date: _____
~~John R. Beck~~, Executive Director
Domenick Mucci, Jr. Chairman
 Brooke-Hancock-Jefferson
 Metropolitan Planning Commission

APPENDIX A
45CSR36
Memorandums of Understanding (MOUs)

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APPENDIX A
Memorandums of Understanding (MOUs)

I. MOU among WVDEP, WVDOT and the Brooke-Hancock-Jefferson Metropolitan Planning Commission (BHJ)

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING
Parties: WVDEP, WVDOT and BHJ

Federal regulations (40 CFR §51.390) require submission to USEPA of a State Implementation Plan (SIP) revision adopting the provisions of 40 CFR Part 93, Subpart A, (Transportation Conformity), including procedures for interagency consultation (Federal, State and local) and resolution of conflicts. This document details procedures for meeting interagency consultation requirements set forth in 40 CFR §93.105. Parties to this Memorandum of Understanding (MOU) are: the West Virginia Division of Environmental Protection (WVDEP); the West Virginia Department of Transportation (WVDOT); and the Brooke-Hancock-Jefferson Metropolitan Planning Commission (BHJ), herein referred to as the "Metropolitan Planning Organization" or "MPO". BHJ will be considered the "primary responsible MPO" and, is the MPO referred to in this MOU, unless otherwise specified. Some provisions require interaction with other MPOs and when necessary, the text will specify which procedures apply to the primary responsible MPO (BHJ), other responsible MPOs or adjacent MPOs.

In addition to the above mentioned parties, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Transportation (USDOT), through the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), have review and/or approval functions at various stages of the conformity determination process.

The parties herein mutually agree to adopt and abide by all provisions of 40 CFR Part 93, "Determining the Conformity of Federal Actions to State or Federal Implementation Plans", Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" as effective on September 15, 1997. The only exception is §93.102 (d) "Grace Period for new nonattainment areas" which is expressly excluded because it has been invalidated by a federal court. Furthermore, the parties agree to abide by the consultation procedures detailed below in order to meet the requirements of 40 CFR §93.105, "Consultation".

Consultation is required in at least three instances: 1) SIP revision relating, directly or indirectly, to mobile sources (transportation); 2) conformity analysis for new or amended Transportation Improvement Program (TIP); and 3) conformity analysis for new or revised Transportation Plan. Additional consultation requirements are specified below. SIP revisions are initiated by WVDEP. TIP and Transportation Plan conformity determinations are initiated by the

MPO, with the technical assistance of WVDOT.

a) General

- 1) WVDEP will prepare, and submit to USEPA, a SIP revision that adopts the provisions of the federal transportation conformity rule and which includes the consultation procedures below. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. WVDEP will provide reasonable opportunity for comment from the MPO, WVDOT and USDOT before submitting SIP revisions that directly impact transportation activities. Such revisions include, at a minimum, SIP revisions that establish or change the highway vehicle emissions budget, or specify Transportation Control Measures (TCMs) in nonattainment or maintenance areas.
- 2) The MPO and WVDOT, before making conformity determinations, must provide reasonable opportunity for consultation with WVDEP, USDOT and USEPA. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. Further, the USDOT (via FHWA and FTA) and the USEPA have review, comment and approval responsibilities at various stages of the conformity process.

b) Interagency consultation procedures - General factors

40 CFR §93.105(b)(2) requires that six general factors be addressed. The following procedures are numbered consistently with the federal rule and address each of the requirements found in 40 CFR §93.105(b):

- 1) The procedures to be included in the SIP revision are detailed below.
- 2) Interagency consultation procedures will include, at a minimum, the items listed below and the specific processes in paragraph (c) of this section:
 - i) When a SIP revision is proposed, it will be the responsibility of WVDEP to provide the MPO and WVDOT with copies of relevant documents at the earliest practical date, but no later than the initiation of a public comment/participation process. Should any party need additional information or desire a meeting it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

When the TIP or Transportation Plan requires conformity analysis, WVDOT Planning staff will notify the specified contact person in WVDEP, and utilizing mutually agreed upon technical procedures, will calculate the projected emissions for the Transportation Plan or TIP. This emissions information will be provided to the MPO and WVDEP specified contact persons in a timely manner. The MPO will include a finding of

conformity or non-conformity in the appropriate document. The MPO will provide a copy of the TIP; or Transportation Plan; or where applicable, individual project analyses; to WVDEP and WVDOT at the earliest practical date, but not later than the initiation of the public participation process. The MPO will maintain a public participation process consistent with the requirements of 23 CFR Part 450. Should any party need additional information or desire a meeting, it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

ii) Each party: WVDEP, WVDOT, and the MPO will designate a specific person or persons as the contact(s) for technical consultations. The specified person(s) may be assigned or reassigned this duty as necessary for the smooth running of the agency or organization involved. The other parties must be notified of such changes in a timely manner, to facilitate the consultation process.

To the extent possible, the initial consultation process will be on an informal basis between the specified contact persons ("Level One" Consultation). When an issue cannot be resolved through the routine interaction of the specified contact persons, then a more formal process will be required. This more formal process is described in the Conflict Resolution Section.

iii) As previously stated in subsection (i) above, relevant documents or copies will be provided by the appropriate party at the earliest practical date, but not later than the initiation of a public comment/participation process. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to the other parties at their request, in a timely manner.

iv) No regularly scheduled consultation meetings are established by this document. However, any party may initiate a meeting, by phone or in writing, when a need is perceived. The meeting may be conducted by telephone if all parties concur. The initiating party will have the responsibility to establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties will make reasonable efforts to help in selecting a suitable place and time for the meeting and provide representatives to participate in the meetings. If suitable meeting arrangements can not be made or if the issue(s) remain unresolved, the conflict resolution procedures may be initiated by any party.

v) If any party provides substantial written comments regarding any matter subject to the requirements of 40 CFR §93.105, it shall be the responsibility of WVDEP (in the case of a proposed SIP revision) or the MPO (in the case of a TIP or Plan revision) to provide a substantive written response to the party in a timely manner. If the response is not satisfactory to the receiving party, the conflict resolution procedures may be initiated. The

party responsible for generating the document will include both the comments and the response in the official record for the appropriate document.

vi) To date, there have been no Transportation Control Measures (TCMs) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes a SIP revision that includes TCMs, the agency will notify WVDOT and the MPO, and provide each party the opportunity to provide input as soon as practical, but no later than the beginning of any public comment period.

c) Interagency consultation procedures - Specific processes

40 CFR §93.105(c)(1) specifies seven items which must be addressed by the consultation process. The process for handling each of these items, numbered in the same sequence as the federal regulation, is as follows:

1) i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

WVDEP, WVDOT, and the MPO will mutually agree on the model and methods for emissions analyses. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analyses. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP;

WVDOT will make a determination, based on professional judgement, of which projects or project changes may potentially generate regionally significant emissions. Such determination will be included in the appropriate document(s) along with a brief justification. Upon request, WVDOT will provide copies of such documents to any party.

iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR §§93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

It is expected that any project consistent with 40 CFR §93.126 or 40 CFR §93.127 will not have regional air quality impacts. However, any of the parties may initiate a review of the impact of a project if there is reason to believe that a particular project warrants closer scrutiny. Staff of the three parties will evaluate relevant information and attempt to reach a consensus using Level One consultation procedures. If the issue remains unresolved, the conflict resolution procedures may be initiated by any party.

iv) Making a determination, as required by §93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

Historically, there have not been any TCMs pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCMs are not applicable at this time. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes to include TCMs in a SIP revision, the other parties must be notified as soon as practical, but no later than the start of the public comment period for the relevant document. Any such SIP revision must include consultation procedures that satisfy the requirements of 40 CFR §93.105(c)(1)(iv).

v) Identifying, as required by §93.123 (b), projects located at sites in PM_{10} nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM_{10} hot-spot analysis; and

WVDEP will notify the MPO of any areas within its planning region that are designated as PM_{10} nonattainment/maintenance areas. WVDEP will also notify the MPO of any areas within its planning region that are proposed for such designation as soon as practical, but no later than the start of the public comment period related to such designation. Further, WVDEP will notify the MPO of any project sites that have PM_{10} violations verified by monitoring. The MPO will be responsible for providing a summary to WVDEP of all projects in the area, in sufficient detail so that other similar projects may be identified. Using Level One consultation procedures, a determination of which projects require "hotspot" analysis will be made. If the issue can not be resolved at Level One, the conflict resolution procedures will apply.

vi) Notification of transportation plan or TIP revisions or amendments which merely add

or delete exempt projects listed in §§93.126 or 93.127.

As soon as practical, but no later than the time of public notification of transportation plan or TIP revisions or amendments, the MPO will also provide a copy of the revision or amendment to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas as required by §93.109 (g) (2) (iii)

There are no rural areas designated nonattainment (as of May 1998) and only one rural maintenance area in the state. This area has a SIP approved emissions budget and therefore must meet the provisions of §93.118. However, in the event that other rural areas are designated nonattainment, the appropriate Level One contacts (MPO, WVDOT, WVDEP, as applicable) will meet to establish an appropriate protocol for the area(s).

2) Consultation process involving the MPO, WVDEP and WVDOT for the following:

i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR §93.104;

It is expected that most events which may trigger a new conformity determination are clearly established in 40 CFR §93.104. However, any of the parties may initiate a review of additional events which may trigger a new conformity determination if there is reason to believe that a particular event warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the event(s) warrant a new conformity determination. If the issue can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins;

The primary responsible MPO has the responsibility for notifying other responsible MPOs; adjacent MPOs; WVDOT; and WVDEP for transportation activities that cross the borders of MPOs or nonattainment areas or basins. The parties of this agreement and any party so notified above, may request pertinent information or initiate a meeting, to examine and evaluate the impact on air-quality of such activities. It is the responsibility of the initiating party to contact the other parties, establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties must make reasonable efforts to provide requested information in a timely manner; assist in selecting a suitable place and time for requested meetings; and have representatives participate in the meetings. If appropriate information is not supplied in a timely manner, or suitable meeting arrangements can not be made, or if the issue(s) remain unresolved, the conflict resolution procedures may

be initiated by any party. In the event that such activities cross state lines, the primary responsible MPO will notify the other state's responsible MPO or adjacent MPO, which will then have the responsibility of coordinating those activities with that state's air agency and transportation department. If no other MPO has responsibility for such transportation activities, the primary responsible MPO will coordinate those activities directly with that state's air agency and transportation department.

3) Where the metropolitan planning area does not include the entire nonattainment/maintenance area, the parties will use Level One consultation procedures to achieve cooperative planning and analysis for determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area. If any issues can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

4) Regionally significant transportation projects which may be subject to this conformity rule, but which are not FHWA/FTA projects, will in almost all cases be WVDOT highway projects funded by state motor vehicle taxes. As such, these projects will be included in WVDOH program material which is regularly and routinely supplied to the MPO. Few, if any, such projects are anticipated. However, it will be the shared responsibility of WVDOT and the MPO to identify any such regionally significant projects, should they be programmed for implementation, and to initiate coordination with WVDEP to ensure that proper conformity procedures are followed. Once such projects are identified, WVDOT will be responsible for monitoring such projects carefully to identify any changes in concept, scope, or location which may require a new conformity determination, and for advising the MPO of such changes.

Non-FHWA/FTA projects which do not originate as state-funded WVDOT highway projects are expected to be disclosed to one or more of the parties at an early stage of proposal or development. In such cases, the party receiving such knowledge will be responsible for notifying the other parties in a timely manner, but no later than the receipt of any related permit applications, so that appropriate conformity procedures will be followed.

(5) In cases when a project sponsor discloses to the MPO that a regionally significant non-FHWA/FTA project is under consideration for development, the MPO shall have the following responsibilities:

- i) To determine whether the proposed project is sufficiently committed for implementation by the sponsor to warrant inclusion in the MPO's regional emissions analysis; and if so,
- ii) To determine, in consultation with the project sponsor, WVDEP, and WVDOT as necessary, the most reasonably expected development scenario regarding project schedule,

concept, scope, and location, in sufficient detail to permit conformity determination procedures to be applied to the proposed project.

(6) Consultation on the design, schedule, and funding of any research and data collection efforts and regional transportation model development by the MPO will occur under terms of Interagency Consultation- General [Section (b)(2)] of this Memorandum of Understanding.

(7) The process for providing final documents and supporting information to each party after approval or adoption shall be as described under terms of Interagency Consultation - General of this Memorandum of Understanding for parties designated under Section (b)(2)(ii) for regular consultation matters.

With regard to Federal agencies, the following additional steps apply:

USEPA and USDOT will be asked to specify contacts for transportation conformity issues. The responsible party, or party which is initiating some action subject to the above consultation provisions, will notify these federal contacts as soon as practical but no later than the beginning of any public comment period associated with the action. The federal contact may request copies of the relevant document(s). The responsible party, or party which is initiating some action subject to the above consultation provisions will provide such requested copies as soon as practical, but no later than ten (10) days prior to the end of the associated public comment period. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to these federal contacts, at their request, in a timely manner. The federal contacts may specify conditions under which they will be notified prior to the consultation meetings called by the parties. The parties will do so in a timely manner and, if requested, will make reasonable efforts to allow the federal contacts to observe the proceedings and make comments during the meeting(s).

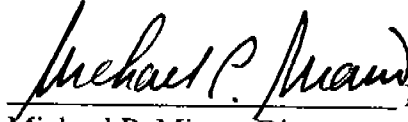
d) Resolving Conflicts

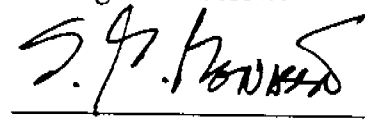
Level One Consultation is consultation that occurs among the specified contact person(s) in the WVDEP, WVDOT and the MPO. In any circumstance where an issue cannot be resolved through the previously identified routine consultation process, the issue may be moved to Level Two by any party. Level Two Consultation is consultation that occurs among the WVDOT Secretary of Transportation; the WVDEP Director; and the MPO's Executive Director or chief administrative officer. In any circumstance where an issue cannot be resolved through Level Two Consultation, the issue may be moved to a Level Three Consultation by any of these three persons. Upon receipt of the written response to comments generated from Level Two Consultation, the person initiating the Level Three Consultation procedure has 14 calendar days to appeal, in writing, to the Governor for resolution of the conflict. Level Three Consultation requires the Governor of the State of West Virginia, or his or her designated representative, to resolve any conflict that can not be resolved by Level Two consultation and negotiation. In no circumstance may the Governor's designated representative in this process be the head or staff of WVDEP, WVDOT, or the MPO.

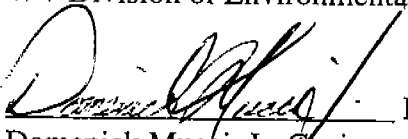
e) Public Consultation Procedures

The MPO has established a public participation process which provides an opportunity for public review and comment prior to taking formal action on all transportation plans, TIPs, and associated conformity determinations, consistent with the requirements of 23 CFR Part 450. Any comment received during the comment period will be documented and resolved prior to formal approval. The MPO periodically reviews these procedures to ensure that the process is consistent with federal requirements. Any necessary revision in the public consultation procedures will be consistent with 23 CFR 450.

The undersigned, as authorized representatives of the agency or organization indicated, do hereby agree to the terms and conditions set forth above, and will ensure that said agency or organization will abide by the terms of this Memorandum of Understanding. This Memorandum of Understanding becomes effective on the date of the final signature below:

 Date: _____
 Michael P. Miano, Director
 WV Division of Environmental Protection

 Date: 7.16.98
 Samuel G. Bonasso, P.E., Secretary
 WV Department of Transportation

 Date: 5/21/98
 Domenick Mucci, Jr. Chairman
 Brooke-Hancock-Jefferson
 Metropolitan Planning Commission

45CSR36
APPENDIX A
Memorandums of Understanding (MOUs)

II. MOU among WVDEP, WVDOT and the KYOVA Interstate Planning Commission (KYOVA)

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING
Parties: WVDEP, WVDOT and KYOVA

Federal regulations (40 CFR §51.390) require submission to USEPA of a State Implementation Plan (SIP) revision adopting the provisions of 40 CFR Part 93, Subpart A, (Transportation Conformity), including procedures for interagency consultation (Federal, State and local) and resolution of conflicts. This document details procedures for meeting interagency consultation requirements set forth in 40 CFR §93.105. Parties to this Memorandum of Understanding (MOU) are: the West Virginia Division of Environmental Protection (WVDEP); the West Virginia Department of Transportation (WVDOT); and the KYOVA Interstate Planning Commission (KYOVA), herein referred to as the "Metropolitan Planning Organization" or "MPO". KYOVA will be considered the "primary responsible MPO" and, is the MPO referred to in this MOU, unless otherwise specified. Some provisions require interaction with other MPOs and when necessary, the text will specify which procedures apply to the primary responsible MPO (KYOVA), other responsible MPOs or adjacent MPOs.

In addition to the above mentioned parties, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Transportation (USDOT), through the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), have review and/or approval functions at various stages of the conformity determination process.

The parties herein mutually agree to adopt and abide by all provisions of 40 CFR Part 93, "Determining the Conformity of Federal Actions to State or Federal Implementation Plans", Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" as effective on September 15, 1997. The only exception is §93.102 (d) "Grace Period for new nonattainment areas" which is expressly excluded because it has been invalidated by a federal court. Furthermore, the parties agree to abide by the consultation procedures detailed below in order to meet the requirements of 40 CFR §93.105, "Consultation".

Consultation is required in at least three instances: 1) SIP revision relating, directly or indirectly, to mobile sources (transportation); 2) conformity analysis for new or amended Transportation Improvement Program (TIP); and 3) conformity analysis for new or revised Transportation Plan. Additional consultation requirements are specified below. SIP revisions are initiated by WVDEP. TIP and Transportation Plan conformity determinations are initiated by the

MPO, with the technical assistance of WVDOT.

- a) General
 - 1) WVDEP will prepare, and submit to USEPA, a SIP revision that adopts the provisions of the federal transportation conformity rule and which includes the consultation procedures below. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. WVDEP will provide reasonable opportunity for comment from the MPO, WVDOT and USDOT before submitting SIP revisions that directly impact transportation activities. Such revisions include, at a minimum, SIP revisions that establish or change the highway vehicle emissions budget, or specify Transportation Control Measures (TCMs) in nonattainment or maintenance areas.
 - 2) The MPO and WVDOT, before making conformity determinations, must provide reasonable opportunity for consultation with WVDEP, USDOT and USEPA. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. Further, the USDOT (via FHWA and FTA) and the USEPA have review, comment and approval responsibilities at various stages of the conformity process.
- b) Interagency consultation procedures - General factors

40 CFR §93.105(b)(2) requires that six general factors be addressed. The following procedures are numbered consistently with the federal rule and address each of the requirements found in 40 CFR §93.105(b):

- 1) The procedures to be included in the SIP revision are detailed below.
- 2) Interagency consultation procedures will include, at a minimum, the items listed below and the specific processes in paragraph (c) of this section:
 - i) When a SIP revision is proposed, it will be the responsibility of WVDEP to provide the MPO and WVDOT with copies of relevant documents at the earliest practical date, but no later than the initiation of a public comment/participation process. Should any party need additional information or desire a meeting it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

When the TIP or Transportation Plan requires conformity analysis, WVDOT Planning staff will notify the specified contact person in WVDEP, and utilizing mutually agreed upon technical procedures, will calculate the projected emissions for the Transportation Plan or TIP. This emissions information will be provided to the MPO and WVDEP specified contact persons in a timely manner. The MPO will include a finding of

conformity or non-conformity in the appropriate document. The MPO will provide a copy of the TIP; or Transportation Plan; or where applicable, individual project analyses; to WVDEP and WVDOT at the earliest practical date, but not later than the initiation of the public participation process. The MPO will maintain a public participation process consistent with the requirements of 23 CFR Part 450. Should any party need additional information or desire a meeting, it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

ii) Each party: WVDEP, WVDOT, and the MPO will designate a specific person or persons as the contact(s) for technical consultations. The specified person(s) may be assigned or reassigned this duty as necessary for the smooth running of the agency or organization involved. The other parties must be notified of such changes in a timely manner, to facilitate the consultation process.

To the extent possible, the initial consultation process will be on an informal basis between the specified contact persons ("Level One" Consultation). When an issue cannot be resolved through the routine interaction of the specified contact persons, then a more formal process will be required. This more formal process is described in the Conflict Resolution Section.

iii) As previously stated in subsection (i) above, relevant documents or copies will be provided by the appropriate party at the earliest practical date, but not later than the initiation of a public comment/participation process. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to the other parties at their request, in a timely manner.

iv) No regularly scheduled consultation meetings are established by this document. However, any party may initiate a meeting, by phone or in writing, when a need is perceived. The meeting may be conducted by telephone if all parties concur. The initiating party will have the responsibility to establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties will make reasonable efforts to help in selecting a suitable place and time for the meeting and provide representatives to participate in the meetings. If suitable meeting arrangements can not be made or if the issue(s) remain unresolved, the conflict resolution procedures may be initiated by any party.

v) If any party provides substantial written comments regarding any matter subject to the requirements of 40 CFR §93.105, it shall be the responsibility of WVDEP (in the case of a proposed SIP revision) or the MPO (in the case of a TIP or Plan revision) to provide a substantive written response to the party in a timely manner. If the response is not satisfactory to the receiving party, the conflict resolution procedures may be initiated. The

party responsible for generating the document will include both the comments and the response in the official record for the appropriate document.

vi) To date, there have been no Transportation Control Measures (TCMs) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes a SIP revision that includes TCMs, the agency will notify WVDOT and the MPO, and provide each party the opportunity to provide input as soon as practical, but no later than the beginning of any public comment period.

c) Interagency consultation procedures - Specific processes

40 CFR §93.105(c)(1) specifies seven items which must be addressed by the consultation process. The process for handling each of these items, numbered in the same sequence as the federal regulation, is as follows:

1) i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

WVDEP, WVDOT, and the MPO will mutually agree on the model and methods for emissions analyses. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analyses. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP;

WVDOT will make a determination, based on professional judgement, of which projects or project changes may potentially generate regionally significant emissions. Such determination will be included in the appropriate document(s) along with a brief justification. Upon request, WVDOT will provide copies of such documents to any party.

iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR §§93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

It is expected that any project consistent with 40 CFR §93.126 or 40 CFR §93.127 will not have regional air quality impacts. However, any of the parties may initiate a review of the impact of a project if there is reason to believe that a particular project warrants closer scrutiny. Staff of the three parties will evaluate relevant information and attempt to reach a consensus using Level One consultation procedures. If the issue remains unresolved, the conflict resolution procedures may be initiated by any party.

iv) Making a determination, as required by §93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

Historically, there have not been any TCMs pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCMs are not applicable at this time. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes to include TCMs in a SIP revision, the other parties must be notified as soon as practical, but no later than the start of the public comment period for the relevant document. Any such SIP revision must include consultation procedures that satisfy the requirements of 40 CFR §93.105(c)(1)(iv).

v) Identifying, as required by §93.123 (b), projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis; and

WVDEP will notify the MPO of any areas within its planning region that are designated as PM₁₀ nonattainment/maintenance areas. WVDEP will also notify the MPO of any areas within its planning region that are proposed for such designation as soon as practical, but no later than the start of the public comment period related to such designation. Further, WVDEP will notify the MPO of any project sites that have PM₁₀ violations verified by monitoring. The MPO will be responsible for providing a summary to WVDEP of all projects in the area, in sufficient detail so that other similar projects may be identified. Using Level One consultation procedures, a determination of which projects require "hotspot" analysis will be made. If the issue can not be resolved at Level One, the conflict resolution procedures will apply.

vi) Notification of transportation plan or TIP revisions or amendments which merely add

or delete exempt projects listed in §§93.126 or 93.127.

As soon as practical, but no later than the time of public notification of transportation plan or TIP revisions or amendments, the MPO will also provide a copy of the revision or amendment to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas as required by §93.109 (g) (2) (iii)

There are no rural areas designated nonattainment (as of May 1998) and only one rural maintenance area in the state. This area has a SIP approved emissions budget and therefore must meet the provisions of §93.118. However, in the event that other rural areas are designated nonattainment, the appropriate Level One contacts (MPO, WVDOT, WVDEP, as applicable) will meet to establish an appropriate protocol for the area(s).

2) Consultation process involving the MPO, WVDEP and WVDOT for the following:

i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR §93.104;

It is expected that most events which may trigger a new conformity determination are clearly established in 40 CFR §93.104. However, any of the parties may initiate a review of additional events which may trigger a new conformity determination if there is reason to believe that a particular event warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the event(s) warrant a new conformity determination. If the issue can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins;

The primary responsible MPO has the responsibility for notifying other responsible MPOs; adjacent MPOs; WVDOT; and WVDEP for transportation activities that cross the borders of MPOs or nonattainment areas or basins. The parties of this agreement and any party so notified above, may request pertinent information or initiate a meeting, to examine and evaluate the impact on air-quality of such activities. It is the responsibility of the initiating party to contact the other parties, establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties must make reasonable efforts to provide requested information in a timely manner; assist in selecting a suitable place and time for requested meetings; and have representatives participate in the meetings. If appropriate information is not supplied in a timely manner, or suitable meeting arrangements can not be made, or if the issue(s) remain unresolved, the conflict resolution procedures may

be initiated by any party. In the event that such activities cross state lines, the primary responsible MPO will notify the other state's responsible MPO or adjacent MPO, which will then have the responsibility of coordinating those activities with that state's air agency and transportation department. If no other MPO has responsibility for such transportation activities, the primary responsible MPO will coordinate those activities directly with that state's air agency and transportation department.

3) Where the metropolitan planning area does not include the entire nonattainment/maintenance area, the parties will use Level One consultation procedures to achieve cooperative planning and analysis for determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area. If any issues can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

4) Regionally significant transportation projects which may be subject to this conformity rule, but which are not FHWA/FTA projects, will in almost all cases be WVDOT highway projects funded by state motor vehicle taxes. As such, these projects will be included in WVDOH program material which is regularly and routinely supplied to the MPO. Few, if any, such projects are anticipated. However, it will be the shared responsibility of WVDOT and the MPO to identify any such regionally significant projects, should they be programmed for implementation, and to initiate coordination with WVDEP to ensure that proper conformity procedures are followed. Once such projects are identified, WVDOT will be responsible for monitoring such projects carefully to identify any changes in concept, scope, or location which may require a new conformity determination, and for advising the MPO of such changes.

Non-FHWA/FTA projects which do not originate as state-funded WVDOT highway projects are expected to be disclosed to one or more of the parties at an early stage of proposal or development. In such cases, the party receiving such knowledge will be responsible for notifying the other parties in a timely manner, but no later than the receipt of any related permit applications, so that appropriate conformity procedures will be followed.

(5) In cases when a project sponsor discloses to the MPO that a regionally significant non-FHWA/FTA project is under consideration for development, the MPO shall have the following responsibilities:

- i) To determine whether the proposed project is sufficiently committed for implementation by the sponsor to warrant inclusion in the MPO's regional emissions analysis; and if so,
- ii) To determine, in consultation with the project sponsor, WVDEP, and WVDOT as necessary, the most reasonably expected development scenario regarding project schedule,

concept, scope, and location, in sufficient detail to permit conformity determination procedures to be applied to the proposed project.

(6) Consultation on the design, schedule, and funding of any research and data collection efforts and regional transportation model development by the MPO will occur under terms of Interagency Consultation- General [Section (b)(2)] of this Memorandum of Understanding.

(7) The process for providing final documents and supporting information to each party after approval or adoption shall be as described under terms of Interagency Consultation - General of this Memorandum of Understanding for parties designated under Section (b)(2)(ii) for regular consultation matters.

With regard to Federal agencies, the following additional steps apply:

USEPA and USDOT will be asked to specify contacts for transportation conformity issues. The responsible party, or party which is initiating some action subject to the above consultation provisions, will notify these federal contacts as soon as practical but no later than the beginning of any public comment period associated with the action. The federal contact may request copies of the relevant document(s). The responsible party, or party which is initiating some action subject to the above consultation provisions will provide such requested copies as soon as practical, but no later than ten (10) days prior to the end of the associated public comment period. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to these federal contacts, at their request, in a timely manner. The federal contacts may specify conditions under which they will be notified prior to the consultation meetings called by the parties. The parties will do so in a timely manner and, if requested, will make reasonable efforts to allow the federal contacts to observe the proceedings and make comments during the meeting(s).

d) Resolving Conflicts

Level One Consultation is consultation that occurs among the specified contact person(s) in the WVDEP, WVDOT and the MPO. In any circumstance where an issue cannot be resolved through the previously identified routine consultation process, the issue may be moved to Level Two by any party. Level Two Consultation is consultation that occurs among the WVDOT Secretary of Transportation; the WVDEP Director; and the MPO's Executive Director or chief administrative officer. In any circumstance where an issue cannot be resolved through Level Two Consultation, the issue may be moved to a Level Three Consultation by any of these three persons. Upon receipt of the written response to comments generated from Level Two Consultation, the person initiating the Level Three Consultation procedure has 14 calendar days to appeal, in writing, to the Governor for resolution of the conflict. Level Three Consultation requires the Governor of the State of West Virginia, or his or her designated representative, to resolve any conflict that can not be resolved by Level Two consultation and negotiation. In no circumstance may the Governor's designated representative in this process be the head or staff of WVDEP, WVDOT, or the MPO.

e) Public Consultation Procedures

The MPO has established a public participation process which provides an opportunity for public review and comment prior to taking formal action on all transportation plans, TIPs, and associated conformity determinations, consistent with the requirements of 23 CFR Part 450. Any comment received during the comment period will be documented and resolved prior to formal approval. The MPO periodically reviews these procedures to ensure that the process is consistent with federal requirements. Any necessary revision in the public consultation procedures will be consistent with 23 CFR 450.

The undersigned, as authorized representatives of the agency or organization indicated, do hereby agree to the terms and conditions set forth above, and will ensure that said agency or organization will abide by the terms of this Memorandum of Understanding. This Memorandum of Understanding becomes effective on the date of the final signature below:

Michael P. Miano Date: 7-24-98
 Michael P. Miano, Director
 WV Division of Environmental Protection

Samuel G. Bonasso Date: 7.16.98
 Samuel G. Bonasso, P.E., Secretary
 WV Department of Transportation

James H. Booten Date: 6/29/98
 James H. Booten, Chairman
 KYOVA Interstate Planning Commission

45CSR36
APPENDIX A
Memorandums of Understanding (MOUs)

III. MOU among WVDEP, WVDOT and the Boone-Clay-Kanawha-Putnam Regional Intergovernmental Council (BCKP-RIC)

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING
Parties: WVDEP, WVDOT and BCKP-RIC

Federal regulations (40 CFR §51.390) require submission to USEPA of a State Implementation Plan (SIP) revision adopting the provisions of 40 CFR Part 93, Subpart A, (Transportation Conformity), including procedures for interagency consultation (Federal, State and local) and resolution of conflicts. This document details procedures for meeting interagency consultation requirements set forth in 40 CFR §93.105. Parties to this Memorandum of Understanding (MOU) are: the West Virginia Division of Environmental Protection (WVDEP); the West Virginia Department of Transportation (WVDOT); and the Boone-Clay-Kanawha-Putnam Regional Intergovernmental Council (BCKP-RIC), herein referred to as the "Metropolitan Planning Organization" or "MPO". BCKP-RIC will be considered the "primary responsible MPO" and, is the MPO referred to in this MOU, unless otherwise specified. Some provisions require interaction with other MPOs and when necessary, the text will specify which procedures apply to the primary responsible MPO (BCKP-RIC), other responsible MPOs or adjacent MPOs.

In addition to the above mentioned parties, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Transportation (USDOT), through the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), have review and/or approval functions at various stages of the conformity determination process.

The parties herein mutually agree to adopt and abide by all provisions of 40 CFR Part 93, "Determining the Conformity of Federal Actions to State or Federal Implementation Plans", Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" as effective on September 15, 1997. The only exception is §93.102 (d) "Grace Period for new nonattainment areas" which is expressly excluded because it has been invalidated by a federal court. Furthermore, the parties agree to abide by the consultation procedures detailed below in order to meet the requirements of 40 CFR §93.105, "Consultation".

Consultation is required in at least three instances: 1) SIP revision relating, directly or indirectly, to mobile sources (transportation); 2) conformity analysis for new or amended Transportation Improvement Program (TIP); and 3) conformity analysis for new or revised Transportation Plan. Additional consultation requirements are specified below. SIP revisions are initiated by WVDEP. TIP and Transportation Plan conformity determinations are initiated by the

MPO, with the technical assistance of WVDOT.

a) General

- 1) WVDEP will prepare, and submit to USEPA, a SIP revision that adopts the provisions of the federal transportation conformity rule and which includes the consultation procedures below. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. WVDEP will provide reasonable opportunity for comment from the MPO, WVDOT and USDOT before submitting SIP revisions that directly impact transportation activities. Such revisions include, at a minimum, SIP revisions that establish or change the highway vehicle emissions budget, or specify Transportation Control Measures (TCMs) in nonattainment or maintenance areas.
- 2) The MPO and WVDOT, before making conformity determinations, must provide reasonable opportunity for consultation with WVDEP, USDOT and USEPA. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. Further, the USDOT (via FHWA and FTA) and the USEPA have review, comment and approval responsibilities at various stages of the conformity process.

b) Interagency consultation procedures - General factors

40 CFR §93.105(b)(2) requires that six general factors be addressed. The following procedures are numbered consistently with the federal rule and address each of the requirements found in 40 CFR §93.105(b):

- 1) The procedures to be included in the SIP revision are detailed below.
- 2) Interagency consultation procedures will include, at a minimum, the items listed below and the specific processes in paragraph (c) of this section:

D) When a SIP revision is proposed, it will be the responsibility of WVDEP to provide the MPO and WVDOT with copies of relevant documents at the earliest practical date, but no later than the initiation of a public comment/participation process. Should any party need additional information or desire a meeting it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

When the TIP or Transportation Plan requires conformity analysis, WVDOT Planning staff will notify the specified contact person in WVDEP, and utilizing mutually agreed upon technical procedures, will calculate the projected emissions for the Transportation Plan or TIP. This emissions information will be provided to the MPO and WVDEP specified contact persons in a timely manner. The MPO will include a finding of

conformity or non-conformity in the appropriate document. The MPO will provide a copy of the TIP; or Transportation Plan; or where applicable, individual project analyses; to WVDEP and WVDOT at the earliest practical date, but not later than the initiation of the public participation process. The MPO will maintain a public participation process consistent with the requirements of 23 CFR Part 450. Should any party need additional information or desire a meeting, it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

ii) Each party: WVDEP, WVDOT, and the MPO will designate a specific person or persons as the contact(s) for technical consultations. The specified person(s) may be assigned or reassigned this duty as necessary for the smooth running of the agency or organization involved. The other parties must be notified of such changes in a timely manner, to facilitate the consultation process.

To the extent possible, the initial consultation process will be on an informal basis between the specified contact persons ("Level One" Consultation). When an issue cannot be resolved through the routine interaction of the specified contact persons, then a more formal process will be required. This more formal process is described in the Conflict Resolution Section.

iii) As previously stated in subsection (I) above, relevant documents or copies will be provided by the appropriate party at the earliest practical date, but not later than the initiation of a public comment/participation process. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to the other parties at their request, in a timely manner.

iv) No regularly scheduled consultation meetings are established by this document. However, any party may initiate a meeting, by phone or in writing, when a need is perceived. The meeting may be conducted by telephone if all parties concur. The initiating party will have the responsibility to establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties will make reasonable efforts to help in selecting a suitable place and time for the meeting and provide representatives to participate in the meetings. If suitable meeting arrangements can not be made or if the issue(s) remain unresolved, the conflict resolution procedures may be initiated by any party.

v) If any party provides substantial written comments regarding any matter subject to the requirements of 40 CFR §93.105, it shall be the responsibility of WVDEP (in the case of a proposed SIP revision) or the MPO (in the case of a TIP or Plan revision) to provide a substantive written response to the party in a timely manner. If the response is not satisfactory to the receiving party, the conflict resolution procedures may be initiated. The

party responsible for generating the document will include both the comments and the response in the official record for the appropriate document.

vi) To date, there have been no Transportation Control Measures (TCMs) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes a SIP revision that includes TCMs, the agency will notify WVDOT and the MPO, and provide each party the opportunity to provide input as soon as practical, but no later than the beginning of any public comment period.

c) Interagency consultation procedures - Specific processes

40 CFR §93.105(c)(1) specifies seven items which must be addressed by the consultation process. The process for handling each of these items, numbered in the same sequence as the federal regulation, is as follows:

1) I) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

WVDEP, WVDOT, and the MPO will mutually agree on the model and methods for emissions analyses. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analyses. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP;

WVDOT will make a determination, based on professional judgement, of which projects or project changes may potentially generate regionally significant emissions. Such determination will be included in the appropriate document(s) along with a brief justification. Upon request, WVDOT will provide copies of such documents to any party.

iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR §§93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

It is expected that any project consistent with 40 CFR §93.126 or 40 CFR §93.127 will not have regional air quality impacts. However, any of the parties may initiate a review of the impact of a project if there is reason to believe that a particular project warrants closer scrutiny. Staff of the three parties will evaluate relevant information and attempt to reach a consensus using Level One consultation procedures. If the issue remains unresolved, the conflict resolution procedures may be initiated by any party.

iv) Making a determination, as required by §93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

Historically, there have not been any TCMs pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCMs are not applicable at this time. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes to include TCMs in a SIP revision, the other parties must be notified as soon as practical, but no later than the start of the public comment period for the relevant document. Any such SIP revision must include consultation procedures that satisfy the requirements of 40 CFR §93.105(c)(1)(iv).

v) Identifying, as required by §93.123 (b), projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis; and

WVDEP will notify the MPO of any areas within its planning region that are designated as PM₁₀ nonattainment/maintenance areas. WVDEP will also notify the MPO of any areas within its planning region that are proposed for such designation as soon as practical, but no later than the start of the public comment period related to such designation. Further, WVDEP will notify the MPO of any project sites that have PM₁₀ violations verified by monitoring. The MPO will be responsible for providing a summary to WVDEP of all projects in the area, in sufficient detail so that other similar projects may be identified. Using Level One consultation procedures, a determination of which projects require "hotspot" analysis will be made. If the issue can not be resolved at Level One, the conflict resolution procedures will apply.

vi) Notification of transportation plan or TIP revisions or amendments which merely add

or delete exempt projects listed in §§93.126 or 93.127.

As soon as practical, but no later than the time of public notification of transportation plan or TIP revisions or amendments, the MPO will also provide a copy of the revision or amendment to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas as required by §93.109 (g) (2) (iii)

There are no rural areas designated nonattainment (as of May 1998) and only one rural maintenance area in the state. This area has a SIP approved emissions budget and therefore must meet the provisions of §93.118. However, in the event that other rural areas are designated nonattainment, the appropriate Level One contacts (MPO, WVDOT, WVDEP, as applicable) will meet to establish an appropriate protocol for the area(s).

2) Consultation process involving the MPO, WVDEP and WVDOT for the following:

I) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR §93.104;

It is expected that most events which may trigger a new conformity determination are clearly established in 40 CFR §93.104. However, any of the parties may initiate a review of additional events which may trigger a new conformity determination if there is reason to believe that a particular event warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the event(s) warrant a new conformity determination. If the issue can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins;

The primary responsible MPO has the responsibility for notifying other responsible MPOs; adjacent MPOs; WVDOT; and WVDEP for transportation activities that cross the borders of MPOs or nonattainment areas or basins. The parties of this agreement and any party so notified above, may request pertinent information or initiate a meeting, to examine and evaluate the impact on air-quality of such activities. It is the responsibility of the initiating party to contact the other parties, establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties must make reasonable efforts to provide requested information in a timely manner; assist in selecting a suitable place and time for requested meetings; and have representatives participate in the meetings. If appropriate information is not supplied in a timely manner, or suitable meeting arrangements can not be made, or if the issue(s) remain unresolved, the conflict resolution procedures may

be initiated by any party. In the event that such activities cross state lines, the primary responsible MPO will notify the other state's responsible MPO or adjacent MPO, which will then have the responsibility of coordinating those activities with that state's air agency and transportation department. If no other MPO has responsibility for such transportation activities, the primary responsible MPO will coordinate those activities directly with that state's air agency and transportation department.

3) Where the metropolitan planning area does not include the entire nonattainment/maintenance area, the parties will use Level One consultation procedures to achieve cooperative planning and analysis for determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area. If any issues can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

4) Regionally significant transportation projects which may be subject to this conformity rule, but which are not FHWA/FTA projects, will in almost all cases be WVDOT highway projects funded by state motor vehicle taxes. As such, these projects will be included in WVDOT program material which is regularly and routinely supplied to the MPO. Few, if any, such projects are anticipated. However, it will be the shared responsibility of WVDOT and the MPO to identify any such regionally significant projects, should they be programmed for implementation, and to initiate coordination with WVDEP to ensure that proper conformity procedures are followed. Once such projects are identified, WVDOT will be responsible for monitoring such projects carefully to identify any changes in concept, scope, or location which may require a new conformity determination, and for advising the MPO of such changes.

Non-FHWA/FTA projects which do not originate as state-funded WVDOT highway projects are expected to be disclosed to one or more of the parties at an early stage of proposal or development. In such cases, the party receiving such knowledge will be responsible for notifying the other parties in a timely manner, but no later than the receipt of any related permit applications, so that appropriate conformity procedures will be followed.

(5) In cases when a project sponsor discloses to the MPO that a regionally significant non-FHWA/FTA project is under consideration for development, the MPO shall have the following responsibilities:

i) To determine whether the proposed project is sufficiently committed for implementation by the sponsor to warrant inclusion in the MPO's regional emissions analysis; and if so,

ii) To determine, in consultation with the project sponsor, WVDEP, and WVDOT as necessary, the most reasonably expected development scenario regarding project schedule,

concept, scope, and location, in sufficient detail to permit conformity determination procedures to be applied to the proposed project.

(6) Consultation on the design, schedule, and funding of any research and data collection efforts and regional transportation model development by the MPO will occur under terms of Interagency Consultation- General [Section (b)(2)] of this Memorandum of Understanding.

(7) The process for providing final documents and supporting information to each party after approval or adoption shall be as described under terms of Interagency Consultation - General of this Memorandum of Understanding for parties designated under Section (b)(2)(ii) for regular consultation matters.

With regard to Federal agencies, the following additional steps apply:

USEPA and USDOT will be asked to specify contacts for transportation conformity issues. The responsible party, or party which is initiating some action subject to the above consultation provisions, will notify these federal contacts as soon as practical but no later than the beginning of any public comment period associated with the action. The federal contact may request copies of the relevant document(s). The responsible party, or party which is initiating some action subject to the above consultation provisions will provide such requested copies as soon as practical, but no later than ten (10) days prior to the end of the associated public comment period. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to these federal contacts, at their request, in a timely manner. The federal contacts may specify conditions under which they will be notified prior to the consultation meetings called by the parties. The parties will do so in a timely manner and, if requested, will make reasonable efforts to allow the federal contacts to observe the proceedings and make comments during the meeting(s).

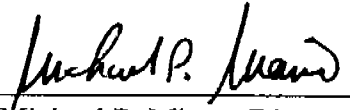
d) Resolving Conflicts

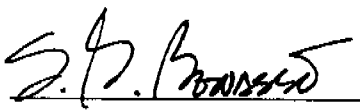
Level One Consultation is consultation that occurs among the specified contact person(s) in the WVDEP, WVDOT and the MPO. In any circumstance where an issue cannot be resolved through the previously identified routine consultation process, the issue may be moved to Level Two by any party. Level Two Consultation is consultation that occurs among the WVDOT Secretary of Transportation; the WVDEP Director; and the MPO's Executive Director or chief administrative officer. In any circumstance where an issue cannot be resolved through Level Two Consultation, the issue may be moved to a Level Three Consultation by any of these three persons. Upon receipt of the written response to comments generated from Level Two Consultation, the person initiating the Level Three Consultation procedure has 14 calendar days to appeal, in writing, to the Governor for resolution of the conflict. Level Three Consultation requires the Governor of the State of West Virginia, or his or her designated representative, to resolve any conflict that can not be resolved by Level Two consultation and negotiation. In no circumstance may the Governor's designated representative in this process be the head or staff of WVDEP, WVDOT, or the MPO.

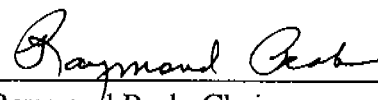
e) Public Consultation Procedures

The MPO has established a public participation process which provides an opportunity for public review and comment prior to taking formal action on all transportation plans, TIPs, and associated conformity determinations, consistent with the requirements of 23 CFR Part 450. Any comment received during the comment period will be documented and resolved prior to formal approval. The MPO periodically reviews these procedures to ensure that the process is consistent with federal requirements. Any necessary revision in the public consultation procedures will be consistent with 23 CFR 450.

The undersigned, as authorized representatives of the agency or organization indicated, do hereby agree to the terms and conditions set forth above, and will ensure that said agency or organization will abide by the terms of this Memorandum of Understanding. This Memorandum of Understanding becomes effective on the date of the final signature below:

 Date: 7-24-98
 Michael P. Miano, Director
 WV Division of Environmental Protection

 Date: 7.16.98
 Samuel G. Bonasso, P.E., Secretary
 WV Department of Transportation

 Date: 5/26/98
 Raymond Peak, Chairman
 BCKP-Regional Intergovernmental Council

45CSR36
APPENDIX A
Memorandums of Understanding (MOUs)

IV. MOU among WVDEP, WVDOT and the Wood-Washington-Wirt Interstate Planning Commission (WWW)

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING
Parties: WVDEP, WVDOT and WWW

Federal regulations (40 CFR §51.390) require submission to USEPA of a State Implementation Plan (SIP) revision adopting the provisions of 40 CFR Part 93, Subpart A, (Transportation Conformity), including procedures for interagency consultation (Federal, State and local) and resolution of conflicts. This document details procedures for meeting interagency consultation requirements set forth in 40 CFR §93.105. Parties to this Memorandum of Understanding (MOU) are: the West Virginia Division of Environmental Protection (WVDEP); the West Virginia Department of Transportation (WVDOT); and the Wood-Washington-Wirt Interstate Planning Commission (WWW), herein referred to as the "Metropolitan Planning Organization" or "MPO". WWW will be considered the "primary responsible MPO" and, is the MPO referred to in this MOU, unless otherwise specified. Some provisions require interaction with other MPOs and when necessary, the text will specify which procedures apply to the primary responsible MPO (WWW), other responsible MPOs or adjacent MPOs.

In addition to the above mentioned parties, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Transportation (USDOT), through the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), have review and/or approval functions at various stages of the conformity determination process.

The parties herein mutually agree to adopt and abide by all provisions of 40 CFR Part 93, "Determining the Conformity of Federal Actions to State or Federal Implementation Plans", Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" as effective on September 15, 1997. The only exception is §93.102 (d) "Grace Period for new nonattainment areas" which is expressly excluded because it has been invalidated by a federal court. Furthermore, the parties agree to abide by the consultation procedures detailed below in order to meet the requirements of 40 CFR §93.105, "Consultation".

Consultation is required in at least three instances: 1) SIP revision relating, directly or indirectly, to mobile sources (transportation); 2) conformity analysis for new or amended Transportation Improvement Program (TIP); and 3) conformity analysis for new or revised Transportation Plan. Additional consultation requirements are specified below. SIP revisions are initiated by WVDEP. TIP and Transportation Plan conformity determinations are initiated by the

MPO, with the technical assistance of WVDOT.

a) General

- 1) WVDEP will prepare, and submit to USEPA, a SIP revision that adopts the provisions of the federal transportation conformity rule and which includes the consultation procedures below. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. WVDEP will provide reasonable opportunity for comment from the MPO, WVDOT and USDOT before submitting SIP revisions that directly impact transportation activities. Such revisions include, at a minimum, SIP revisions that establish or change the highway vehicle emissions budget, or specify Transportation Control Measures (TCMs) in nonattainment or maintenance areas.
- 2) The MPO and WVDOT, before making conformity determinations, must provide reasonable opportunity for consultation with WVDEP, USDOT and USEPA. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. Further, the USDOT (via FHWA and FTA) and the USEPA have review, comment and approval responsibilities at various stages of the conformity process.

b) Interagency consultation procedures - General factors

40 CFR §93.105(b)(2) requires that six general factors be addressed. The following procedures are numbered consistently with the federal rule and address each of the requirements found in 40 CFR §93.105(b):

- 1) The procedures to be included in the SIP revision are detailed below.
- 2) Interagency consultation procedures will include, at a minimum, the items listed below and the specific processes in paragraph (c) of this section:
 - i) When a SIP revision is proposed, it will be the responsibility of WVDEP to provide the MPO and WVDOT with copies of relevant documents at the earliest practical date, but no later than the initiation of a public comment/participation process. Should any party need additional information or desire a meeting it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

When the TIP or Transportation Plan requires conformity analysis, WVDOT Planning staff will notify the specified contact person in WVDEP, and utilizing mutually agreed upon technical procedures, will calculate the projected emissions for the Transportation Plan or TIP. This emissions information will be provided to the MPO and WVDEP specified contact persons in a timely manner. The MPO will include a finding of

conformity or non-conformity in the appropriate document. The MPO will provide a copy of the TIP; or Transportation Plan; or where applicable, individual project analyses; to WVDEP and WVDOT at the earliest practical date, but not later than the initiation of the public participation process. The MPO will maintain a public participation process consistent with the requirements of 23 CFR Part 450. Should any party need additional information or desire a meeting, it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

ii) Each party: WVDEP, WVDOT, and the MPO will designate a specific person or persons as the contact(s) for technical consultations. The specified person(s) may be assigned or reassigned this duty as necessary for the smooth running of the agency or organization involved. The other parties must be notified of such changes in a timely manner, to facilitate the consultation process.

To the extent possible, the initial consultation process will be on an informal basis between the specified contact persons ("Level One" Consultation). When an issue cannot be resolved through the routine interaction of the specified contact persons, then a more formal process will be required. This more formal process is described in the Conflict Resolution Section.

iii) As previously stated in subsection (i) above, relevant documents or copies will be provided by the appropriate party at the earliest practical date, but not later than the initiation of a public comment/participation process. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to the other parties at their request, in a timely manner.

iv) No regularly scheduled consultation meetings are established by this document. However, any party may initiate a meeting, by phone or in writing, when a need is perceived. The meeting may be conducted by telephone if all parties concur. The initiating party will have the responsibility to establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties will make reasonable efforts to help in selecting a suitable place and time for the meeting and provide representatives to participate in the meetings. If suitable meeting arrangements can not be made or if the issue(s) remain unresolved, the conflict resolution procedures may be initiated by any party.

v) If any party provides substantial written comments regarding any matter subject to the requirements of 40 CFR §93.105, it shall be the responsibility of WVDEP (in the case of a proposed SIP revision) or the MPO (in the case of a TIP or Plan revision) to provide a substantive written response to the party in a timely manner. If the response is not satisfactory to the receiving party, the conflict resolution procedures may be initiated. The

party responsible for generating the document will include both the comments and the response in the official record for the appropriate document.

vi) To date, there have been no Transportation Control Measures (TCMs) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes a SIP revision that includes TCMs, the agency will notify WVDOT and the MPO, and provide each party the opportunity to provide input as soon as practical, but no later than the beginning of any public comment period.

c) Interagency consultation procedures - Specific processes

40 CFR §93.105(c)(1) specifies seven items which must be addressed by the consultation process. The process for handling each of these items, numbered in the same sequence as the federal regulation, is as follows:

1) i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

WVDEP, WVDOT, and the MPO will mutually agree on the model and methods for emissions analyses. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analyses. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP;

WVDOT will make a determination, based on professional judgement, of which projects or project changes may potentially generate regionally significant emissions. Such determination will be included in the appropriate document(s) along with a brief justification. Upon request, WVDOT will provide copies of such documents to any party.

iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR §§93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

It is expected that any project consistent with 40 CFR §93.126 or 40 CFR §93.127 will not have regional air quality impacts. However, any of the parties may initiate a review of the impact of a project if there is reason to believe that a particular project warrants closer scrutiny. Staff of the three parties will evaluate relevant information and attempt to reach a consensus using Level One consultation procedures. If the issue remains unresolved, the conflict resolution procedures may be initiated by any party.

iv) Making a determination, as required by §93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

Historically, there have not been any TCMs pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCMs are not applicable at this time. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other parties will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes to include TCMs in a SIP revision, the other parties must be notified as soon as practical, but no later than the start of the public comment period for the relevant document. Any such SIP revision must include consultation procedures that satisfy the requirements of 40 CFR §93.105(c)(1)(iv).

v) Identifying, as required by §93.123 (b), projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis; and

WVDEP will notify the MPO of any areas within its planning region that are designated as PM₁₀ nonattainment/maintenance areas. WVDEP will also notify the MPO of any areas within its planning region that are proposed for such designation as soon as practical, but no later than the start of the public comment period related to such designation. Further, WVDEP will notify the MPO of any project sites that have PM₁₀ violations verified by monitoring. The MPO will be responsible for providing a summary to WVDEP of all projects in the area, in sufficient detail so that other similar projects may be identified. Using Level One consultation procedures, a determination of which projects require "hotspot" analysis will be made. If the issue can not be resolved at Level One, the conflict resolution procedures will apply.

vi) Notification of transportation plan or TIP revisions or amendments which merely add

or delete exempt projects listed in §§93.126 or 93.127.

As soon as practical, but no later than the time of public notification of transportation plan or TIP revisions or amendments, the MPO will also provide a copy of the revision or amendment to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas as required by §93.109 (g) (2) (iii)

There are no rural areas designated nonattainment (as of May 1998) and only one rural maintenance area in the state. This area has a SIP approved emissions budget and therefore must meet the provisions of §93.118. However, in the event that other rural areas are designated nonattainment, the appropriate Level One contacts (MPO, WVDOT, WVDEP, as applicable) will meet to establish an appropriate protocol for the area(s).

2) Consultation process involving the MPO, WVDEP and WVDOT for the following:

i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR §93.104;

It is expected that most events which may trigger a new conformity determination are clearly established in 40 CFR §93.104. However, any of the parties may initiate a review of additional events which may trigger a new conformity determination if there is reason to believe that a particular event warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the event(s) warrant a new conformity determination. If the issue can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins;

The primary responsible MPO has the responsibility for notifying other responsible MPOs; adjacent MPOs; WVDOT; and WVDEP for transportation activities that cross the borders of MPOs or nonattainment areas or basins. The parties of this agreement and any party so notified above, may request pertinent information or initiate a meeting, to examine and evaluate the impact on air-quality of such activities. It is the responsibility of the initiating party to contact the other parties, establish the agenda and to determine a mutually agreeable time and place to meet. The contacted parties must make reasonable efforts to provide requested information in a timely manner; assist in selecting a suitable place and time for requested meetings; and have representatives participate in the meetings. If appropriate information is not supplied in a timely manner, or suitable meeting arrangements can not be made, or if the issue(s) remain unresolved, the conflict resolution procedures may

be initiated by any party. In the event that such activities cross state lines, the primary responsible MPO will notify the other state's responsible MPO or adjacent MPO, which will then have the responsibility of coordinating those activities with that state's air agency and transportation department. If no other MPO has responsibility for such transportation activities, the primary responsible MPO will coordinate those activities directly with that state's air agency and transportation department.

3) Where the metropolitan planning area does not include the entire nonattainment/maintenance area, the parties will use Level One consultation procedures to achieve cooperative planning and analysis for determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area. If any issues can not be resolved at Level One, the conflict resolution procedures may be initiated by any party.

4) Regionally significant transportation projects which may be subject to this conformity rule, but which are not FHWA/FTA projects, will in almost all cases be WVDOT highway projects funded by state motor vehicle taxes. As such, these projects will be included in WVDOH program material which is regularly and routinely supplied to the MPO. Few, if any, such projects are anticipated. However, it will be the shared responsibility of WVDOT and the MPO to identify any such regionally significant projects, should they be programmed for implementation, and to initiate coordination with WVDEP to ensure that proper conformity procedures are followed. Once such projects are identified, WVDOT will be responsible for monitoring such projects carefully to identify any changes in concept, scope, or location which may require a new conformity determination, and for advising the MPO of such changes.

Non-FHWA/FTA projects which do not originate as state-funded WVDOT highway projects are expected to be disclosed to one or more of the parties at an early stage of proposal or development. In such cases, the party receiving such knowledge will be responsible for notifying the other parties in a timely manner, but no later than the receipt of any related permit applications, so that appropriate conformity procedures will be followed.

(5) In cases when a project sponsor discloses to the MPO that a regionally significant non-FHWA/FTA project is under consideration for development, the MPO shall have the following responsibilities:

- i) To determine whether the proposed project is sufficiently committed for implementation by the sponsor to warrant inclusion in the MPO's regional emissions analysis; and if so,
- ii) To determine, in consultation with the project sponsor, WVDEP, and WVDOT as necessary, the most reasonably expected development scenario regarding project schedule,

concept, scope, and location, in sufficient detail to permit conformity determination procedures to be applied to the proposed project.

(6) Consultation on the design, schedule, and funding of any research and data collection efforts and regional transportation model development by the MPO will occur under terms of Interagency Consultation- General [Section (b)(2)] of this Memorandum of Understanding.

(7) The process for providing final documents and supporting information to each party after approval or adoption shall be as described under terms of Interagency Consultation - General of this Memorandum of Understanding for parties designated under Section (b)(2)(ii) for regular consultation matters.

With regard to Federal agencies, the following additional steps apply:

USEPA and USDOT will be asked to specify contacts for transportation conformity issues. The responsible party, or party which is initiating some action subject to the above consultation provisions, will notify these federal contacts as soon as practical but no later than the beginning of any public comment period associated with the action. The federal contact may request copies of the relevant document(s). The responsible party, or party which is initiating some action subject to the above consultation provisions will provide such requested copies as soon as practical, but no later than ten (10) days prior to the end of the associated public comment period. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to these federal contacts, at their request, in a timely manner. The federal contacts may specify conditions under which they will be notified prior to the consultation meetings called by the parties. The parties will do so in a timely manner and, if requested, will make reasonable efforts to allow the federal contacts to observe the proceedings and make comments during the meeting(s).

d) Resolving Conflicts

Level One Consultation is consultation that occurs among the specified contact person(s) in the WVDEP, WVDOT and the MPO. In any circumstance where an issue cannot be resolved through the previously identified routine consultation process, the issue may be moved to Level Two by any party. Level Two Consultation is consultation that occurs among the WVDOT Secretary of Transportation; the WVDEP Director; and the MPO's Executive Director or chief administrative officer. In any circumstance where an issue cannot be resolved through Level Two Consultation, the issue may be moved to a Level Three Consultation by any of these three persons. Upon receipt of the written response to comments generated from Level Two Consultation, the person initiating the Level Three Consultation procedure has 14 calendar days to appeal, in writing, to the Governor for resolution of the conflict. Level Three Consultation requires the Governor of the State of West Virginia, or his or her designated representative, to resolve any conflict that can not be resolved by Level Two consultation and negotiation. In no circumstance may the Governor's designated representative in this process be the head or staff of WVDEP, WVDOT, or the MPO.

e) Public Consultation Procedures

The MPO has established a public participation process which provides an opportunity for public review and comment prior to taking formal action on all transportation plans, TIPs, and associated conformity determinations, consistent with the requirements of 23 CFR Part 450. Any comment received during the comment period will be documented and resolved prior to formal approval. The MPO periodically reviews these procedures to ensure that the process is consistent with federal requirements. Any necessary revision in the public consultation procedures will be consistent with 23 CFR 450.

The undersigned, as authorized representatives of the agency or organization indicated, do hereby agree to the terms and conditions set forth above, and will ensure that said agency or organization will abide by the terms of this Memorandum of Understanding. This Memorandum of Understanding becomes effective on the date of the final signature below:

Michael P. Miano Date: 7/24/98
 Michael P. Miano, Director
 WV Division of Environmental Protection

S.G. Bonasso Date: 7.16.98
 Samuel G. Bonasso, P.E., Secretary
 WV Department of Transportation

Joe Matthews Date: 5.22.98
 Joe Matthews, Chairman
 W WV Interstate Planning Commission

45CSR36
APPENDIX A
Memorandums of Understanding (MOUs)

V. MOU between the West Virginia Division of Environmental Protection (WVDEP), and the West Virginia Department of Transportation (WVDOT)

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING
Parties: WVDEP and WVDOT

Federal regulations (40 CFR §51.390) require submission to USEPA of a State Implementation Plan (SIP) revision adopting the provisions of 40 CFR Part 93, Subpart A, (Transportation Conformity), including procedures for interagency consultation (Federal, State and local) and resolution of conflicts. This document details procedures for meeting interagency consultation requirements set forth in 40 CFR §93.105 for areas in West Virginia which are designated as nonattainment or maintenance areas and for which no Metropolitan Planning Organization (MPO) responsible for transportation planning exists or for which WVDOT holds the primary transportation planning responsibility. Parties to this Memorandum of Understanding (MOU) are: the West Virginia Division of Environmental Protection (WVDEP) and the West Virginia Department of Transportation (WVDOT).

In addition to the above mentioned parties, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Transportation (USDOT), through the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), have review and/or approval functions at various stages of the conformity determination process.

The parties herein mutually agree to adopt and abide by all provisions of 40 CFR Part 93, "Determining the Conformity of Federal Actions to State or Federal Implementation Plans", Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" as effective on September 15, 1997. The only exception is §93.102 (d) "Grace Period for new nonattainment areas" which is expressly excluded because it has been invalidated by a federal court. Furthermore, the parties agree to abide by the consultation procedures detailed below in order to meet the requirements of 40 CFR §93.105, "Consultation".

Consultation is required in at least three instances: 1) SIP revision relating, directly or indirectly, to mobile sources (transportation); 2) conformity analysis for a new or amended State Transportation Improvement Program (STIP) or Statewide Transportation Plan in nonattainment or maintenance areas for which no MPO exists or for which WVDOT holds the primary transportation planning responsibility; and 3) conformity analysis for any specific transportation projects which are not exempted from conformity provisions; which do not come from previous conforming STIPs or Plans; and for which WVDOT holds the primary transportation planning responsibility.

Additional consultation requirements are specified below. SIP revisions are initiated by WVDEP. STIP and Statewide Transportation Plan conformity determinations are initiated by WVDOT.

a) General

- 1) WVDEP will prepare, and submit to USEPA, a SIP revision that adopts the provisions of the federal transportation conformity rule and which includes the consultation procedures below. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. WVDEP will provide reasonable opportunity for comment from the WVDOT and USDOT before submitting SIP revisions that directly impact transportation activities. Such revisions include, at a minimum, SIP revisions that establish or change the highway vehicle emissions budget, or specify Transportation Control Measures (TCMs) in nonattainment or maintenance areas.
- 2) WVDOT, before making conformity determinations, must provide reasonable opportunity for consultation with WVDEP, USDOT and USEPA. Such consultation will include, at a minimum, the issues described in paragraph (c)(1) below. Further, the USDOT (via FHWA and FTA) and the USEPA have review, comment and approval responsibilities at various stages of the conformity process.

b) Interagency consultation procedures - General factors

40 CFR §93.105(b)(2) requires that six general factors be addressed. The following procedures are numbered consistently with the federal rule and address each of the requirements found in 40 CFR §93.105(b):

- 1) The procedures to be included in the SIP revision are detailed below.
- 2) Interagency consultation procedures will include, at a minimum, the items listed below and the specific processes in paragraph (c) of this section:
 - i) When a SIP revision is proposed, it will be the responsibility of WVDEP to provide WVDOT with copies of relevant documents at the earliest practical date, but no later than the initiation of a public comment/participation process. Should either party need additional information or desire a meeting it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

When an applicable portion of the STIP or Statewide Transportation Plan requires conformity analysis, WVDOT Planning staff will notify the specified contact person in WVDEP, and utilizing mutually agreed upon technical procedures, will calculate the projected emissions for the Transportation Plan or STIP. This emissions information will be

provided to the WVDEP specified contact person(s) in a timely manner. The WVDOT will include a finding of conformity or non-conformity in the appropriate document. The WVDOT will provide a copy of the STIP; or Transportation Plan; or where applicable, individual project analyses to WVDEP at the earliest practical date, but not later than the initiation of the public participation process. The WVDOT will maintain a public participation process consistent with the requirements of 23 CFR Part 450. Should either party need additional information or desire a meeting, it is the responsibility of that party to request the information or meeting. The party receiving the request must make reasonable efforts to comply in a timely manner. If the party generating the request is dissatisfied with the response or perceives a lack of response, the conflict resolution procedures may be initiated.

ii) Both parties, WVDEP and WVDOT, will designate a specific person or persons as the contact(s) for technical consultations. The specified person(s) may be assigned or reassigned this duty as necessary for the smooth running of the agency or organization involved. The other party must be notified of such changes in a timely manner, to facilitate the consultation process.

To the extent possible, the initial consultation process will be on an informal basis between the specified contact persons ("Level One" Consultation). When an issue cannot be resolved through the routine interaction of the specified contact persons, then a more formal process will be required. This more formal process is described in the Conflict Resolution Section.

iii) As previously stated in subsection (I) above, relevant documents or copies will be provided by the appropriate party at the earliest practical date, but not later than the initiation of a public comment/participation process. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to the other party at their request, in a timely manner.

iv) No regularly scheduled consultation meetings are established by this document. However, either party may initiate a meeting, by phone or in writing, when a need is perceived. The meeting may be conducted by telephone if both parties concur. The initiating party will have the responsibility to establish the agenda and to determine a mutually agreeable time and place to meet. The contacted party will make reasonable efforts to help in selecting a suitable place and time for the meeting and provide representatives to participate in the meetings. If suitable meeting arrangements can not be made or if the issue(s) remain unresolved, the conflict resolution procedures may be initiated by either party.

v) If either party provides substantial written comments regarding any matter subject to the requirements of 40 CFR §93.105, it shall be the responsibility of WVDEP (in the case

of a proposed SIP revision) or the WVDOT (in the case of a STIP or Plan revision) to provide a substantive written response to the party in a timely manner. If the response is not satisfactory to the receiving party, the conflict resolution procedures may be initiated. The party responsible for generating the document will include both the comments and the response in the official record for the appropriate document.

vi) To date, there have been no Transportation Control Measures (TCMs) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, the other party will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes a SIP revision that includes TCMs, the agency will notify WVDOT and provide the opportunity to provide input as soon as practical, but no later than the beginning of any public comment period.

c) Interagency consultation procedures - Specific processes

40 CFR §93.105(c)(1) specifies seven items which must be addressed by the consultation process. The process for handling each of these items, numbered in the same sequence as the federal regulation, is as follows:

1) i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

WVDEP and WVDOT will mutually agree on the model and methods for emissions analyses. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analyses. Both parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or STIP;

WVDOT will make a determination, based on professional judgement, of which projects or project changes may potentially generate regionally significant emissions. Such determination will be included in the appropriate document(s) along with a brief justification. Upon request, WVDOT will provide copies of such documents to WVDEP.

iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR §§93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

It is expected that any project consistent with 40 CFR §93.126 or 40 CFR §93.127 will not have regional air quality impacts. However, either party may initiate a review of the impact of a project if there is reason to believe that a particular project warrants closer scrutiny. The staff of both parties will evaluate relevant information and attempt to reach a consensus using Level One consultation procedures. If the issue remains unresolved, the conflict resolution procedures may be initiated by either party.

iv) Making a determination, as required by §93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

Historically, there have not been any TCMs pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCMs are not applicable at this time. However, if WVDEP anticipates utilizing TCMs to obtain emissions reductions in the nonattainment or maintenance area, WVDOT will be consulted early in the process to determine the effectiveness and feasibility of such measures in obtaining the desired reductions. If WVDEP subsequently proposes to include TCMs in a SIP revision, the other party must be notified as soon as practical, but no later than the start of the public comment period for the relevant document. Any such SIP revision must include consultation procedures that satisfy the requirements of 40 CFR §93.105(c)(1)(iv).

v) Identifying, as required by §93.123 (b), projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis;

WVDEP will notify the WVDOT of any areas within its planning region that are designated as PM₁₀ nonattainment/maintenance areas. WVDEP will also notify the WVDOT of any areas within its planning region that are proposed for such designation as soon as practical, but no later than the start of the public comment period related to such designation. Further, WVDEP will notify the WVDOT of any project sites that have PM₁₀ violations verified by monitoring. The WVDOT will be responsible for providing a summary to WVDEP of all projects in the area, in sufficient detail so that other similar projects may be identified. Using Level One consultation procedures, a determination of which projects

require "hotspot" analysis will be made. If the issue can not be resolved at Level One, the conflict resolution procedures will apply.

- vi) Notification of transportation plan or STIP revisions or amendments which merely add or delete exempt projects listed in §§93.126 or 93.127.

As soon as practical, but no later than the time of public notification of transportation plan or STIP revisions or amendments, the WVDOT will also provide a copy of the revision or amendment to WVDEP. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

- vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas as required by §93.109 (g) (2) (iii)

There are no rural areas designated nonattainment (as of May 1998) and only one rural maintenance area in the state. This area has a SIP approved emissions budget and therefore must meet the provisions of §93.118. However, in the event that other rural areas are designated nonattainment, the designated Level One contacts will meet to establish an appropriate protocol for the area(s).

- 2) Consultation process involving the WVDEP and WVDOT for the following:

- i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR §93.104;

It is expected that most events which may trigger a new conformity determination are clearly established in 40 CFR §93.104. However, either party may initiate a review of additional events which may trigger a new conformity determination if there is reason to believe that a particular event warrants closer scrutiny. Level One contacts of both parties will evaluate relevant information and attempt to reach a consensus on whether the event(s) warrant a new conformity determination. If the issue can not be resolved at Level One, the conflict resolution procedures may be initiated by either party.

- ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins;

In the event that such activities cross state lines, WVDOT will notify the other state's responsible MPO or adjacent MPO, which will then have the responsibility of coordinating those activities with that state's air agency and transportation department. If no MPO has responsibility for such transportation activities, WVDOT will coordinate those activities directly with that state's air agency and transportation department.

3) WVDOT has responsibilities for transportation planning throughout the entire state of West Virginia. Therefore, the planning area includes all nonattainment or maintenance areas within the state. When an MPO or other such organization holds primary responsibilities for transportation planning activities in the nonattainment or maintenance area, WVDOT will use Level One Consultation procedures to coordinate such activities. If any issues can not be resolved at Level One, the conflict resolution procedures may be initiated by either party.

4) Regionally significant transportation projects which may be subject to this conformity rule, but which are not FHWA/FTA projects, will in almost all cases be WVDOT highway projects funded by state motor vehicle taxes. As such, these projects will be included in WVDOH program material which is regularly and routinely supplied to the MPO. Few, if any, such projects are anticipated. However, it will be the responsibility of WVDOT to identify any such regionally significant projects, should they be programmed for implementation, and to initiate coordination with WVDEP to ensure that proper conformity procedures are followed. Once such projects are identified, WVDOT will be responsible for monitoring such projects carefully to identify any changes in concept, scope, or location which may require a new conformity determination, and for advising the WVDEP of such changes.

Non-FHWA/FTA projects which do not originate as state-funded WVDOT highway projects are expected to be disclosed to one or more of the parties at an early stage of proposal or development. In such cases, the party receiving such knowledge will be responsible for notifying the other party in a timely manner, but no later than the receipt of any related permit applications, so that appropriate conformity procedures will be followed.

(5) In cases when a project sponsor discloses to the WVDOT that a regionally significant non-FHWA/FTA project is under consideration for development, the WVDOT shall have the following responsibilities:

i) To determine whether the proposed project is sufficiently committed for implementation by the sponsor to warrant inclusion in the WVDOT's regional emissions analysis; and if so,

ii) To determine, in consultation with the project sponsor and WVDEP as necessary, the most reasonably expected development scenario regarding project schedule, concept, scope, and location, in sufficient detail to permit conformity determination procedures to be applied to the proposed project.

(6) Consultation on the design, schedule, and funding of any research and data collection efforts and regional transportation model development by the WVDOT will occur under terms of Interagency Consultation- General [Section (b)(2)] of this Memorandum of Understanding.

(7) The process for providing final documents and supporting information to each party after approval or adoption shall be as described under terms of Interagency Consultation - General of this Memorandum of Understanding for parties designated under Section (b)(2)(ii) for regular consultation matters.

With regard to Federal agencies, the following additional steps apply: USEPA and USDOT will be asked to specify contacts for transportation conformity issues. The responsible party, or party which is initiating some action subject to the above consultation provisions, will notify these federal contacts as soon as practical but no later than the beginning of any public comment period associated with the action. The federal contact may request copies of the relevant document(s). The responsible party, or party which is initiating some action subject to the above consultation provisions will provide such requested copies as soon as practical, but no later than ten (10) days prior to the end of the associated public comment period. Extensive technical support documentation need not be provided initially. However, the existence of such information and associated documents will be noted in the relevant document(s) and it will be made available to these federal contacts, at their request, in a timely manner. The federal contacts may specify conditions under which they will be notified prior to the consultation meetings called by the parties. The parties will do so in a timely manner and, if requested, will make reasonable efforts to allow the federal contacts to observe the proceedings and make comments during the meeting(s).

d) Resolving Conflicts

Level One Consultation is consultation that occurs among the specified contact person(s) in the WVDEP and the WVDOT. In any circumstance where an issue cannot be resolved through the previously identified routine consultation process, the issue may be moved to Level Two by either party. Level Two Consultation is consultation that occurs between the WVDOT Secretary of Transportation and the WVDEP Director. In any circumstance where an issue cannot be resolved through Level Two Consultation, the issue may be moved to a Level Three Consultation by either person. Upon receipt of the written response to comments generated from Level Two Consultation, the person initiating the Level Three Consultation procedure has 14 calendar days to appeal, in writing, to the Governor for resolution of the conflict. Level Three Consultation requires the Governor of the State of West Virginia, or his or her designated representative, to resolve any conflict that can not be resolved by Level Two consultation and negotiation. In no circumstance may the Governor's designated representative in this process be the head or staff of WVDEP or WVDOT.

e) Public Consultation Procedures

The WVDOT has established a public participation process which provides an opportunity for public review and comment prior to taking formal action on all transportation plans, STIPs, and associated conformity determinations, consistent with the requirements of 23 CFR Part 450. Any comment received during the comment period will be documented and resolved prior to formal approval. The WVDOT periodically reviews these procedures to ensure that the process is consistent

with federal requirements. Any necessary revision in the public consultation procedures will be consistent with 23 CFR 450.

The undersigned, as authorized representatives of the agency or organization indicated, do hereby agree to the terms and conditions set forth above, and will ensure that said agency or organization will abide by the terms of this Memorandum of Understanding. This Memorandum of Understanding becomes effective on the date of the final signature below:

Michael P. Miano Date: 7-24-98
Michael P. Miano, Director
WV Division of Environmental Protection

S. G. Bonasso Date: 7.16.98
Samuel G. Bonasso, P.E., Secretary
WV Department of Transportation

Federal Register

Friday
August 15, 1997

Part II

Environmental Protection Agency

40 CFR Parts 51 and 93
Transportation Conformity Rule
Amendments: Flexibility and Streamlining;
Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL-5871-4]

RIN 2060-AG16

Transportation Conformity Rule Amendments: Flexibility and Streamlining

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today EPA promulgates a clarified and more flexible transportation conformity rule. The conformity rule requires that transportation plans, programs, and projects conform to state air quality implementation plans (SIPs) and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The conformity rule changes promulgated today result from the experience that EPA, the Department of Transportation (DOT), and state and local air and transportation officials have had with implementation of the rule since it was first published in November of 1993. While these changes clarify the rule and in some cases offer increased flexibility, they will not result in any negative change in health and environmental benefits.

Today's rule gives state and local governments more authority in selecting the performance measures used as tests of conformity and more discretion when a transportation plan does not conform to a SIP. For example, the rule allows motor vehicle emissions budgets in a submitted SIP to be used to determine conformity instead of the "build/no-build" test, and rural areas can choose among several conformity tests to address the time period after that covered by the SIP.

EFFECTIVE DATE: September 15, 1997.

ADDRESSES: Materials relevant to this rulemaking are contained in Docket No. A-96-05. The docket is located in room M-1500 Waterside Mall (ground floor) at the Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket may be inspected from 8 a.m. to 5:30 p.m., Monday through Friday, including all non-government holidays. For information on electronic availability see Supplementary Information.

FOR FURTHER INFORMATION CONTACT: Meg Patulski, Transportation and Market Incentives Group, Regional and State Programs Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105, patulski.meg@epamail.epa.gov. (313) 741-7842.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially regulated by the conformity rule are those which adopt, approve, or fund transportation plans, programs, or projects under title 23 U.S.C. or title 49 U.S.C. Regulated categories and entities include:

Category	Examples of regulated entities
Local government	Local transportation and air quality agencies.
State government	State transportation and air quality agencies.
Federal government ..	Department of Transportation (Federal Highway Administration and Federal Transit Administration).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this rule. This table lists the types of entities that EPA is now aware could potentially be regulated by the conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in § 93.102 of the conformity rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Electronic Availability

The final rule is also available electronically from the EPA internet web site. Users are able to access and download files on their first call using a personal computer according to the following information:

Internet Web Sites

<http://www.epa.gov/docs/fedrgstr/EPA-AIR/>
(either select desired date or use Search feature)

Or

<http://www.epa.gov/OMSWWW/>
(look in What's New or under the Conformity file area)

The electronic version of this final rule should be available today on any of the above-listed sites. Please note that due to differences between the software used to develop the document and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

The contents of this preamble are listed in the following outline:

- I. Background on Transportation Conformity
- II. Replacement of Build/No-build Test With Submitted SIPs
- III. Other Comments on Conformity Tests
- IV. Conformity Tests for Areas That Are Not Required to Submit SIPs
- V. Rural Nonattainment and Maintenance Areas
- VI. Mismatch in SIP/Transportation Plan Timeframe
- VII. Non-federal Projects
- VIII. Deadline for Use of Network Models and Affected Areas
- IX. Content of Network Modeling Requirements in Serious and Above Ozone and CO Areas
- X. Adding Non-Exempt Projects to the Plan/TIP Without Regional Analysis
- XI. Consequences of SIP Disapproval
- XII. Traffic Signal Synchronization
- XIII. Conformity SIPs
- XIV. Hot-spot Tests
- XV. TCM Flexibility
- XVI. Conformity and the Proposed NAAQS Revisions
- XVII. Minor Changes to the Rule
- XVIII. Administrative Requirements

I. Background on Transportation Conformity

Today's action amends the transportation conformity rule, "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" (58 FR 62188, November 24, 1993). Required under section 176(c) of the Clean Air Act as amended in 1990, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and metropolitan planning organizations (MPOs) determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state air quality implementation plans (SIPs). Conformity ensures that transportation plans, programs, and projects do not produce new air quality violations, worsen existing violations, or delay timely attainment of national ambient air quality standards (NAAQS). According to the Clean Air Act, federally supported activities must conform to the implementation plan's

purpose of attaining and maintaining these standards.

Since publication of the transportation conformity rule in November 1993, EPA, the Department of Transportation (DOT), and state and local air and transportation officials have had considerable experience implementing the criteria and procedures in the rule. This experience has led to the streamlining, clarification, and new opportunities for flexibility found in today's rule, which is the third of a series of amendments to the transportation conformity rule. In each case, the amendments were needed to clarify ambiguities, correct errors, or make the conformity process more logical and feasible.

The first set of amendments was published as an interim final rule on February 8, 1995 (60 FR 7449), and was finalized on August 7, 1995 (60 FR 40098). The first set of amendments aligned the dates of conformity lapses (i.e., halting conformity determinations for new federally funded highway/transit projects) due to SIP failures with the application of Clean Air Act highway sanctions for certain ozone areas and all areas with disapproved SIPs with a protective finding (defined below in section XI).

The second set of amendments was proposed on August 29, 1995 (60 FR 44790), and was finalized on November 14, 1995 (60 FR 57179). The second set of amendments aligned the date of conformity lapses with the date of application of Clean Air Act highway sanctions for any failure to submit or submission of an incomplete control strategy SIP; extended the grace period before which areas must determine conformity to a submitted control strategy SIP; established a grace period before which transportation plan and program conformity must be determined in newly designated nonattainment areas; and corrected the nitrogen oxides (NO_x) provisions of the transportation conformity rule to be consistent with the NO_x requirements of the Clean Air Act and previous commitments made by EPA.

The second set of amendments also allowed any transportation control measure (TCM) from an approved SIP to proceed during a conformity lapse, although EPA stated that it did not intend to approve SIPs containing TCMs that have not been coordinated through the transportation planning process, as required by 23 CFR part 450 and 49 CFR part 613. The Clean Air Act and the Intermodal Surface Transportation Efficiency Act require that an integrated transportation/air quality planning

process be used to identify effective TCMs and ensure their funding sources.

The Notice of Proposed Rulemaking for today's rule was published in the *Federal Register* on July 9, 1996 (61 FR 36111). This proposal was undertaken in response to several issues raised by conformity implementers and other interested parties. EPA worked closely with conformity stakeholders in developing the proposal, and had input from the National Governors' Association (NGA), the Environmental Council of States (ECOS), state DOTs, state environmental agencies, MPOs, environmentalists, industry groups, other public interest groups, and DOT. In 1995, meetings to discuss potential amendments to the conformity rule were held by NGA and ECOS as well as the EPA. EPA developed draft regulatory language in response and sought comment from stakeholders.

The proposal's comment period ended September 9, 1996. EPA held a public hearing for this proposal on August 6, 1996. EPA received more than 50 comments from a variety of interests, including MPOs, state and local air quality agencies, state DOTs, NGA, and environmentalists. Copies of comments in their entirety can be obtained from the docket for this rule (see ADDRESSES). The docket also includes a complete Response to Comments document for this rule.

Since 1993, the transportation conformity rule has been included in 40 CFR part 51 and largely duplicated in 40 CFR part 93. In order to streamline the CFR and eliminate this duplication, the only section of today's conformity rule that remains in 40 CFR part 51 is § 51.390, which requires a conformity SIP revision. Part 51 is entitled, "Requirements for Preparation, Adoption, and Submittal of Implementation Plans." The remainder of the conformity rule is included in 40 CFR part 93, which is entitled, "Determining Conformity of Federal Actions to State or Federal Implementation Plans."

II. Replacement of Build/No-Build Test With Submitted SIPs

A. Description of Final Rule

Today's action finalizes the proposal to eliminate the build/no-build test and other emission reduction tests once a control strategy SIP or maintenance plan has been submitted to EPA and EPA has had 45 days to review the SIP submission and the adequacy of its motor vehicle emissions budget(s) for conformity purposes. This final rule also includes regulatory text from the proposal's preamble which establishes

the minimum criteria that must be satisfied in order for EPA to find a submitted motor vehicle emissions budget adequate for transportation conformity purposes. EPA clarifies today that submitted SIPs must already meet these minimum criteria in order to be approved; EPA is not imposing any new requirements for submitted SIPs.

EPA described the minimum adequacy criteria in the preamble to the proposal (61 FR 36114, July 9, 1996), and they are outlined as follows. In accordance with this final rule, an area's submitted SIP must be endorsed by the Governor (or his/her designee) and subject to a public hearing in order for EPA to find the submitted SIP adequate. Prior to submitting the SIP, consultation between federal, state, and local agencies must occur. SIP development must be documented and any technical support information needed to review the adequacy of the SIP must be submitted to EPA. In addition, any concerns stated by EPA must be addressed before the SIP is submitted. The emissions budget(s) must be clearly identified and precisely quantified. When considered with point, area, and mobile sources, the emissions budget(s) must be consistent with applicable requirements for reasonable further progress (RFP), attainment, or maintenance, depending upon the particular SIP submission. The SIP budget(s) must be consistent with the area's emissions inventory for all sources and a clear relationship among the budget(s), control measures and emissions inventory must be shown.

In addition, submitted SIPs must explain and document any changes to previously submitted motor vehicle emissions budgets and control measures; impacts on point and area source emissions; any changes to established safety margins; and reasons for the changes, including the basis for any changes related to emission factors or estimates of vehicle miles traveled (VMT). EPA is defining safety margin in this final rule to be the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable Clean Air Act requirement for RFP, attainment, or maintenance.

EPA will interpret these adequacy criteria to mean that if a submitted SIP's emissions budgets rely upon additional control measures to demonstrate RFP, attainment, or maintenance, such new control measures must be specified in the SIP submission. The submitted SIP would need to quantify the emissions impacts of any new control measures in its revised SIP, and at a minimum,

include commitments by appropriate agencies for adoption and implementation schedules, in addition to draft regulations or other relevant documents. These are minimum criteria for adequacy of emissions budgets for conformity purposes; an approvable SIP must have adopted and enforceable control measures.

Prior to EPA determining the adequacy of a submitted SIP budget, EPA will also review documentation from the state's public comment hearing on the SIP submission and the state's responses to the public comments received. This documentation is currently required to be included in the SIP package when it is submitted to EPA for its review. EPA will send a letter to the state documenting EPA's finding of adequacy or inadequacy, including EPA's consideration of public comment.

The conformity adequacy review is separate from EPA's completeness review of a submitted SIP for purposes of SIP processing. In addition, EPA's 45-day adequacy review should not be used to prejudge EPA's ultimate approval or disapproval of the SIP. As stated in the proposal, EPA cannot ensure that a submitted SIP is consistent with RFP, attainment, or maintenance until EPA has completed its formal review process and the SIP has been approved or disapproved through notice-and-comment rulemaking. Although the minimum criteria for adequacy allow EPA to make a cursory review of the submitted motor vehicle emissions budget for conformity purposes, EPA recognizes that other elements must also be in the SIP for it to ultimately be approved. Therefore, a budget that is found adequate in the 45-day review period could later be disapproved when reviewed with the entire SIP submission.

EPA will find a submitted motor vehicle emissions budget inadequate if the submitted budget does not meet the minimum criteria. However, the criteria included in the conformity rule are not intended to be a comprehensive definition of an adequate SIP for SIP approval purposes.

EPA also clarifies that the 45-day adequacy review period begins upon the receipt of the SIP submission in the EPA regional office.

Areas that submit SIPs after the effective date of this final rule will be able to use their SIP budget(s) within 45 days of submission or sooner if EPA finds them adequate. Areas that submit SIPs prior to the effective date of this final rule can use those SIPs according to the requirements of § 51.448(a)(2)/§ 93.128(a)(2) as amended on November 14, 1995 (60 FR 57179). According to

these sections, areas can use submitted SIP budgets beginning 90 days after submission unless EPA finds them inadequate; areas can use them earlier if EPA declares them adequate.

EPA's 90-day review period that is described in § 51.448(a)(2)/§ 93.128(a)(2) of the previous conformity rule may have used different standards for adequacy than are being outlined in this final rule, because under the previous rule the build/no-build test applied in addition to the submitted budget. SIPs that EPA believed adequate under that rule may not be adequate if they are the sole test of conformity. As a result, EPA may use the adequacy criteria of this final rule to re-examine SIPs that were submitted before this final rule and have not yet been approved. EPA intends to complete this re-examination within 45 days after the effective date of this final rule. During this time, areas will continue using their SIPs that have been submitted for more than 90 days; EPA's possible re-examination will not delay or in any way interfere with areas determining conformity unless EPA finds the SIP inadequate.

B. Rationale and Response to Comments

Most commenters agreed that the emission reduction tests should not be required once a SIP is submitted. The majority of commenters agreed that compared to the budget test, the value of the build/no-build test is limited. Commenters believed that the proposed flexibility would streamline conformity and use state and local resources more efficiently. Most commenters also supported the proposal's reduction of the adequacy review period for a submitted SIP from 90 to 45 days.

However, some commenters were concerned that submitted budgets may not be able to fully satisfy the purpose of the emission reduction tests, which is to ensure that annual emissions will be reduced and/or that violations will not be created or worsened (see Clean Air Act sections 176(c)(3)(A)(iii) and (c)(1)(B)). Specifically, some commenters stated that the proposed EPA review period would not be sufficient to ensure the adequacy of submitted budgets because the proposal did not establish any objective criteria for adequacy in the regulatory language, or provide an opportunity for public comment on EPA's adequacy finding. Some argued that the absence of adequacy criteria for submitted budgets could lead to the submission of inflated budgets (not based on credible, quantifiable attainment demonstrations) for the convenience of determining conformity. Commenters felt that although these SIPs would ultimately

not prove acceptable, they could allow projects to proceed during EPA's rulemaking to disapprove the SIP. This could also lead to delays in attainment. Another commenter was concerned that the lack of objective criteria for adequacy in the rule would make EPA more vulnerable to political pressure to approve inadequate budgets.

EPA agrees that if submitted budgets are to replace the build/no-build test as the primary measure of conformity, the criteria by which EPA will judge their adequacy must be clearly articulated in the rule. EPA has done so in this final action, and these criteria are those described in the preamble to the proposal. In addition, submitted SIPs must already meet these criteria in order for EPA to ultimately approve them. Since the criteria included in this final rule are the same as those described in the proposal and thus subjected to public comment, EPA does not believe a reproposal is necessary prior to adding the criteria to the regulatory language.

EPA also agrees that the public should be given the opportunity to comment on the adequacy of a submitted SIP. Some commenters suggested requiring public notice of submitted budgets and a 60-day period during which the public could file objections and present arguments to EPA for its consideration in its adequacy review. However, because the state already holds a public hearing on the draft SIP before submitting it to EPA, EPA believes the public has sufficient opportunity to comment at the state level on the adequacy of the budgets contained in the SIP. EPA believes the rule now addresses commenters' concerns by requiring EPA to review and consider the compilation of public comment that the state is already required to include with any SIP submission. EPA will document its consideration of such comments in the letter to the state indicating the adequacy of the submitted budget(s).

Commenters also expressed concern that EPA is not even obligated to determine adequacy, since a submitted budget can be used even if EPA has not determined adequacy within the 45-day review period. However, EPA is committed to helping ensure that conformity and future transportation investment decisions are made using the best possible SIPs, and EPA intends to review all submitted SIPs within the 45-day period.

Some commenters stated that EPA may not establish a motor vehicle emissions budget as a legally enforceable obligation without following the notice and comment procedures of the Administrative

Procedure Act (APA). EPA believes that it is appropriate not to provide notice and comment for adequacy determinations for submitted SIPs, since these determinations are only administrative reviews and not substantive rules. When EPA reviews a SIP for completeness, EPA does not perform a notice-and-comment rulemaking. EPA believes that determining adequacy is more similar to completeness review than a SIP approval action, in that adequacy determinations are merely administrative applications of established criteria to emissions budgets. For these reasons, EPA is not requiring notice and comment for its 45-day adequacy review period. However, EPA believes the commenters' concerns relating to public review under the APA are addressed because EPA has established the criteria for determining adequacy through this final rule, which has gone through APA notice and comment procedures. In addition, EPA is ensuring that public comment on adequacy of individual budgets is considered through review of comments submitted to the state.

In addition to specific criteria for adequacy, some commenters wanted to limit the grandfathering of new projects found to conform on the basis of a submitted SIP's budget. A "grandfathered" project can proceed without further conformity determinations (see § 93.102(c) for more details). Transportation projects are currently grandfathered after a National Environmental Policy Act (NEPA) document is approved and a project-level conformity determination is made. In order for a project-level conformity determination to occur, a conforming plan and TIP must be in place at the time of the determination.

Under the commenters' scenario, projects would only be grandfathered when a project agreement authorizing federal funds pursuant to 23 USC 110 or 49 USC 5309 has been executed. This would grandfather projects later in the transportation planning process than is currently the case. Changing the grandfathering in this manner would make it more likely that local and state planners could halt a project(s) if the SIP is ultimately disapproved. The commenters were concerned that a submitted SIP's budget may not contain the necessary emission reductions for demonstrating conformity in the future. If EPA declared a budget adequate during the 45-day review period but later disapproved it, commenters were concerned that an area may have difficulty demonstrating conformity in the future if all the projects planned

according to that budget are grandfathered.

EPA believes that current grandfathering requirements are appropriate and should not be changed. EPA has always believed that there should only be one point in the transportation planning process at which a project-level conformity determination is necessary. This maintains stability and efficiency in the transportation planning process.

Completion of the NEPA process is the step EPA has selected historically for grandfathering transportation projects for several reasons. Making a determination under NEPA is clearly an action to support or approve an activity, and the Clean Air Act does not allow a federal agency to take such an action without a conformity determination. In addition, an air quality analysis is already required by NEPA. To require this analysis again at a later date may create redundancies in the transportation process and cause state and local resources to be used less efficiently.

EPA is partially addressing these stakeholder concerns by maintaining adverse conformity consequences in the case of SIP disapproval without a protective finding. As described in section XI. of this preamble, today's final rule does not allow any new projects to be added to the plan or TIP beginning 120 days after a SIP is disapproved without a protective finding. In cases of a SIP disapproval without a protective finding, areas would only be able to advance projects in the first three years of the currently conforming plan and TIP. Therefore, although EPA is not changing the grandfathering of projects after a SIP is submitted, there are real consequences if a submitted SIP is ultimately found to have emissions budgets that will not result in reasonable further progress or attainment. In addition, EPA believes that with the adequacy requirements added to the rule and the review of submitted public comments, it is less likely that budgets which EPA finds adequate will ultimately be disapproved.

III. Other Comments on Conformity Tests

A. Implementation of Budget Test: Submitted vs. Approved Budgets

Some commenters stated that EPA should allow submitted SIP budgets to override those in approved SIPs for years directly addressed by the approved SIP. These commenters believed that newly submitted SIPs often provide a more realistic picture of

the future than approved SIPs. Some believed that, unlike approved SIPs, newly submitted SIPs are more accurate because they are based on an area's latest planning assumptions.

Although EPA acknowledges that using updated budgets may be preferable, EPA does not believe that it is legal to allow a submitted SIP to supersede an approved SIP for years addressed by the approved SIP. As stated in the proposal, Clean Air Act section 176(c) specifically requires conformity to be demonstrated to approved SIPs. SIP revisions that EPA has approved under Clean Air Act section 110 are enforceable and cannot be relieved by a submission, even if that submission utilizes better data. Approved SIP budgets have also been subject to full technical review and public comment and should not be replaced by budgets that have not yet been fully analyzed and reviewed. Some commenters suggested that EPA should institute another adequacy review process (similar to that being finalized today for submitted SIPs) which could ensure that submitted SIPs are consistent with attainment or maintenance. However, this type of process does not resolve the legal prohibition on overriding approved SIPs, and it would not be possible to determine whether submitted SIPs are consistent with attainment or maintenance without EPA's full public review and approval process. Although submitted SIPs cannot override approved SIPs for years addressed by the approved SIP, EPA did clarify in the proposal and this final rule that submitted SIPs can be used for years later than those addressed by an approved SIP.

Others suggested that, if EPA could not allow submitted SIPs to override approved SIPs, then EPA should require conformity determinations to be done using the same models and inputs that were used in the approved SIP. However, Clean Air Act section 176(c)(1)(B)(iii) requires that conformity determinations "be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel, and congestion estimates." As stated in the preamble to the 1993 conformity rule (58 FR 62210), it is expected that over time conformity determinations will deviate from the SIP's assumptions regarding VMT growth, demographics, trip generation, etc. Conformity is intended to ensure that a SIP's emission targets are achieved given the most recent planning assumptions. If conformity cannot be demonstrated using the most recent

planning assumptions, either the SIP or the transportation plan and TIP must be adjusted.

Even though an approved SIP can be changed if another SIP is submitted and approved by EPA, some commenters believed that EPA's review and approval of submitted SIPs would not occur in a timely manner. The commenters urged EPA to conduct expedited review and approval of submitted SIPs (e.g., 6- to 12-month timeframe), especially those that are revisions of the currently approved SIP.

EPA recognizes these stakeholder concerns and has already made expedited approval processes, such as parallel processing, available to states. In parallel processing, states can develop a draft SIP revision with close EPA involvement. If all approvability issues are resolved prior to submitting the SIP to EPA, the state and EPA then request public comment on the SIP at the same time. If no adverse comment is received, EPA then finalizes approval as soon as possible after formal state adoption and submittal, as long as no substantive changes have occurred and the package is still approvable. Parallel processing is encouraged when SIP revisions are straightforward, especially when assumptions are updated and new, significant control measures are unnecessary. In addition to parallel processing, EPA can use direct final rulemaking to approve SIPs more quickly in cases where EPA does not expect adverse comment.

B. VMT Comparison as Substitute for Budget Test

A few commenters recommended that areas be given the option to use a VMT comparison test instead of the budget test, especially if data sets and modeling used in the SIP are different than those used in the plan and TIP. These commenters argued that the present budget test's analytical inconsistencies could be eliminated if areas were allowed to replace the budget test with a comparison of the projected vehicle travel activity in the plan/TIP and that assumed in the SIP. If the projected VMT in the plan/TIP is consistent with that in the SIP, the commenters argued that Clean Air Act conformity requirements would be met.

In order to meet the "VMT test," commenters said that areas would have to demonstrate that: a) vehicle trips, VMT, and number of vehicles projected in the proposed plan/TIP have not exceeded these projections in the SIP; and, b) the transportation system in the proposed plan and TIP, and vehicle speed distributions on that system, are found through the consultation process

to be in reasonable agreement with the system and speed distributions assumed in the SIP. Commenters argued that this idea is supported by Clean Air Act section 176(c)(2)(A) which says that "emissions expected from the implementation of plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan * * *". If an MPO's "most recent population, employment, travel and congestion estimates" (section 176(c)(1)) do not exceed estimates of these parameters in the SIP, the commenters believe that the transportation community has fulfilled its Clean Air Act requirements.

EPA believes that this is not the correct legal interpretation of Clean Air Act section 176(c)(2)(A), and consequently, a VMT-based test is not a viable substitute for the budget test. As cited by the commenters, section 176(c)(2)(A) emphasizes that the projected emissions from the plan and TIP must be consistent with emissions targets in the SIP. Emissions estimates depend on numerous factors other than VMT, such as travel speed, fuels, inspection and maintenance (I/M), or other technological factors, and thus emissions could decrease even where VMT increases or vice-versa. Therefore, a VMT-based test could possibly make it more difficult for some areas to demonstrate conformity. For example, an area with high VMT growth could have difficulty passing a VMT-based test, even though it might have a cleaner fleet of vehicles resulting from electric vehicles or a successful I/M program. For all of these reasons, EPA is not offering a VMT-based test in this final rule.

IV. Conformity Tests for Areas That Are Not Required to Submit SIPs

A. Description of Final Rule

Today's action finalizes many of the options that were proposed for demonstrating conformity in areas that are not required to submit control strategy SIPs. The July 9, 1996 proposal outlined three options for determining conformity in these types of areas: (1) create a budget through the SIP process and use the budget test; (2) create a default budget based on clean data in areas that have achieved the standard but have not submitted a maintenance plan; or (3) use either the build/no-build or "no-greater-than-1990" emission reduction test. Today's final rule keeps the first and third proposed options, while limiting the second option.

Areas that are not required to submit control strategy SIPs include: marginal and below ozone nonattainment areas, not classified carbon monoxide (CO) nonattainment areas, and moderate CO nonattainment areas with a design value of 12.7 ppm or less. In addition, some moderate and above ozone nonattainment areas that are meeting the NAAQS are not required to submit control strategy SIPs. (See May 10, 1995, memorandum from John S. Seitz, Director of the Office of Air Quality Planning and Standards, to Regional Air Division Directors, entitled "Reasonable Further Progress, Attainment Demonstrations, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard" for more information about this small number of ozone areas.)

Under the November 1993 transportation conformity rule, all areas that are not required to submit control strategy SIPs had two options for demonstrating conformity. They could choose between satisfying both emission reduction tests (i.e., the build/no-build and less-than-1990 tests) or submitting a SIP and using the budget test. Areas that decided to choose the latter option, under the former conformity rule, were required to perform the build/no-build and less-than-1990 tests until the submitted SIP was approved.

According to this final rule, all areas that are not required to submit control strategy SIPs can demonstrate conformity by using either the build/no-build test or no-greater-than-1990 test (i.e., emissions must be equal to or less than 1990 emissions); or, by submitting a SIP through the regular SIP process and using the budget test 45 days after submittal, provided EPA has not found the submitted SIP inadequate. The SIP budget could be based on a modeled attainment demonstration or, for areas with clean data (defined in the conformity rule as complete, quality-assured monitoring data demonstrating attainment in accordance with 40 CFR part 58), the SIP budget could be based on the motor vehicle emissions in the most recent year of clean data.

In addition to these options, moderate and above ozone nonattainment areas which EPA declares through rulemaking to be "clean data areas" under the May 10, 1995 policy could request that a budget based on the level of motor vehicle emissions in the most recent year of clean data be established through that EPA rulemaking process. See the May 10, 1995 memorandum cited above for more information about these types of areas.

B. Discussion of Comments and Rationale

1. Default Budgets for Clean Data Areas

Most commenters supported the proposed options for demonstrating conformity in areas that are not required to submit control strategy SIPs. However, some questioned the enforceability of a "default" budget for clean data areas because such a budget would be created through interagency consultation instead of the SIP process. Another commenter argued that state air quality agencies should not be allowed to create default budgets without EPA approval and public comment. The commenter believed that this would be the equivalent of adopting an element of the SIP, and it should be subject to the conformity rule's public participation requirements and approval by EPA.

After further consideration, EPA agrees that budgets must be established through rulemaking; an area cannot adopt a default budget without EPA review and public comment. As a result, if clean data areas choose to create a budget, the SIP process must be used (through which they could establish a budget based on clean data); or, if they are subject to the May 10, 1995 memo, they could establish a budget through the EPA rulemaking process described in the memo. Of course, clean data areas could also choose to use the emission reduction test flexibility already described above. Because both the SIP and rulemaking processes provide for EPA review and an opportunity for public comment, EPA believes that the commenters' concerns are addressed in the clean data option of this final rule.

EPA does not believe that areas choosing the rulemaking option will have any additional administrative burden in submitting clean data budgets for EPA review. Furthermore, since public comment is already a part of the rulemaking process, additional time will not be needed for gathering public input.

EPA recognizes there are clean data areas for which EPA has already completed rulemaking under the May 10, 1995, memorandum. If these areas are not subject to a control strategy SIP, they have the choice of using either the build/no-build or no-greater-than-1990 test, or the budget test if they decide to create one through the SIP process. Again, if such areas choose to submit a SIP budget, they have the option of basing the budget on a demonstration of clean data (rather than modeling) and the budget could be the motor vehicle emissions in the most recent year of clean data.

One commenter was concerned that, under the proposal, clean data areas would not have an incentive to submit maintenance plans for redesignation. EPA acknowledges the commenter's concern and believes that limiting the default budget option in today's final rule addresses this concern. However, EPA does believe that other significant incentives already exist for areas with clean data to submit maintenance plans.

Another commenter argued that the July 9, 1996, proposal was flawed because it would allow areas to adopt de facto budgets based on clean years even if subsequent years have NAAQS violations (thus demonstrating that budgets derived from clean data years are not adequate to maintain the standard). EPA believes that the final rule addresses this concern since any SIP budget would be established only through the rulemaking or SIP process. If an approved emissions budget is based on clean data and violations occur, EPA can issue a SIP call or, if a SIP has not yet been approved, EPA can declare the submitted budget inadequate during adequacy review. EPA also has the ability to disapprove a submitted SIP based on clean data if violations occur prior to approval.

2. Maintenance Areas

A few commenters believed that the proposed options for areas that are not required to submit control strategy SIPs should also be available to these areas during the maintenance period.

Since maintenance areas have already submitted SIP budgets and EPA has approved those budgets, maintenance areas must use the motor vehicle emissions budget(s) in their maintenance plans to demonstrate conformity unless a subsequent budget demonstrating maintenance is approved. As discussed in section III. of this preamble, "Other Comments on Conformity Tests," Clean Air Act section 176(c) specifically requires conformity findings to be based on approved SIPs. Maintenance plans that EPA has approved under Clean Air Act section 110 are enforceable and their budgets must be used for conformity.

3. Emission Reduction Test Flexibility in PM-10 and NO₂ Nonattainment Areas

One commenter requested that EPA remove the build/no-build test as an option for demonstrating conformity in PM-10 (particles with an aerodynamic diameter of less than or equal to a nominal 10 micrometers) and NO₂ (nitrogen dioxide) nonattainment areas that have not submitted control strategy SIPs or maintenance plans. Section

93.119(c) of the proposal, like the November 1993 final transportation conformity rule, offered PM-10 and NO₂ nonattainment areas the option to use either the build/no-build test or no-greater-than-1990 test to determine conformity, provided they have not submitted a control strategy SIP or maintenance plan. The commenter believed that the build/no-build test will not ensure that the frequency and severity of existing violations will not be increased, as required by Clean Air Act section 176(c)(1). Furthermore, commenters did not believe that the same logic that was used in the November 1993 final rule could be used to provide the build/no-build test option in ozone and CO nonattainment areas that are not required to submit control strategy SIPs.

Since the flexibility for PM-10 and NO₂ nonattainment areas was finalized in the November 24, 1993 conformity rule, the deadline for commenting on this provision has passed, and EPA is not obligated to respond to this comment. Nevertheless, EPA does believe that it is appropriate to continue to offer the build/no-build test as an option in PM-10 and NO₂ nonattainment areas. By ensuring that motor vehicle emissions are less than they would be if no new transportation investments were made, the build/no-build test does ensure that the frequency and severity of violations are not increased as a result of new transportation investments. EPA believes that this same rationale can be used to justify the build/no-build test option in ozone and CO areas that are not required to submit control strategy SIPs. In summary, EPA continues to believe that where no SIP has been submitted, the build/no-build test is sufficient for areas to meet the requirements of section 176(c)(1).

V. Rural Nonattainment and Maintenance Areas

A. Description of the Final Rule

In today's action, EPA finalizes the flexibility proposed in § 93.119, with two minor clarifications. Rural nonattainment and maintenance areas with submitted or approved control strategy SIPs or maintenance plans will be allowed to choose among several tests for demonstrating conformity for years after the time period addressed by the SIP: (1) the budget test; (2) the emissions reduction tests ("build/no-build test" and/or one of the 1990 tests, depending on what is required of the area's classification); or (3) air quality modeling.

In the proposal, EPA's third option was "air quality dispersion modeling," which was more specific than intended. The final rule's language has been changed to allow an area to use the air quality modeling technique it used in its SIP attainment or maintenance demonstration, even if that technique is not dispersion modeling. For example, some SIP attainment demonstrations (most commonly in PM-10 areas) are developed using rollback/rollforward techniques based on emission inventories, and/or chemical mass balance modeling, pursuant to EPA guidance. Where the SIP demonstration correctly used one of these techniques, the conformity determination can use the same technique. EPA will reject SIP budgets during the 45-day review period if such non-dispersion modeling was used inappropriately.

EPA also clarifies in the final rule that areas electing to use the emissions reduction tests to demonstrate conformity for the outyears must perform these tests even if the area has received a NO_x waiver.

Generally, NO_x waivers are findings by the EPA Administrator under Clean Air Act sections 182(b) or 182(f) that additional reductions of NO_x would not contribute to attainment of the ozone standard by the statutory deadline. Areas have historically applied for NO_x waivers to eliminate the NO_x emissions reduction requirement.

When EPA proposed to allow rural ozone areas with attainment demonstrations or maintenance plans to have the option of relying on the NO_x emissions reduction tests for the years not addressed by these SIPs, EPA did not intend to allow these areas the option of performing no NO_x test at all. This would be the result, however, if such areas could avoid meeting the substitute tests by receiving NO_x waivers. In the November 14, 1995, conformity amendments (60 FR 57183), EPA stated that areas with NO_x budgets have to conform to these budgets even if they were granted a NO_x waiver. EPA emphasized that "a NO_x waiver's demonstration that additional NO_x reductions would not contribute to attainment does not necessarily mean that NO_x increases would not affect an area's ability to attain and maintain the standard. The purpose of a NO_x budget is to prevent NO_x emissions from reaching levels that would threaten attainment or maintenance of the ozone standard."

EPA is allowing rural ozone areas to substitute the emissions reduction tests for the budget test as a means of demonstrating that these areas are meeting the requirements of Clean Air

Act section 176(c)(1) that plans, TIPs, and projects not cause or contribute to any new violation, worsen existing violations, or delay attainment of the NAAQS. Therefore, for the same reasons a NO_x waiver cannot exempt an area from the budget test, a NO_x waiver cannot exempt an area from the NO_x emission reduction tests when these tests are selected as a substitute for existing NO_x budgets. EPA believes that the clarification in the final rule is consistent with EPA's original intentions and stakeholders' understanding of the proposal, and therefore believes that a reproposal is not necessary to incorporate this minor change.

The choice of a test in rural areas will be determined through the interagency consultation process and will reflect the consensus of the state and local air and transportation agencies and the project sponsor.

B. Rationale and Response to Comments

Most commenters supported the proposal for increased flexibility in rural areas. EPA changed the language for the air quality modeling option because EPA agrees with the stakeholder who pointed out that modeling techniques deemed adequate in certain areas for SIP attainment demonstrations ought to be adequate in those areas for conformity determinations as well. EPA originally referred to air quality dispersion modeling because it is the technique generally required for SIP demonstrations. Because some PM-10 areas appropriately use air quality modeling that is not dispersion modeling, EPA has broadened its language to allow use of these other techniques.

One stakeholder commented that the proposal is illegal, because the Clean Air Act does not provide for an exemption from the budget test for rural areas. However, as explained in the proposal's preamble, EPA believes that providing some flexibility for the years not addressed by the SIP is consistent with the Clean Air Act. The Clean Air Act requirement for consistency with the SIP's emissions reduction goals can be construed to apply only for the years that an individual SIP revision addresses, where there is another appropriate method of demonstrating conformity as defined in Clean Air Act section 176(c)(1).

In general, EPA believes that a SIP budget, even if it is not yet approved by EPA, is a better measure of conformity than the build/no-build test. For this reason, EPA requires most areas to continue demonstrating conformity to

the SIP emissions budgets even after the timeframe of the SIP (see section VI., "Mismatch in SIP/Transportation Plan Timeframe," for more explanation). However, EPA believes it does have the flexibility to allow conformity to be demonstrated using some test other than the SIP budget for years not addressed by the SIP, if that test is more appropriate.

EPA believes that the reasons why the build/no-build test is less desirable than the budget test for most areas do not apply in the special circumstances of rural areas. The main critique of the build/no-build test is that the difference in emissions that it predicts is often small enough to be within the range of error of the models themselves. EPA believes this will not be as problematic in rural areas. Since there are fewer transportation projects and the transportation network is less complex in rural areas, the build/no-build test is more reliable. The test is better able to capture the effects of new projects in such areas. Therefore, EPA believes it is reasonable to allow the use of the build/no-build test as an option to demonstrate conformity for the time period of the transportation plan not covered by the SIP in rural areas.

Several commenters provided ideas for additional flexibilities in rural areas. One stakeholder suggested that areas should be able to use the budget from any year of clean data when employing the budget test. This suggestion is not being implemented today because SIP budgets must be established through notice-and-comment rulemaking. As stated in section IV. of this preamble, EPA believes that areas cannot adopt a default budget based on clean data without EPA review and public comment. See this section for more details on the options available for areas with clean data.

Another commenter suggested that areas be allowed to use alternatives to regional modeling, such as "subregional" modeling or "mesoscale analysis." EPA is not including that suggestion in this section because specific modeling requirements do not apply to rural areas; they only apply to urbanized areas with populations greater than 200,000. As a result, rural areas already have flexibility in modeling, provided that their methods consider all regionally significant projects in the nonattainment or maintenance area.

Several stakeholders suggested that the rule explicitly require state and local air agency concurrence for the selection of conformity tests, rather than just consultation. EPA does intend that

agencies reach agreement on which test to use to demonstrate conformity in a rural area. However, EPA is retaining the language of the proposal, because of concerns that requiring concurrence would imply that the existing conflict resolution process (by which state agencies can elevate disputes to the governor) cannot be used. EPA believes that the regulatory language adequately indicates that consensus should be reached or disputes raised through the conflict resolution process.

VI. Mismatch in SIP/Transportation Plan Timeframe

A. Description of Final Rule

This final rule retains the November 1993 conformity rule's requirements (described in the proposal as option 1). Conformity must continue to be demonstrated over a 20-year timeframe, and SIP budgets continue to apply for conformity purposes for all future years until superseded by other SIP revisions (except as provided in rural areas, as described above).

Although EPA is not changing the November 1993 conformity rule requirements with respect to the mismatch issue, EPA's existing SIP policy already does provide for some of the flexibility proposed in option 3, which would have allowed a default emissions budget to be established for years outside the maintenance plan's timeframe. Because EPA is aware of the challenges posed by the differing timeframes of the SIP and the transportation plan, EPA does allow SIPs to establish motor vehicle emissions budgets for conformity purposes for years outside the timeframe that the SIP normally addresses. For example, some areas are developing maintenance plans that include motor vehicle emissions budgets for conformity purposes for the years 2010 and 2015, even though the initial demonstration of maintenance is only required to address ten years. EPA's approval of these budgets is not an approval of a full 20-year maintenance demonstration; these budgets are for conformity purposes only and will be superseded when the second ten-year maintenance plan is submitted.

EPA will require areas to demonstrate that motor vehicle emissions budgets for years outside the timeframe of the maintenance plan are consistent with maintenance of air quality standards. EPA will not permit areas to simply use the motor vehicle emissions in the year of redesignation as a budget without considering growth in non-mobile source emissions, which was a

possibility discussed in the proposal under option 3. However, EPA believes it has the flexibility to approve budgets for years outside the usual maintenance plan timeframe for conformity purposes based on less rigorous demonstrations than are required for the Clean Air Act-mandated ten-year maintenance plan. Whereas normally control measures must be fully adopted in order for EPA to approve the SIP, EPA would be willing to approve conformity budgets that were based in part on enforceable commitments to adopt specific control measures in the future. Because these commitments would be included in the approved SIP, they would be enforceable by all parties, including the public. In addition, EPA would consider allowing the motor vehicle emissions budgets in the last year of the ten-year maintenance plan to be increased for future years provided offsetting emissions reductions are adopted or committed to in the SIP.

The ability to establish motor vehicle emissions budgets for conformity purposes for years outside the normal timeframe of the SIP is not specifically discussed in this final rule's regulatory text because it is currently possible under EPA's existing SIP policy, and therefore no regulatory changes are needed.

B. Rationale and Discussion of Comments

EPA is finalizing option 1 (i.e., not changing conformity rule requirements to address the mismatch in plan/SIP timeframes) for two reasons. First, EPA believes there are important benefits associated with this option, as commenters pointed out (discussed below). Second, EPA believes there are adequate flexibilities under the existing conformity rule and EPA SIP policy that will help areas address the challenges of the timeframe mismatch in a manner that is more supportive of air quality goals and prudent planning than any of the other options proposed. The other options proposed included option 2, which would have required emission reduction tests ("build/no-build test" and less-than-1990 test) for demonstrating conformity in years not addressed by SIPs; and option 3, which would have allowed a default motor vehicle emissions budget (such as the motor vehicle emissions in the year of redesignation) to be used for the years outside the maintenance plan's timeframe.

Many commenters supported option 1 because they believe that maintaining the SIP's emission targets for the timeframe of the transportation plan is a central purpose of conformity and

perhaps its most important requirement. Commenters stated that because the obligation to meet air quality standards persists indefinitely, the obligation to meet the motor vehicle emissions budget should not terminate after the attainment date or the last year of the maintenance plan. According to some commenters, it is appropriate to analyze the effects of transportation investments over a 20-year timeframe, because it may in fact take decades for these effects to be fully realized. They stated that it is better to use a long timeframe and make the right choices at the outset than to pursue a path for several years and then try to quickly overcome the adverse consequences of that path. One commenter pointed out that demonstrating conformity to the SIP's budget over the 20 years of the transportation plan is the best way to prepare for the fact that the benefits of fleet turnover do decline over time.

Some commenters preferred option 1 to the other options proposed because option 1 requires emissions related to growth to be specifically addressed and tradeoffs to be examined. According to these commenters, the other options would not accomplish this, and the conformity determinations that would result from these other options would not have as much integrity because they would not be based on a performance target with real meaning (i.e., a SIP budget that supports reasonable further progress, attainment, or maintenance).

Many other commenters supported option 3, which would have allowed a default motor vehicle emissions budget for the years after the last year of the maintenance plan. These commenters believe this option would be less burdensome than the other options. They also believe that SIP budgets may be unrealistic because they are not established with a 20-year horizon in mind, and therefore it is not necessarily appropriate to require areas to conform to them indefinitely. Option 3 was broadly discussed in the preamble to the proposal and included possibilities that ranged from allowing motor vehicle emissions to grow to levels in the year of redesignation without consideration of growth in non-mobile emissions, to allowing budgets to increase only if it is demonstrated that the standards will be maintained when growth in mobile, area, and stationary sources is considered. Several commenters supported option 3 only if the motor vehicle emissions budgets were based on a demonstration of maintenance that considered all emissions sources.

The approach that EPA is finalizing combines the benefits of option 1 with some of the flexibility contemplated by

option 3. EPA agrees with the commenters' reasons for supporting option 1. EPA is sympathetic to the concerns that prompted commenters to advocate option 3, but EPA believes that the flexibility allowed under existing SIP policy to establish reasonable budgets outside the timeframe of the SIP is an effective means of addressing those concerns without compromising the benefits of option 1. EPA is committed to assisting areas with the challenges that arise when addressing long-term emissions impacts. EPA also encourages a collaborative process between local, state, and federal agencies in order to facilitate acceptable solutions to these challenges under existing SIP policy.

A few commenters preferred option 2 (emission reduction tests) because in their specific areas they could pass the build/no-build test but not the NO_x budget test. However, some commenters opposed option 2 because the emission reduction tests have significant limitations and would not ensure that regional mobile source emissions remain consistent with attainment or maintenance requirements. One commenter stated that the build/no-build test is an imprecise analytical approach that bears no direct relationship to the attainment demonstration.

EPA agrees that these arguments against option 2 are compelling. Allowing areas to use emission reduction tests instead of SIP budgets would be inconsistent with EPA's action described in section II. to eliminate the emission reduction tests where SIP budgets have been established. Overwhelming support has been expressed for this elimination of the emission reduction tests in such cases, and this has convinced EPA that option 2 is not a suitable solution for addressing the mismatch of transportation plan and SIP timeframes. EPA is pursuing the approach proposed in option 2 only in the limited case of rural nonattainment and maintenance areas, for reasons specific to such areas as explained in section V.

C. Response to Specific Comments

Several commenters stated that EPA should allow areas to use any of the three proposed options. A commenter suggested that the choice of options would be decided by each area through its own interagency consultation process. As explained above, EPA believes that the option being finalized is the most appropriate. One commenter supported option 1 provided areas have more flexibility to account for future programs that will affect emissions. Currently, areas cannot assume future

programs unless they are adopted or included in the SIP. EPA believes that the approach being finalized today will allow the flexibility the commenter is seeking, because it allows budgets established for conformity purposes to be based on enforceable commitments in the SIP rather than requiring fully adopted control measures, as needed for approval as part of a control strategy SIP.

One commenter suggested that the plan should be qualitatively analyzed for the years beyond the timeframe of the SIP. EPA believes this would not be consistent with the Clean Air Act's requirement for the use of emissions estimates for determining conformity. In addition, EPA believes that both the air quality and transportation planning processes benefit from long-term quantitative analyses of transportation plans. EPA believes that areas have sufficient flexibility in analysis methods to develop a quantitative approach that is both reasonable and useful.

Some commenters suggested that conformity should not be required at all in years beyond the timeframe of the SIP. Other commenters suggested that conformity should not be required until there are tools adequate to the task. EPA believes this is not consistent with the Clean Air Act's requirement to demonstrate that the transportation plan will not cause or worsen violations of air quality standards. Conformity of a transportation plan cannot be determined unless all years of the transportation plan are considered. EPA believes that adequate analytical tools are currently available and are continually being improved. All areas have great freedom to improve their own analysis techniques, which EPA supports.

One commenter suggested that the options proposed for rural nonattainment and maintenance areas be provided for all areas as a way of addressing the mismatch in transportation plan and SIP timeframes. The options being provided to rural areas include a choice among the SIP emissions budget, the emission reduction tests, or air quality modeling. The emission reduction tests are not being pursued for all areas as described in the discussion of option 2, above. The reasons for using the emission reduction tests in rural areas, as described in section V., are only applicable in rural areas and would not provide a basis to use these tests in other areas. However, option 1 does give areas the opportunity to use either the SIP emissions budget or establish new budgets that are supported by air quality modeling.

Some commenters stated that demonstrating consistency with the motor vehicle emissions budget established for the attainment year or the last year of the maintenance plan is not sufficient to demonstrate that an activity will not cause or worsen air quality violations. These commenters argue that it must be demonstrated that the motor vehicle emissions budget is consistent with attainment or maintenance when the most recent projections about non-mobile source emissions growth are also considered. EPA does not believe that this is required by the Clean Air Act. EPA believes that if motor vehicle emissions are less than or equal to the most recent motor vehicle emissions budgets in the SIP that was approved as meeting attainment or maintenance requirements, then it can be stated that motor vehicles are not "causing or contributing" to violations, as required by the Clean Air Act. It is not the role of the conformity requirements to provide attainment or maintenance plans, but merely to prevent adverse impacts on such demonstrations.

However, EPA does recognize that consistency with the motor vehicle emissions budgets for the transportation plan's 20-year timeframe does not guarantee attainment or maintenance because of the possibility for growth in non-mobile sources. This is one reason why EPA is not finalizing a version of option 3 that would allow motor vehicle emissions to increase above approved SIP budgets without considering emissions from other sources.

VII. Non-Federal Projects

A. Description of Final Rule

As was proposed, the final rule allows certain regionally significant non-federal transportation projects to be adopted or approved during a transportation plan/TIP conformity lapse, provided the project was included in the regional emissions analysis supporting the most recent transportation plan and TIP conformity determination. Non-federal projects are projects which are funded or approved by a recipient of federal funds designated under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53) but which do not rely at all on any FHWA/FTA funding or approvals.

The final rule clarifies that only those non-federal projects from the first three years of the most recent conforming plan and TIP (or supporting regional emissions analysis) may proceed during a conformity lapse. In the proposal, EPA had simply stated that non-federal projects in the most recent conforming

plan and TIP's regional emissions analysis could proceed when a lapse occurs.

B. Rationale for Clarification and Response to Comments

Most commenters supported the proposal, and many said that it was appropriate because the emissions impacts from affected non-federal projects have already been considered and sufficient project reviews have already occurred. However, some commenters expressed concern that in their understanding the proposal would facilitate the exchanging of funds between federal and non-federal projects during a conformity lapse. Some even implied that there may be areas that would build large numbers of non-federal projects by exchanging funds, and thereby, avoid conformity consequences for an indefinite amount of time. There was concern that because some TIPs cover more than three years, sometimes even five or more years, a substantial number of non-federal projects could be built during a conformity lapse. Some of these commenters even believed that the proposal would allow areas to advance all non-federal projects in the 20-year transportation planning horizon during a conformity lapse, thus reducing or removing the incentive to develop transportation plans and TIPs that actually do conform. EPA did not intend this in the proposal, and as a result, EPA believes that a regulatory clarification is necessary in this final rule.

Although commenters suggested possible safeguards to protect against such abuses, including limiting the number of non-federal projects that could go forward during a lapse or restricting the ability to exchange funds between federal and non-federal projects, EPA believes that the final rule's clarification addresses these concerns.

EPA did not intend that a non-federal project identified for any year in the 20-year transportation planning horizon could proceed at any time. This interpretation would be inconsistent with other regulatory requirements and with the stated rationale for the proposed non-federal project flexibility. Under DOT's metropolitan planning requirements (23 CFR 450.332(c)), projects identified for funding in the first three years of the plan and TIP are the only projects that can proceed under any approved TIP. New TIPs are required every two years, and projects from the outyears of an approved TIP cannot be moved forward without a TIP amendment. Therefore, EPA believes that allowing non-federal projects in the

outyears of the TIP and plan to advance at any time for conformity purposes is inconsistent with this general regulatory context. In the proposal, EPA had intended that only those projects already scheduled to begin in the timeframe of the first three years of the TIP could proceed during a conformity lapse.

There are several reasons why the final rule's clarification is consistent with EPA's original intentions and rationale for providing areas flexibility for non-federal projects. During the development of the proposal, stakeholders who suggested the proposed non-federal project flexibility argued that it was appropriate because future plans and TIPs would have to consider the emissions from non-federal projects and offset them as necessary. These projects would ultimately have to be considered in the next TIP in the metropolitan planning process. In addition, as EPA pointed out in the preamble to the proposal and as many commenters argued, requiring non-federal projects to have been included in the most recent conforming plan and TIP ensures that the emissions consequences of the projects have been considered.

Neither of these rationales would be consistent with allowing a non-federal project from the outyears to proceed at any time. The emissions analysis for the plan and TIP would no longer be valid if the implementation dates of non-federal projects were altered. Allowing non-federal projects from the outyears to be accelerated during a conformity lapse so that a new conforming plan and TIP could be substantially delayed would in effect be allowing the non-federal projects to escape the scrutiny of the metropolitan planning process which EPA had relied on in making the proposal. The final rule's clarification ensures that the flexibility operates as originally intended by EPA and conformity stakeholders. EPA believes this is fully consistent with the original proposal and therefore does not require any reproposal prior to proceeding with final action.

C. Governor Approval

EPA requested comment on whether the governor should be required to approve each non-federal project that would proceed during a conformity lapse. EPA did not believe that it could propose such a change because governor approval is not explicitly required by the Clean Air Act, and it was unclear whether state and local officials should have the authority to adopt or approve non-federal projects during a lapse. Due to the comments received, EPA has

decided not to require governor approval in the final rule.

EPA received many comments on this issue that strongly supported the proposal to not require governor approval of non-federal projects affected by the final rule. Many reasons were cited by commenters. Some said that governor approval isn't necessary since the governor appoints the directors of the state transportation and air agencies, and in some cases, governors have even appointed the MPO as his/her designee for air quality planning. Others emphasized that the conformity rule already provides for involving the governor, when necessary, through the conflict resolution process. Many argued that local non-federal projects are usually time-sensitive and many local governments fund these projects in order to expeditiously move them through the planning process. In this case, requiring governor approval is unnecessary and would impede rather than facilitate the process of non-federal project implementation. Finally, some believed that it was not appropriate for governors to have authority over approving local non-federal projects. EPA agrees generally with commenters and believes that requiring governor approval is not necessary. Therefore, EPA is not requiring governor approval of non-federal projects during a conformity lapse.

D. Responses to Other Comments on Non-Federal Projects

EPA received other comments on the proposed non-federal project flexibility which did not result in changes to the proposal.

1. Comments Opposing Statutory Interpretation

One commenter argued that any exemption for non-federal projects would violate the statutory requirement that any such project only be approved or funded if it either "comes from a conforming plan and program," or its emissions when considered with those of "the conforming transportation plans and programs within the nonattainment area" do not exceed the applicable emissions budgets. The commenter argued that the present tense of the operative verbs in the statutory language does not allow exemptions for projects that come from a plan and program that no longer conform. The commenter also argued that this exemption cannot be justified as a grandfathering mechanism because it allegedly applies to projects that have not yet satisfied applicable federal requirements. Finally, the commenter objected that the proposal allows state DOTs to continue to build

projects with state funds during periods when the metropolitan transportation plans fail to satisfy the Clean Air Act's requirements for emission reductions, and therefore leads to a delay in attainment.

EPA believes that it is appropriate to allow non-federally funded projects that have previously satisfied conformity requirements to proceed during a conformity lapse because the existence of a conforming plan and TIP is not necessary to facilitate the implementation of such projects. As to the commenter's concern about potential emissions increases, any future plan and TIP will have to account for and offset if necessary the emissions of any non-federal projects that are implemented during a conformity lapse.

EPA acknowledges that there is some tension with the present tense statutory language concerning the existence of a conforming plan and TIP. However, EPA believes that this is a proper case of grandfathering projects that had been previously found to satisfy the applicable federal conformity requirements. The only obligation imposed by the conformity rule on non-federal projects is to account for project emissions in a conforming plan and TIP. If this has been done, EPA believes that it is appropriate to allow projects in the timeframe of the first three years of the plan and TIP to proceed towards implementation, so as not to interfere with the priorities of non-federal entities funding such projects.

2. Changes in Implementation Date

Another commenter said that it was unclear whether a non-federal project could go forward during a lapse if the project's design concept and scope had changed; or, if the project's implementation date had changed in a manner that changed emissions in a milestone or analysis year. Under the proposal and this final rule, a non-federal project cannot go forward during a conformity lapse if its design concept and scope has changed significantly. A non-federal project also cannot go forward if its implementation date changes in a manner that changes the emissions that the emissions analysis supporting the most recent conforming plan and TIP projected for a given analysis year. In either case, a new air quality analysis would be needed to ensure that the project would still conform, and it would be inappropriate to allow such projects to proceed based on the analysis in the most recent plan/TIP. The final rule's clarification should reduce confusion on this point.

3. Comments on Original Conformity Rule

One commenter objected to the provisions of the original conformity rule that do not require conformity determinations for non-federally funded projects. The commenter included detailed statutory arguments alleging that Clean Air Act section 176(c) on its face requires conformity determinations for all transportation projects, and the commenter also included citations to the legislative history supporting these allegations. The commenter also argued that non-federal project sponsors should provide a public process prior to determining that emissions from non-federal projects are consistent with applicable emissions budgets.

EPA's proposal did not cover this aspect of the conformity rule, which has been final since 1993. EPA did not intend to reopen the issue of whether non-federal projects should undergo conformity determinations when it proposed to allow certain non-federal projects to proceed during a lapse. As EPA explained in the preamble to the 1993 conformity rule, Clean Air Act section 176(c)(2)(C) clearly distinguishes non-federal projects from those projects required to conduct a conformity determination, requiring only that non-federal projects be considered in a regional emissions analysis prior to adoption or approval. Non-federal projects are not covered in the requirement to conduct a conformity determination in section 176(c)(1), which applies only to actions of federal agencies and metropolitan planning agencies. For these reasons, EPA is not responding in full to comments submitted on this issue. For more explanation of EPA's rationale for the provisions of the original conformity rule, see the preamble to the final rule at 58 FR 62188, 62204 (Nov. 24, 1993). Finally, since federal agencies do not approve non-federal projects, such approvals are not subject to the requirements of the federal Administrative Procedure Act. Non-federal project sponsors would have to comply with any applicable public participation processes required under state law.

VIII. Deadline for Use of Network Models and Affected Areas

A. Description of Final Rule

Today's action finalizes the proposal to require serious CO and serious, severe, and extreme ozone areas to use network models for conformity determinations by January 1, 1997. In addition, as proposed, these network modeling requirements are revised so

that they only apply to metropolitan planning areas with an urbanized area population over 200,000. EPA continues to believe that network modeling requirements are most important for large urbanized areas, and therefore believes that it is appropriate for the conformity rule to focus its specific modeling requirements on them. See section IX.A. for a description of the final rule's requirements for network models.

As stated in the proposal and required under the original conformity rule, whether or not an area is required to use a network model, all areas must use the consultation process to select regional models and assumptions, as required by § 93.105(c).

B. Rationale and Discussion of Comments

Most commenters supported the final rule's limiting of network modeling requirements to serious and above areas with an urbanized population over 200,000. Commenters agreed with EPA that network modeling is not always appropriate in rural or urban areas with smaller populations, and therefore, should not be required in these areas.

One commenter suggested that all urban areas with a population greater than 50,000 people should also be required to use network models because these models are simple and inexpensive. However, the commenter did not believe that the proposal would seriously weaken the conformity process, since most of these smaller cities already use network models for conformity analyses.

As previously stated, EPA believes that network modeling requirements are most important for large urbanized areas. As a result, EPA is not changing the proposed population threshold. However, EPA also notes that § 93.122(c) of the conformity rule requires areas that are already using network models to continue using them, even if they are not serious or above areas or have a population less than 200,000. EPA and DOT will consider the specific technical needs of smaller areas when developing future modeling guidance.

A couple of commenters supported stratifying the network modeling requirements by size of urban area. EPA believes that the final rule in part addresses this concern by only requiring larger urbanized areas to adhere to the network modeling requirements. However, EPA does not want to create a complicated stratification system that would require multiple sets of modeling requirements. Therefore, EPA did not

change the rule in response to this comment.

As proposed, today's action also extends the deadline for implementing the network modeling requirements from January 1, 1995, to January 1, 1997. A few commenters suggested that MPOs that are not meeting the rule's network modeling requirements should be put on a timetable for compliance. Other commenters thought that extending the deadline was unnecessary due to the ease of implementing such a network model, especially since the majority of areas already have a network model in place. They also felt that an extension would seriously weaken the modeling regulation. Some commenters stated that the extension of the deadline is obsolete, since the final rule would be published after January 1, 1997.

EPA acknowledges that the January 1, 1997, deadline has already passed. The original conformity rule required that areas use network models in conformity analyses by January 1, 1995, and when the proposal was being developed, most areas had achieved the rule's network modeling requirements by this deadline. However, as discussed in the proposal, a few areas had not yet complied with the deadline, and EPA believed that an extension until January 1, 1997, would be adequate to address their difficulties.

EPA did consider extending the deadline even further when it became apparent that the final rule would not be effective before January 1, 1997. However, reproposal would have been necessary to significantly extend the proposed January 1, 1997, deadline, and EPA believes it is likely that the few areas in question will have adequate network models developed before a reproposal could be finalized.

For all of these reasons, EPA is retaining the January 1, 1997, deadline. EPA agrees with the commenters that the majority of affected areas are already using network models. EPA and DOT are currently working with the two areas that have not yet met the network modeling requirements so that they will overcome their unique circumstances and meet the requirements in the future.

IX. Content of Network Modeling Requirements in Serious and Above Ozone and CO Areas

A. Description of Final Rule

In today's final rule, EPA is streamlining the conformity rule's modeling requirements and committing to collaborate with DOT to develop future modeling guidance. Specifically, EPA is eliminating several modeling criteria from regulatory text while

retaining those criteria that establish minimum acceptable practice.

The proposal requested comment on three options for addressing the modeling criteria in the conformity rule. Option 1 proposed to eliminate all of the 11 required attributes of network models in the original November 24, 1993, final transportation conformity rule and address the attributes only in guidance. Option 2 would have retained all of the original modeling attributes. Option 3 proposed to streamline the original requirements for network models and address the eliminated attributes in guidance. Today's action finalizes option 3 with some minor modifications.

The final rule includes six required elements for network modeling in serious and above ozone and CO areas with an urbanized population over 200,000. These elements include the five that were proposed as option 3 (with minor wording changes), as well as the November 1993 conformity rule's requirement in § 51.452(b)(1)(iv)/§ 93.130(b)(1)(iv) for reasonable agreement between zone-to-zone travel times used in trip distribution and the travel times resulting from traffic assignment.

Specifically, this final rule requires network-based models to be validated against observed counts (peak and off-peak, if possible) for a base year that is not more than ten years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented. Land use, population, employment, and other network-based model assumptions must be documented and based on the best available information. Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable.

A capacity-restrained traffic assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak volumes and speeds, and which uses speeds based on final assigned volumes. Zone-to-zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling

mode splits. Finally, network-based models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

EPA believes that the streamlined criteria and clarified rule language will assist areas in implementing the rule's network modeling provisions. The final rule does not create any new network modeling requirements for large, urbanized serious and above ozone and CO areas.

As stated in the proposal, EPA and DOT will develop modeling guidance in the future to address some of the modeling requirements that were eliminated from the final rule and to foster the exchange of information on current and future modeling improvements. As discussed later in this section, EPA and DOT are committed to an open stakeholder process about modeling procedures that will begin shortly after the rule becomes effective.

B. Rationale and Discussion of Comments: Selected Option

There were commenters who supported each of the three proposed options for the content of the network modeling requirements. Some supported option 1 because they believed that eliminating all modeling attributes would simplify the conformity rule and create maximum flexibility for areas. Other commenters argued strongly for option 2, which would have retained all 11 modeling attributes from the original rule. According to one commenter, removing all of the modeling attributes from the rule would have detrimental effects on the entire conformity process. Finally, many commenters from the transportation and environmental communities supported option 3, which proposed to streamline the modeling requirements without fully eliminating them. These commenters believed that having some baseline modeling criteria in the rule ensures national consistency of network models while streamlining the rule to allow for flexibility at the state and local levels.

As previously stated, this final rule streamlines the original conformity rule's network modeling criteria by eliminating some criteria and clarifying the rule's language. EPA is retaining some modeling requirements in this final rule because EPA agrees with commenters that minimum modeling standards are an important component of the conformity process. Many commenters believed that all or some of the original modeling criteria should be retained in the final rule, because without them, modeling practice would

become highly variable across the country. They also thought that eliminating all criteria would undermine the integrity, reliability, and credibility of the process for assessing the expected impacts of transportation investments on travel demand, travel behavior, and estimates of future vehicle miles traveled (VMT) and emissions. Others believed that having modeling criteria in the conformity rule has spurred the funding and development of state and local transportation model improvements. Finally, some pointed out that sound network models are needed for other processes besides conformity, such as SIP development, and therefore should be retained.

Other commenters were concerned that lawsuits would increase if all of the modeling attributes were eliminated, due to the inconsistency of requirements across the country. According to commenters, the outcomes of these suits would be hard to predict and money would be wasted in the adversarial process.

EPA agrees with these comments and believes that the final rule addresses them. EPA also agrees that nationally consistent and enforceable minimum standards are central to the integrity of the conformity process. Minimum standards clarify the expectations of all agencies involved in the conformity process and thus ensure some equity among all areas.

One commenter argued that EPA cannot eliminate all of the modeling attributes because they are a regulatory requirement which cannot be substituted with unspecified guidance that is developed outside of the rulemaking process. EPA agrees with this comment and is addressing it by retaining minimum standards in this final rule.

Although some commenters supported option 1, EPA does not believe that eliminating the modeling requirements is necessary to achieve the objectives of these particular commenters. Some supported option 1 because eliminating all modeling criteria would allow areas to tailor their network models to satisfy their current modeling and air quality planning needs. According to one commenter, this option would distribute resources and technical expertise appropriately in state and local agencies. Commenters also believed that under option 1 areas would be able to do sound quantitative analysis while having the flexibility to accommodate modeling improvements and demographic changes in their area. A couple of commenters suggested states should have the authority to determine network model attributes on

an area-by-area basis, and one approach for this is to allow state-level approval of an area's model subject to the interagency consultation process.

EPA believes that areas have the flexibility to appropriately tailor their models and distribute their resources under option 3 as well as option 1. The conformity rule's modeling requirements define minimum acceptable practice, and beyond this, areas have flexibility to determine appropriate modeling practices and accommodate modeling improvements through interagency consultation. EPA does not believe that areas should be able to use models that do not meet minimum standards of acceptable professional practice, for the reasons described in this section.

One commenter stated that the criteria in options 2 and 3 are accounted for in some way in existing practice, and that requiring them does not advance the state of the practice and may hinder it if future developments lead to improved, but different, methodologies. Another commenter suggested that by eliminating all modeling criteria, EPA and DOT could incorporate future modeling improvements by revising the guidance rather than having to go through the difficult and time-consuming process of revising the rule. Others believed option 1 would give agencies across the country access to technical changes and expertise which may not be available to them on a case-by-case basis, and may provide a better way of communicating updates and improvements in network modeling procedures.

EPA does not believe that establishing baseline modeling criteria, as is being done in this final rule, will inhibit the adoption of future modeling improvements. EPA agrees that future modeling guidance should provide information to state and local agencies about modeling updates, and EPA and DOT are committed to working with stakeholders to exchange ideas in the guidance development process. However, EPA does not believe it is necessary to eliminate the rule's modeling requirements in order to issue future modeling guidance. As general modeling practices improve, EPA and DOT will make periodic updates in the form of non-enforceable modeling guidance, rather than future amendments to the conformity rule.

An area that has not yet implemented the currently required model improvements supported option 1 because the area believed option 1 would provide flexibility and make a conformity lapse for this area less likely. EPA believes that it would be

inappropriate to eliminate all of the modeling criteria just because a few areas are having temporary difficulty achieving them. This stakeholder concern was also raised in the context of extending the deadline for implementing network modeling requirements. EPA considered the merits of this comment, and as outlined above, decided that a reproposal to extend the deadline could not be completed in time to provide relief to the few affected areas. As previously mentioned, EPA and DOT are assisting the two areas without adequate network models to achieve the minimum standards in this rule.

EPA believes that option 3 also addresses the concerns of the commenters who supported option 2. These commenters seemed most concerned with whether any modeling requirements would be retained in the rule; option 1 would have eliminated all of the rule's network modeling requirements. Many of the commenters who supported option 2 also supported option 3, provided there were modifications for some of the language in option 3. EPA believes that the changes made to option 3, which are discussed below, make the final rule's language more streamlined, clear, and useful than the 1993 conformity rule language proposed for retention in option 2.

A few commenters who supported option 3 also thought that areas should not be required to use network modeling improvements in the conformity process prior to their application in the SIP process. The commenters believed this would remedy problems associated with inconsistencies between the models used in conformity analysis and those used in SIP development. EPA recognizes the commenters' concerns about the implementation difficulties that may occur as a result of model improvements. However, Clean Air Act section 176(c)(1)(B)(iii) requires conformity determinations to "be based on the most recent estimates of emissions." EPA believes that areas must use the most current tools available at the time of the conformity determination, in accordance with the Clean Air Act. Using the best models and assumptions will also produce the best emissions estimates on which areas will base decisions regarding transportation and air quality. EPA also notes that areas already have the ability to use the consultation process to coordinate the introduction of transportation modeling improvements into their planning processes. For these reasons, EPA is not finalizing the commenters' suggestion.

C. Future Modeling Guidance and Response to Comments

As stated in the proposal, EPA and DOT will develop modeling guidance in the future. This guidance will address some of the modeling requirements that were eliminated from the final rule; provide guidance on implementing modeling requirements; and facilitate the exchange of information on advancements in modeling. EPA and DOT are committed to working with stakeholders in the development of the guidance, an idea which was supported by many commenters. This process will begin soon after this rule becomes effective, and will include stakeholder participation in workshops for developing the guidance. In addition, EPA and DOT will make drafts available for stakeholder comments. This joint federal, state, and local effort will bring together the expertise to assure national consistency and meaningful emissions results in conformity analyses.

Some commenters were concerned that the guidance would be mandatory and that future guidance updates would be difficult to implement if it were mandatory. Today, EPA clarifies that the guidance will not be an enforceable requirement, although EPA and DOT encourage use of future guidance on a voluntary basis as deemed appropriate by affected state and local agencies. There is also no specific date by which future modeling guidance must be used, or by which models are required to be improved in accordance with future guidance, since the use of future guidance is not an enforceable requirement. Areas will decide upon how to implement modeling guidance using the interagency consultation process.

Another commenter said that each MPO should have the responsibility to demonstrate the adequacy of their model through documentation, and such documentation should be included as an appendix to the area's conformity package. EPA agrees with this comment and encourages MPOs to submit such documentation with their conformity determinations.

D. Rationale and Discussion of Comments: Specific Criteria

As discussed above, this final rule specifies six requirements for network models for serious and above ozone and CO areas. These replace the 11 that were required by the November 1993 conformity rule. This final rule includes the five requirements that were proposed as option 3, as well as a requirement from the November 1993 conformity rule that was not originally

proposed as part of option 3 (but was included in proposed option 2, which included all requirements of the 1993 rule). Several minor changes were made to the wording proposed in option 3 in order to respond to comments, reduce ambiguity, and streamline the text.

EPA proposed to require network-based models to be validated against peak and off-peak ground counts for a base year that is not more than ten years prior to the date of the conformity determination. The final rule requires validation against "observed" counts rather than "ground" counts because the term "ground" counts sometimes implies automobile counts only. In fact, models should be validated against counts for all modes, including transit, bicycle, and pedestrian. EPA believes that because "observed" counts is a more general term, it more appropriately conveys the intent of the proposed requirement.

EPA has also qualified the proposed requirement for validation against peak and off-peak counts so that validation against both peak and off-peak counts is only required where it is possible. The November 1993 conformity rule simply required validation against ground counts; there was no reference to peak and off-peak. When EPA proposed option 3, it did not intend to impose any new or more stringent network modeling requirements. Since the time of the proposal EPA has become aware that not all areas collect peak and off-peak counts. As a result, although EPA continues to believe that validation against peak and off-peak counts is preferable, the rule only requires it where it is already possible given available data.

A commenter suggested that the conformity rule should require areas to validate their models for a second year at least three years before or after the base year whenever possible. The commenter also suggested that the rule require validation against peak and off-peak travel demand, traffic volume, speed, and mode share data for household and commercial travel. EPA did not incorporate these suggestions in the conformity rule because the modeling requirements are only intended to outline minimum practice, and in addition, EPA intends for these amendments to streamline the existing rule. The EPA/DOT modeling guidance will have further discussion about best practices and other advances in validation techniques, and EPA believes that this will be a better forum to address the commenter's ideas.

This final rule adds to the proposed validation requirement a sentence specifying that model forecasts must be

analyzed for reasonableness and compared to historical trends and other factors, and that the results must be documented. This sentence was added for several reasons. First, a commenter suggested that the conformity rule should require model forecasts to be compared to documented historical trends in travel behavior, such as changes in per capita vehicle trips and VMT, trip length, mode shares, and time-of-day-travel, and require significant differences between trends and forecasts to be explained. EPA agrees that this is minimum acceptable practice and has added language to the conformity rule accordingly. The language that is included in the final rule is more general than that suggested by the commenter, and EPA plans for the EPA/DOT modeling guidance to address the issue in more detail. EPA also added this language because it better reflects what EPA intended when it proposed that network-based modeling inputs (such as land use, population, and employment) be appropriate to the validation base year. This language is consistent with the proposal on this issue and does not require reproposal prior to final action.

The second network modeling requirement in the final rule requires land use, population, employment, and other network-based model assumptions to be documented and based on the best available information. The proposal's requirement for these assumptions to be "appropriate to the validation base year" has been eliminated in favor of the new language described above that requires reasonableness checks as part of validation. A commenter suggested that the proposed requirement be expanded to refer not only to land use, population, and employment assumptions, but also demographic and spatial attribute assumptions. EPA believes that the final rule's reference to "other network-based modeling inputs" is sufficiently inclusive, and specificity such as the commenter suggests is more appropriate to the EPA/DOT modeling guidance.

The final rule's third network modeling requirement states that scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. This is substantially similar to the language proposed as the fourth modeling requirement in option 3, with minor wording adjustments for the sake of clarity. The final rule also includes a sentence stating that the distribution of employment and residences for different transportation options must be reasonable. This statement is intended

as further clarification of what was intended by the original proposed language. Appropriate consideration must be given to how major anticipated transportation system improvements might influence development and, in turn, how that might affect the forecasted distribution of population and employment used to estimate travel and emissions.

A commenter suggested that instead of the proposed language, EPA should require that areas make reasonable adjustments to land use assumptions between scenarios to account for effects of changes in accessibility on the likely timing and pattern of development, using the best methods available. EPA does not believe it is appropriate for the conformity rule to specifically require the use of the "best" methods, because cutting-edge practices may not be reasonably available at the same time in all areas subject to conformity's network modeling requirements. With this exception, EPA believes that the commenter's suggestion is basically a restatement of the language that is being finalized.

The final rule's fourth network modeling requirement states that a capacity-sensitive assignment methodology must be used. In addition, emission estimates must be based on a methodology which differentiates between peak and off-peak link volumes and speeds and uses speeds based on final assigned volumes. This additional language clarifies the proposed requirement that "peak and off-peak travel demand and travel times must be provided," which did not indicate which step in the modeling process was being referred to. EPA in fact simply intends that emissions be calculated on the basis of peak and off-peak speeds separately and applied to peak and off-peak final assigned volumes, regardless of whether these assigned volumes are based on peak and off-peak modeling or are modeled on a 24-hour basis.

The final rule's fifth network modeling requirement is based on § 51.452(b)(1)(iv)/§ 93.130(b)(1)(iv) of the November 1993 conformity rule, which requires feedback of travel times resulting from traffic assignment to travel times used in trip distribution. Although this requirement was not proposed as part of option 3, EPA received comments based on proposed option 2 that this requirement of the original rule should be retained. Commenters pointed out that this type of consistency in the evaluation of travel time is almost universally recognized to be scientifically valid. A commenter stated that not requiring feedback would allow analyses to be manipulated to

produce desired results. Another commenter stated that most MPOs have already implemented full feedback, and it is easy to perform and more accurate than partial feedback. Commenters submitted technical reports and papers to the docket in order to document their claims that full feedback is recognized to be a necessary and sound modeling improvement.

EPA agrees with commenters that there is clear theoretical justification for feedback between traffic assignment and trip distribution, and that feedback may be essential to accurate forecasts when congestion exists. In addition, EPA agrees that full feedback is already widely available and used. As a result, EPA believes it is appropriate to retain the feedback requirement.

The regulatory language has been slightly modified from the November 1993 rule to read that zone-to-zone travel impedances used in trip distribution must be in reasonable agreement with travel times that are estimated from final assigned traffic volumes. The language now refers to "impedances" rather than "travel times" because trip distribution impedances may reflect more than just vehicle travel time (e.g., cost, travel times by other modes, etc.). The language refers to travel times "estimated from final assigned traffic volumes" rather than travel times "which result from" traffic assignment in order to reflect the fact that speeds should be estimated by post-processing assigned volumes.

The final rule's sixth and final network modeling requirement is for network-based models to be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices. EPA's proposed option 3 would have required models to be reasonably sensitive to trip-making changes due to changes in the cost, travel time, capacity, and quality of all travel choices, if the necessary information is available. EPA has eliminated the reference to "trip-making changes" because EPA received comments indicating that this implies a requirement for trip generation to be dependent on accessibility. This is not what EPA intended. The November 1993 conformity rule strongly encouraged a dependence of trip generation on the accessibility of destinations, but it was not specifically required. EPA continues to believe that such a trip generation requirement is not widely available, minimum practice. In addition to deleting "trip-making changes," EPA made other modifications to the proposed requirement in order to streamline the

language. By making the language more general, EPA believes that the qualification "if the necessary information is available" is no longer necessary. EPA has therefore eliminated this language.

EPA received comment that § 51.452(b)(1)(v)/§ 93.130(b)(1)(v) of the November 1993 conformity rule should be retained in addition to the other paragraphs proposed as option 3. Section 51.452(b)(1)(v)/§ 93.130(b)(1)(v) of the November 1993 conformity rule required free-flow speeds on network links to be based on empirical observations. EPA is not including this requirement in the final rule because it has been widely misinterpreted, and because issues relating to the use of speeds in network models are complex enough that they are best handled in modeling guidance, where they can be fully discussed. The November 1993 requirement was read by some to require significant data collection efforts. In fact, EPA had simply intended that available empirical information be used instead of posted speed limits. In addition to creating this misinterpretation, the original language was not clear about which step of the modeling process it referred to, and whether it was directed at input assumptions or outputs.

EPA believes that this issue warrants a full discussion in the EPA/DOT modeling guidance, and that the original regulatory requirement regarding free-flow speeds should be eliminated from the streamlined rule in order to avoid confusion. However, EPA and DOT would like to emphasize that input network speed assumptions used in model application must be consistent with speed assumptions used in model development and calibration, and that these assumptions and calibration techniques should be documented. EPA and DOT recognize that free-flow impedance inputs into traffic assignment may not reflect empirically observed free-flow speeds, because these input impedances may reflect considerations that affect travel behavior other than travel time, such as driver preferences for using specific classes of facilities. If free-flow impedance inputs used in traffic assignment deviate significantly from observed free-flow speeds, the documentation should include a discussion of the differences and rationale for adjustments made.

In addition, since emissions estimates are extremely sensitive to vehicle speed, EPA and DOT recommend that speeds be estimated in a separate step after traffic assignment (also known as "post-processing"), using refined speed-

volume relationships and final assigned traffic volumes. Post-processed speeds estimated in the validation year should be compared with speeds empirically observed during the peak and off-peak periods. These comparisons may be made for typical facilities, for example, by facility class/area type category. Based on these comparisons, speed-volume relationships used for speed post-processing should be adjusted to obtain reasonable agreement with observed speeds. Regardless of the specific analytical technique, every effort must be made to ensure that speed estimates are credible and based on a reproducible and logical analytical procedure.

X. Adding Non-Exempt Projects to the Plan/TIP Without Regional Analysis

A. Description of Final Rule

In today's final rule, EPA is not finalizing the flexibility proposed in § 93.122(b)(4), which would have allowed projects to be added to the plan and TIP based on an alternate emissions analysis that does not use network modeling (for areas that are required to use network models, i.e., serious and above areas with an urbanized population over 200,000). This final rule retains the 1993 conformity rule requirement that every plan/TIP amendment that involves regionally significant, non-exempt projects requires the same level of regional emissions analysis. For the purposes of this discussion, a non-exempt project is any transportation project other than those listed in § 93.126, "Exempt projects," and § 93.127, "Projects exempt from regional emissions analysis."

Areas that are not serious or above or do not have an urbanized population over 200,000 are not affected by the proposal or this change to the proposal, because they are not subject to requirements for network models.

B. Rationale

Based on stakeholder comments received, EPA has determined that the flexibility to add projects without a regional emissions analysis would have to be accompanied by safeguards or limitations that were not proposed. EPA believes that the restrictions that would have to be imposed on the flexibility would outweigh its benefits.

EPA agrees with a commenter who pointed out that regulatory requirements that govern how satisfaction of a conformity test is demonstrated cannot be removed and replaced with unspecified guidance that is not subject to notice and comment. EPA believes

that the commenter is correct in asserting that guidelines for how the alternate emissions analysis would have to be performed would have to be included in regulatory language, if the flexibility were to be finalized. Such additional regulatory language would require reproposal because it is a significant departure from what was originally proposed; EPA did not propose any specific guidelines or limitations for this flexibility in either the preamble or regulatory language of the July 9, 1996, proposal.

Other commenters expressed serious concerns that the flexibility to add projects without analysis could undermine the coordinated planning process and achievement of air quality objectives unless some safeguards are included. Suggestions for limitations and safeguards included adding minimum criteria for alternate analysis methodology in the rule; limiting the flexibility to projects which are unlikely to cause major long-term changes in travel and development patterns; limiting the flexibility to a certain number of projects per planning cycle; or requiring that the emissions from the existing plan and TIP be below a minimum threshold of the applicable emissions budget. Commenters were also concerned that safeguards needed to be applied consistently throughout the country. Including such safeguards would require reproposal, and could result in additional rule complexity that would hamper use of the proposed flexibility.

Because EPA believes it is legally compelled to include minimum guidelines for alternate emissions analysis in the regulatory text, EPA's choice was to either repropose regulatory guidelines and safeguards or eliminate the proposed flexibility. EPA is choosing the latter in today's final rule because the few alternate methodologies suggested by commenters were not sufficient to provide a basis for EPA to propose general regulatory guidelines. In addition, EPA believes that additional regulatory text would outweigh the benefits of the flexibility.

The few methodologies proposed by stakeholders were not sufficient to form the basis of nationally applicable, minimum guidelines for alternate emissions analysis. When EPA proposed the flexibility, it was seeking a procedure that would yield similar results as a full-scale regional analysis but with less effort. However, the methodologies suggested by commenters were sketch planning techniques, which are ancillary to but not substitutes for network modeling.

While sketch planning techniques may be appropriate for certain projects in certain circumstances, the commenters did not suggest guidelines that would delineate when sketch planning techniques may be an adequate approximation or how these techniques could be replicated nationally.

Based on comments received during the development of the proposal and during the comment period on the proposal itself, EPA and DOT believe that regulatory constraints on the proposed flexibility would defeat the flexibility's purpose. Many commenters did not believe EPA could or should develop alternate analysis techniques that would apply nationally, because the value of the flexibility would be its application on a case-by-case basis. In addition, many stakeholders want the regulatory text to be streamlined and procedural modeling guidelines to be minimized.

EPA and DOT also believe that the possible benefits of the proposed flexibility do not warrant the complication of a new set of modeling guidelines. Commenters have indicated that the proposed flexibility would not have a large impact on day-to-day implementation of the conformity rule. Many commenters stated that the flexibility would be used infrequently, or only in limited circumstances. Some commenters believe that a full-scale regional analysis is just as easy as using an alternate sketch planning method. For example, a commenter indicated that adding a project and running the regional model again is not time-consuming once the network for the plan has already been coded. EPA and DOT believe the time and effort spent in developing an alternate procedure and getting agreement from all involved agencies seems greater than that involved in running the regional model.

C. Pilot Program

Although EPA did not grant the general analysis flexibility in today's final rule, EPA and DOT remain willing to consider alternate procedures on a case-by-case basis for determining the impact of transportation projects, since a substitute may prove to be more expeditious and less costly in certain circumstances than a network-based analysis. Those areas that develop such an alternate procedure are invited to apply to the conformity pilot program, proposed on July 9, 1996. Given the pilot program's purposes to allow greater flexibility in implementing the rule and to evaluate potential improvements to the rule, the pilot program is an appropriate vehicle for this flexibility.

XI. Consequences of SIP Disapproval**A. Description of the Rule**

EPA is finalizing the primary option in the proposal, which is the option for which the regulatory text was proposed. In today's final rule, EPA is also clarifying the definition of a protective finding. Consequences of SIP disapproval apply when control strategy SIPs are disapproved. Control strategy SIPs are 15% SIPs, post-1996 SIPs, and attainment demonstrations.

1. Disapproval With a Protective Finding

When disapproving a control strategy SIP revision, EPA may give the SIP a protective finding. If EPA disapproves a SIP but gives a protective finding, the motor vehicle emissions budget in the disapproved SIP could still be used to demonstrate conformity. There would be no adverse conformity consequences unless highway sanctions were imposed, as is the case with respect to all other SIP planning failures. Highway sanctions would be imposed two years following EPA's disapproval if the SIP deficiency had not been remedied. The conformity of the plan and TIP would lapse once highway sanctions were imposed.

EPA would give a protective finding where a submitted SIP contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the SIP was submitted, such as reasonable further progress (RFP) or attainment. That is, EPA would give such a submitted SIP a protective finding if it contains enough emissions reduction measures or commitments to these measures to achieve its purpose of either demonstrating RFP or attainment. Like the November 1993 rule, a SIP could receive a protective finding even if all control measures are not fully adopted in enforceable form, provided there are written commitments to such measures. EPA would not give a protective finding to a SIP whose emission reduction measures or commitments are inadequate to achieve the required RFP or attainment.

2. Disapproval Without a Protective Finding

In the cases where EPA disapproves a SIP and does not give it a protective finding, an area has a 120-day grace period, after which the only transportation projects that could be found to conform would be those included in the first three years of the currently conforming transportation plan and TIP. No new plans, TIPs, or

plan/TIP amendments could be found to conform after the grace period. Further, no additional projects not already in the first three years of the currently conforming plan and TIP could be found to conform. Since exempt projects and non-federal projects do not require conformity determinations, they could proceed as long as they meet other applicable requirements of the conformity rule (for example, a regionally significant non-federal project must have been included in the regional emissions analysis supporting the most recent plan and TIP conformity determination).

If any one phase of a project is included in the first three years of the currently conforming plan/TIP, all subsequent phases could proceed following a disapproval, provided that all phases of the project were included in the plan/TIP conformity analysis and all other applicable project-level conformity criteria were satisfied (e.g., hot-spot requirements).

The "freeze" on new transportation plans, TIPs, and projects would be removed once an area submits another control strategy SIP or maintenance plan to replace the disapproved SIP, provided EPA does not find the budget inadequate. If such a replacement SIP does not apply for conformity purposes by the time Clean Air Act highway sanctions are imposed (two years after EPA's final disapproval), conformity would lapse, and no new project-level conformity determinations could be made, even for projects in the first three years of the plan and TIP. The lapse would last until a replacement SIP applies for conformity purposes (i.e., until an adequate replacement SIP has been submitted to EPA).

During the 120-day grace period, plans, TIPs, and projects could be found to conform using the budgets from the disapproved SIP, if there is no applicable replacement SIP for transportation conformity purposes. This 120-day grace period is intended to allow areas to complete conformity determinations that were in progress at the time of EPA's final disapproval. Both the MPO and DOT must have determined conformity by the end of the 120-day grace period.

As in the previous conformity rule, adverse consequences would occur following any EPA final disapproval action on a control strategy SIP without a protective finding, even if the disapproval is limited or partial. The motor vehicle emissions budget is sufficient for conformity determinations only if the SIP as a whole satisfies the Clean Air Act requirements for RFP or attainment. If one part of a SIP is disapproved without a protective

finding, even if that part does not address mobile sources, then there is no overall strategy for RFP or attainment, and it is not possible to determine whether consistency with the motor vehicle emissions budget will result in a level of emissions consistent with RFP or attainment.

A plan/TIP conformity lapse previously imposed under the November 1993 rule due to SIP disapproval without a protective finding would convert to a "freeze" as described in this notice once this rule becomes effective, provided highway sanctions have not yet been imposed. The "freeze" would continue until highway sanctions are imposed, which normally occurs two years after EPA's final disapproval. Once highway sanctions are imposed, the conformity of the plan and TIP would lapse, as occurs whether or not the SIP had received a protective finding.

Finally, EPA wishes to clarify that although the preamble to the proposal inadvertently indicated that consequences of SIP disapproval also apply to disapproval of maintenance plans, this is not what EPA intends nor is it included in the final rule language. Consequences of SIP disapproval only apply when control strategy SIPs are disapproved. EPA did not refer to maintenance plans in the relevant regulatory text of the proposal or the conformity rule as amended in 1995. The regulatory text would not make sense with respect to maintenance plans because sanctions do not apply for maintenance plan disapprovals. Furthermore, there is less need to apply the consequences for disapproving a maintenance plan, since an area could revert to using its attainment SIP budget for demonstrating conformity if a maintenance plan is disapproved.

B. Rationale

EPA believes that the option finalized today provides the best balance between the competing objectives of minimizing new transportation commitments after a SIP disapproval and minimizing disruption to the transportation planning process. EPA believes that new projects should not be approved when the control strategy SIP has been disapproved without a protective finding, because if a SIP does not identify enough emission reductions and the motor vehicle emissions budget does not provide for RFP or attainment, then there is no basis to claim that a transportation activity conforms within the meaning of Clean Air Act section 176(c). Furthermore, adding more transportation projects may make it

more difficult for the air agency to create a SIP that achieves sufficient emissions reductions, and may intensify the need for additional control strategies later. EPA is allowing areas to grandfather projects included in the first three years of the currently conforming plan and TIP in order to provide stability for planning.

Most commenters supported the primary option EPA is finalizing today, and gave a variety of reasons. Several stakeholders commented that this option allows some continuity for transportation planning, since ideally it allows the TIP to continue in the short term while changes to the SIP are underway. Another commenter noted that since this option minimizes the disruption of projects in the first three years of the TIP, it limits the financial and legal risk to local governments when they undertake local bond programs to finance these projects. Another commenter noted that SIPs may be disapproved for numerous reasons outside of the control of the DOT or MPO, and stopping all transportation projects immediately is not in the public's best interest. Finally, a commenter added that since the projects that would be allowed to proceed would have been included in a plan and TIP found to conform previously, it seems reasonable to allow these projects to advance.

Some commenters supported aligning the timing of conformity consequences of SIP disapproval with imposition of highway sanctions, which was option 4 in the proposal. Commenters suggested that this option would simplify communication, make the rule more consistent, and eliminate a perceived inequity with stationary sources. However, for the reasons stated above, EPA believes that there is no appropriate basis to find new projects that were not included in the previously conforming plan/TIP to conform when the SIP has been disapproved without a protective finding. Commenters supporting option 4 did not identify a means by which to claim that such projects would not contribute to violations of the standards.

C. Discussion of Specific Comments

Some objections to the legality of the primary option were raised. One commenter objected to any project approvals based on plans and TIPs that have lapsed, since even projects in the first three years cannot satisfy the statutory test for coming from a conforming plan and TIP if the conformity of the plan and TIP has lapsed. EPA agrees that projects cannot be approved if the plan and TIP have

lapsed. However, in this situation, the conformity status of existing plans and TIPs is not lapsing. The plan and TIP is frozen such that no new projects can be added, but projects in the first three years can proceed to project-level approval. EPA is grandfathering plans and TIPs that have already been found to conform. EPA agrees that new plans and TIPs or plan/TIP amendments cannot be found to conform after the 120-day grace period.

Another objection raised was that EPA cannot allow plans, TIPs, or projects to conform based on SIPs that have been disapproved, since conformity must be based on the applicable implementation plan. EPA agrees with this statement as well. Today's action makes it clear that an area cannot find any new projects to conform once the SIP has been disapproved without a protective finding. EPA is only allowing areas to approve projects that are within the first three years of a plan and TIP that has already been found to conform, for the two years prior to lapsing.

A commenter objected to codification of EPA's committal SIP policy by the adoption of the definition of "protective finding" and the authorization for protective findings in § 93.120.

EPA responds by clarifying that granting a protective finding does not codify a committal SIP policy. By giving a SIP a protective finding, EPA does not mean to imply that these SIPs are in any way approvable. Rather, by disapproving the SIP, EPA is stating that the SIP does not meet Clean Air Act SIP requirements. Granting a protective finding merely allows an area to use the motor vehicle emissions budget in the disapproved SIP to demonstrate conformity, where appropriate. As other commenters stated, there are many reasons why a SIP could be disapproved by EPA, some of which would have nothing to do with the integrity of the motor vehicle emissions budget. A protective finding ensures that the transportation community is not penalized as a result of a SIP failure when the emissions budget in the SIP is adequate to serve as the basis of a conformity determination.

Finally, a commenter believed that prohibiting any project funding except for grandfathered projects after the imposition of highway sanctions (i.e., a conformity lapse) is not consistent with the policy adopted by Congress for the imposition of sanctions. The commenter stated that the conformity rule should be revised to explicitly adopt the policy of prohibiting funding only for highway capacity expansion while providing funding for all those projects that will

improve air quality identified in Clean Air Act section 179(b)(1)(B). Section 179(b)(1)(B) lists the types of projects that can proceed under sanctions.

However, sanctions and conformity are two different parts of the Clean Air Act, and serve quite different purposes. Because certain activities can proceed under sanctions does not mean that these types of projects should not have to undergo a conformity analysis prior to implementation, or should be permanently grandfathered from conformity requirements. Furthermore, EPA does allow transportation control measures in approved SIPs to proceed even during a conformity lapse. This is consistent with the sanctions policy's provision for projects that benefit air quality to proceed.

XII. Traffic Signal Synchronization

On September 24, 1996, Congress amended the Clean Air Act to state that traffic signal synchronization projects are exempt from conformity determinations prior to their funding, approval, or implementation. However, once these projects are funded, approved, or implemented (whichever occurs first), they are to be included in the conformity determinations for future transportation plans, TIPs, and projects.

The final rule reflects this Clean Air Act amendment in new § 93.128, "Traffic signal synchronization projects." This section states that traffic signal synchronization projects may be approved, funded, and implemented without a conformity determination. However, all subsequent regional emissions analyses required by §§ 93.118 and 93.119 for transportation plans, TIPs, or projects not from a conforming plan and TIP must include such regionally significant traffic signal synchronization projects.

In the preamble to the proposal, prior to congressional action on this issue, EPA had discussed whether traffic signal synchronization projects should be exempt from conformity. This topic was included because several stakeholders had advocated the exemption of signal synchronization projects on the basis of positive air quality and congestion mitigation impacts. EPA did not propose to exempt these projects for reasons explained in the proposal's preamble. EPA received a few comments on both sides of this issue. However, EPA is now promulgating this change to the conformity rule without repropounding because Congress has already amended the Clean Air Act and any additional comments could not change the outcome. The Clean Air Act has exempted these projects from advance

conformity determinations as a matter of law, and EPA is now merely reflecting this statutory change in the regulations. EPA finds good cause to dispense with notice and comment because EPA has no discretion in this matter and is merely clarifying the rule to be consistent with the amended statute.

XIII. Conformity SIPs

As specified in the original November 1993 conformity rule and § 51.390(b) of today's final rule, the federal conformity requirements no longer govern conformity determinations once EPA approves a state conformity SIP revision. The provisions of the approved SIP apply instead. Therefore, the new flexibilities found in today's rulemaking will not take effect in areas that already have an approved conformity SIP until the state prepares a new conformity SIP and it is approved by EPA.

Several stakeholders commented that this process could take too long to give areas adequate relief. Commenters suggested several possible solutions. For example, EPA could grant relief from the build/no-build test without the approval of the new conformity SIP, or today's rule could become effective upon submission of a formal statement that the state is preparing a new conformity SIP. These suggestions cannot be implemented because once EPA approves a state's conformity SIP, that SIP becomes federally enforceable law, and cannot be changed without notice-and-comment rulemaking. The conformity rule itself cannot change the applicability of approved conformity SIPs.

Another commenter suggested that EPA add language to the rule to automatically approve conformity SIPs that adopt the EPA language by reference. However, SIP approval requires public notice and comment in the *Federal Register* in accordance with the APA; it cannot be given automatically. Furthermore, there are sections of the conformity SIP, for example, the consultation section, that cannot be adopted by reference or verbatim because they must be tailored for the state's own circumstances.

However, EPA understands areas' desire to determine conformity using the procedures in today's final rule, and EPA will give priority to processing conformity SIP revisions designed to incorporate these changes in those areas with approved conformity SIPs. EPA also commits to expedite the approval of conformity SIP revisions that, to the extent possible, incorporate the amendments verbatim or by reference.

EPA is requiring conformity SIPs to be submitted to EPA within 12 months of

today's rulemaking. One commenter stated that the 12-month timeframe for revising conformity SIPs is too short given that state air quality agencies would have to hire new staff to accomplish the task, and that 12 months is inconsistent with the Clean Air Act provisions that allow 18 months after a SIP call for an area to remedy its deficiencies. EPA agrees that experience has shown 12 months to be a very ambitious deadline. However, Clean Air Act section 176(c)(4)(C) is very specific in its intent that states submit conformity SIPs within 12 months of EPA's rules. EPA does not believe that the Clean Air Act's general language regarding SIP calls should be used to override the specific timeframe for submitting conformity SIPs that is evidenced in Clean Air Act section 176(c)(4)(C). In the case of a SIP call, EPA is allowed to establish reasonable deadlines not to exceed 18 months for an area to correct its SIP inadequacies. However, because it cannot be argued that revising a conformity SIP to include these amendments is more time-consuming than preparing an original conformity SIP, there is no appropriate basis to claim that the general SIP call language should override the specific intent of Congress regarding deadlines for submission of conformity SIPs relative to promulgation of federal conformity rules.

XIV. Hot-Spot Tests

Most commenters supported the clarification to § 93.123, "Procedures for determining localized CO and PM-10 concentrations (hot-spot analysis)," which allows the use of procedures other than "Guideline" models in hot-spot analyses if the alternate procedures are developed through the interagency consultation process and are approved by the EPA Regional Administrator.

A few commenters believed that the CO hot-spot requirements for all projects affecting intersections of level of service (LOS) D, E, and F are too stringent and burdensome when compared to the realized benefits from such analyses. Other commenters thought that the requirements were too prescriptive, because LOS D does not automatically indicate an air quality problem. One commenter suggested that the conformity rule should only require hot-spot analyses for the worst, most representative intersection on each major street impacted by a project, rather than all intersections that fit the current rule's hot-spot criteria. EPA believes no change to the proposal is necessary to address these concerns because it does have flexibility that allows areas to develop their own

protocols that have different screening mechanisms.

A few commenters suggested that the conformity rule should be clarified to allow projects which decrease the likelihood of public exposure to exceedances of the NAAQS. For example, commenters stated that a project should be allowed to make a violation worse in a place not frequented by the public if it improves air quality and eliminates violations where public exposure is more likely. However, Clean Air Act section 176(c)(1)(B) states that transportation projects must not cause or contribute to any new violation of any standard in any area, or increase the frequency or severity of any existing violation of any standard in any area. It is not public exposure to a violation of a standard that the Clean Air Act language prohibits; it prohibits any violation of any standard in any area. The conformity rule cannot override the Clean Air Act to make exceptions that create new or worsen existing violations.

XV. TCM Flexibility

As discussed in the proposal preamble, EPA remains committed to issuing guidance on how areas can substitute TCMs in previously approved SIPs without additional EPA approvals. EPA also stated in the proposal that development of such a substitution mechanism is possible under existing EPA SIP policy, so this final rule does not address the issue.

XVI. Conformity and the Proposed NAAQS Revisions

Several commenters requested information on how the revisions of the ozone and particulate matter (PM) NAAQS standards would affect conformity. EPA issued a notice of proposed policy entitled, "Interim Implementation Policy on New or Revised Ozone and Particulate Matter NAAQS" (61 FR 65752, December 13, 1996), which proposes how current programs would be affected while states are developing plans to implement the new NAAQS. This proposed policy notice specifically discusses conformity. A final policy for implementing the one hour ozone and pre-existing PM NAAQS will be published in the *Federal Register* in September 1997.

EPA proposed in its December 1996 notice that conformity determinations would not be required to address the new NAAQS until SIPs addressing the new NAAQS are approved by EPA. New nonattainment areas would not be subject to conformity until EPA approves the SIPs that address these

standards. Existing nonattainment and maintenance areas would not have to consider the 8-hour ozone standard or the PM-2.5 standard in their conformity determinations until EPA approved SIPs addressing those pollutants.

In general, the existing control strategy SIPs and maintenance plans that establish motor vehicle emissions budgets will remain in force until they are superseded by new or revised SIPs that have been approved by EPA. Thus, conformity will continue as usual in existing nonattainment and maintenance areas for several years. Areas that have not submitted post-1996 rate-of-progress plans or attainment demonstrations for the one hour ozone standard would be required to conform to the 15% SIP until a post-1996 plan or new attainment demonstration is submitted.

In such areas, conformity to that plan would not be required, and these areas would continue to demonstrate conformity to the 15% SIP. Areas that are not required to submit control strategy SIPs (e.g., marginal areas) and have not been demonstrating conformity to motor vehicle emissions budgets would be required to continue demonstrating conformity using the emission reduction tests until SIPs with motor vehicle emissions budgets are submitted. Areas with approved maintenance plans would continue demonstrating conformity using the budgets established by those plans.

States are free to establish, through the SIP process, a motor vehicle emissions budget that addresses the new NAAQS in advance of a complete SIP attainment demonstration. That is, a state could submit a motor vehicle emissions budget that does not demonstrate attainment but is consistent with projections and commitments to control measures and achieves some progress toward attainment. Such a budget would apply for conformity purposes in addition to existing budgets addressing the old NAAQS (i.e., a SIP that does not demonstrate attainment of the new NAAQS would not supersede existing control strategy SIPs).

Today's final conformity rule does not include any changes specifically intended to address the NAAQS revisions. No changes are necessary in the short term because the existing conformity process will continue for several years. The Federal Advisory Committee Act (FACA) Subcommittee for Ozone, PM and Regional Haze Implementation Programs is discussing the longer-term conformity issues, and EPA's decisions will be published in future policy notices. In addition, EPA will be promulgating a conformity rule

addressing transitional ozone areas under the new standard by December 1998.

XVII. Minor Changes to the Rule

A. Definitions

This final rule includes three new definitions in § 93.101. For the purposes of this final rule, EPA has defined "written commitment" to mean a commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the SIP. The conformity rule uses the term "written commitment" with respect to SIP commitments to control measures, and also with respect to commitments to project-level emissions mitigation or control measures as part of a conformity determination. As described in § 93.125(c), these latter commitments are enforceable under the conformity SIP. As is the case with any other type of SIP commitments, written commitments as defined by the conformity rule must be made by an agency that has legal authority to implement the action in question.

EPA is defining the term "written commitment" because a commenter requested it, and EPA agrees that this will ease implementation by clarifying EPA's intent. This definition is consistent with EPA's historical implementation of the conformity rule.

EPA is also defining the term "safety margin" to mean the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable Clean Air Act requirement for reasonable further progress, attainment, or maintenance. EPA has added a reference to that term in § 93.118(e)(4), which lists the requirements for the adequacy of submitted SIPs. This section specifies that documentation of any changes to established safety margins is a criterion for the adequacy of a submitted SIP. The term "safety margin" is also used in § 93.124(b), although it is used and defined in that section in a specific context. This definition is consistent with the historical implementation of the conformity rule and with the definition in § 93.124(b).

EPA is defining "lapse" to mean that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan and TIP.

B. Consultation

EPA is making two minor changes to the consultation section in response to comments on the proposal. One commenter suggested that the public consultation requirements of § 93.105(e) should be included in the conformity SIP. EPA agrees with this commenter and has modified § 93.105(a) to clarify that the public consultation requirements described in § 93.105(e) must also be required by the conformity SIP. Because the federal conformity rule ceases to apply once the conformity SIP has been approved, the requirements of § 93.105(e) must be required by the conformity SIP or the SIP would not provide for appropriate public input.

Section 93.105(e) requires public consultation consistent with the requirements of 23 CFR 450.316(b) and articulates a few specific requirements. EPA intends for the conformity SIP to reiterate these statements; EPA does not intend for the conformity SIP to actually include the specific public consultation procedures that an area develops under 23 CFR 450.316(b).

EPA is also adding a new element to the list of processes for which consultation procedures must be developed. Section 93.105(c)(1)(vii) requires areas to establish a process for choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by § 93.109(g)(2)(iii). (Refer to section V. of this preamble, "Rural Nonattainment and Maintenance Areas" for a discussion of the choices of conformity tests that are available to rural areas.) Of course, states without isolated rural nonattainment and maintenance areas would not need to develop such procedures.

As explained in the proposal preamble, EPA had not proposed to amend § 51.402/§ 93.105 of the original conformity rule to add this element to the list of processes for which consultation procedures must be developed, because EPA believed it was necessary to use the new rural provision. Commenters had mixed opinions about whether and how the new consultation needs should be integrated into the conformity rule. Some commenters did not believe that the conformity rule needed to be changed. However, some thought that further guidance regarding necessary changes in areas' consultation procedures would be useful. Given these comments, EPA decided to add the new consultation requirement to the conformity rule for clarity and so that the rule could serve as a comprehensive

list of items that consultation procedures must address.

One commenter requested that EPA explain that Memoranda of Understanding, or MOUs, can be used to establish interagency consultation procedures. The commenter is correct that MOUs can be used to establish interagency consultation procedures, provided that the MOU is enforceable under state law. In order for the MOU to be enforceable, all agencies that are covered by the conformity rule must sign the MOU, including federal agencies and the recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws (i.e., non-federal project sponsors). In addition, the conformity SIP must include a rule that requires all future parties covered by the rule, including new recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws, to sign the MOU. This ensures that the MOU approach will continue to apply to all subject parties. EPA does not believe that any regulatory changes are needed to address this issue.

C. Changes to § 93.109

Section 93.109, "Criteria and procedures for determining conformity of transportation plans, programs, and projects: General," describes which conformity tests apply and when they apply for each pollutant and for rural areas. This section has been revised to reflect changes discussed elsewhere in this preamble. In addition, this section has been slightly revised so that its description of conformity requirements does not refer solely to an area's nonattainment classification. The section now also refers to the control strategy SIP requirements for a given classification. EPA believes this clarifies the conformity rule and makes it more flexible in the case of future revisions to the classification system, which could occur if the NAAQS are revised. These clarifications do not change the substance of the section's requirements.

XVIII. Administrative Requirements

A. Administrative Designation

Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or otherwise adversely affect in a material

way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;

(4) Raise novel or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because this action raises novel legal or policy issues arising out of legal mandates, the President's priorities, and the principles set forth in the Executive Order. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This final rule does not impose any new information collection requirements and results in no change to the currently approved collection requirements. OMB has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

The information collection requirements of EPA's Transportation Conformity Rule and these amendments to it are covered under the Information Collection Request of the Department of Transportation entitled, "Metropolitan and Statewide Transportation Planning," approved by OMB under the Paperwork Reduction Act, and assigned OMB Control Number 2132-0529.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for DOT's regulations are listed in 5 CFR Part 1320.

Send any comments on the recordkeeping and reporting requirements of Transportation Conformity to: Mr. Sean Libberton, U.S. Department of Transportation, TPL11, 400 7th Street, SW., Washington, DC 20590, and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA/OAR, Room 10202, 725 17th Street, NW., Washington, DC 20503. In any correspondence please refer to OMB Control Number 2132-0529.

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 requires federal agencies to identify potentially adverse impacts of federal regulations upon small entities. In instances where significant impacts are possible on a substantial number of these entities, agencies are required to perform a Regulatory Flexibility Analysis (RFA).

EPA has determined that today's regulations will not have a significant impact on a substantial number of small entities. This regulation affects federal agencies and metropolitan planning organizations, which by definition are designated only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities.

Therefore, as required under section 605 of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Submission to Congress and the Comptroller General

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in today's *Federal Register*. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

E. Unfunded Mandates

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA

must undertake various actions in association with proposed or final rules that include a federal mandate that may result in estimated costs of \$100 million or more to the private sector, or to state, local, or tribal governments in the aggregate.

EPA has determined that to the extent this rule imposes any mandate within the meaning of the Unfunded Mandates Act, this final action does not include a mandate that may result in estimated costs of \$100 million or more to state, local, or tribal governments in the aggregate or to the private sector. These rule amendments relax requirements of the previously applicable conformity rule, and thus do not impose any additional burdens. Therefore, EPA has not prepared a statement with respect to budgetary impacts.

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Transportation, Volatile organic compounds.

40 CFR Part 93

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: July 31, 1997.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, 40 CFR parts 51 and 93 are amended as follows:

PART 51—[AMENDED]

1. The authority citation for part 51 is revised to read as follows:

Authority: 42 U.S.C. 7401-7671q.

2. Subpart T is revised to read as follows:

Subpart T—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

§ 51.390 Implementation plan revision.

(a) States with areas subject to this subpart and part 93, subpart A, of this chapter must submit to the EPA and DOT a revision to their implementation plan which contains criteria and

procedures for DOT, MPOs and other State or local agencies to assess the conformity of transportation plans, programs, and projects, consistent with this subpart and part 93, subpart A, of this chapter. This revision is to be submitted by November 25, 1994 (or within 12 months of an area's redesignation from attainment to nonattainment, if the State has not previously submitted such a revision). Further revisions to the implementation plan required by amendments to part 93, subpart A, of this chapter must be submitted within 12 months of the date of publication of such final amendments. EPA will provide DOT with a 30-day comment period before taking action to approve or disapprove the submission. A State's conformity provisions may contain criteria and procedures more stringent than the requirements described in this subpart and part 93, subpart A, of this chapter only if the State's conformity provisions apply equally to non-federal as well as Federal entities.

(b) The Federal conformity rules under part 93, subpart A, of this chapter, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the requirements of Clean Air Act section 176(c) until such time as EPA approves the conformity implementation plan revision required by this subpart. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable implementation plan, conformity determinations would be governed by the approved (or approved portion of the) State criteria and procedures. The Federal conformity regulations contained in part 93, subpart A, of this chapter would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable implementation plan conformity requirements remain enforceable until the State submits a revision to its applicable implementation plan to specifically remove them and that revision is approved by EPA.

(c) The implementation plan revision required by this section must meet all of the requirements of part 93, subpart A, of this chapter.

(d) In order for EPA to approve the implementation plan revision submitted to EPA and DOT under this subpart, the plan must address all requirements of part 93, subpart A, of this chapter in a manner which gives them full legal effect. In particular, the revision shall incorporate the provisions of the following sections of part 93, subpart A,

of this chapter in verbatim form, except insofar as needed to clarify or to give effect to a stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in the following sections of this chapter: §§ 93.101, 93.102, 93.103, 93.104, 93.106, 93.109, 93.110, 93.111, 93.112, 93.113, 93.114, 93.115, 93.116, 93.117, 93.118, 93.119, 93.120, 93.121, 93.126, and 93.127.

PART 93—[AMENDED]

3. The authority citation for part 93 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

4. Subpart A is revised to read as follows:

Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

Sec.

- 93.100 Purpose.
- 93.101 Definitions.
- 93.102 Applicability.
- 93.103 Priority.
- 93.104 Frequency of conformity determinations.
- 93.105 Consultation.
- 93.106 Content of transportation plans.
- 93.107 Relationship of transportation plan and TIP conformity with the NEPA process.
- 93.108 Fiscal constraints for transportation plans and TIPs.
- 93.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.
- 93.110 Criteria and procedures: Latest planning assumptions.
- 93.111 Criteria and procedures: Latest emissions model.
- 93.112 Criteria and procedures: Consultation.
- 93.113 Criteria and procedures: Timely implementation of TCMs.
- 93.114 Criteria and procedures: Currently conforming transportation plan and TIP.
- 93.115 Criteria and procedures: Projects from a plan and TIP.
- 93.116 Criteria and procedures: Localized CO and PM₁₀ violations (hot spots).
- 93.117 Criteria and procedures: Compliance with PM₁₀ control measures.
- 93.118 Criteria and procedures: Motor vehicle emissions budget.
- 93.119 Criteria and procedures: Emission reductions in areas without motor vehicle emissions budgets.
- 93.120 Consequences of control strategy implementation plan failures.
- 93.121 Requirements for adoption or approval of projects by other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws.
- 93.122 Procedures for determining regional transportation-related emissions.
- 93.123 Procedures for determining localized CO and PM₁₀ concentrations (hot-spot analysis).

- 93.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).
- 93.125 Enforceability of design concept and scope and project-level mitigation and control measures.
- 93.126 Exempt projects.
- 93.127 Projects exempt from regional emissions analyses.
- 93.128 Traffic signal synchronization projects.

Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

§ 93.100 Purpose.

The purpose of this subpart is to implement section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.), and the related requirements of 23 U.S.C. 109(j), with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This subpart sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to an applicable implementation plan developed pursuant to section 110 and Part D of the CAA.

§ 93.101 Definitions.

Terms used but not defined in this subpart shall have the meaning given them by the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations, or other DOT regulations, in that order of priority.

Applicable implementation plan is defined in section 302(q) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110, or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) and which implements the relevant requirements of the CAA.

CAA means the Clean Air Act, as amended (42 U.S.C. 7401 et seq.).

Cause or contribute to a new violation for a project means:

- (1) To cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard

during the future period in question, if the project were not implemented; or

- (2) To contribute to a new violation in a manner that would increase the frequency or severity of a new violation of a standard in such area.

Clean data means air quality monitoring data determined by EPA to meet the requirements of 40 CFR part 58 that indicate attainment of the national ambient air quality standard.

Control strategy implementation plan revision is the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (CAA sections 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 189(a)(1)(B), and 189(b)(1)(A); and sections 192(a) and 192(b), for nitrogen dioxide).

Design concept means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade-separated highway, reserved right-of-way rail transit, mixed-traffic rail transit, exclusive busway, etc.

Design scope means the design aspects which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes or tracks to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

DOT means the United States Department of Transportation.

EPA means the Environmental Protection Agency.

FHWA means the Federal Highway Administration of DOT.

FHWA/FTA project, for the purpose of this subpart, is any highway or transit project which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

Forecast period with respect to a transportation plan is the period covered by the transportation plan pursuant to 23 CFR part 450.

FTA means the Federal Transit Administration of DOT.

Highway project is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required

phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

- (2) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Horizon year is a year for which the transportation plan describes the envisioned transportation system according to § 93.106.

Hot-spot analysis is an estimation of likely future localized CO and PM₁₀ pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

Increase the frequency or severity means to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

Lapse means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan and TIP.

Maintenance area means any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended.

Maintenance plan means an implementation plan under section 175A of the CAA, as amended.

Metropolitan planning organization (MPO) is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 5303. It is the forum for cooperative transportation decision-making.

Milestone has the meaning given in sections 182(g)(1) and 189(c) of the CAA. A milestone consists of an

emissions level and the date on which it is required to be achieved.

Motor vehicle emissions budget is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

National ambient air quality standards (NAAQS) are those standards established pursuant to section 109 of the CAA.

NEPA means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*).

NEPA process completion, for the purposes of this subpart, with respect to FHWA or FTA, means 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, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.

Nonattainment area means any geographic region of the United States which has been designated as nonattainment under section 107 of the CAA for any pollutant for which a national ambient air quality standard exists.

Project means a highway project or transit project.

Protective finding means a determination by EPA that a submitted control strategy implementation plan revision contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

Recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws means any agency at any level of State, county, city, or regional government that routinely receives title 23 U.S.C. or Federal Transit Laws funds to construct FHWA/FTA projects, operate FHWA/FTA projects or equipment, purchase equipment, or undertake other services or operations via contracts or agreements. This definition does not include private landowners or developers, or contractors or entities that are only paid for services or products created by their own employees.

Regionally significant project means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.

Safety margin means the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable requirement for reasonable further progress, attainment, or maintenance.

Standard means a national ambient air quality standard.

Transit is mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.

Transit project is an undertaking to implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It does not include actions that are solely within the jurisdiction of local transit agencies, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it must be defined inclusively enough to:

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Transportation control measure (TCM) is any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in section 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the first sentence of this definition, vehicle technology-based, fuel-based,

and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this subpart.

Transportation improvement program (TIP) means a staged, multiyear, intermodal program of transportation projects covering a metropolitan planning area which is consistent with the metropolitan transportation plan, and developed pursuant to 23 CFR part 450.

Transportation plan means the official intermodal metropolitan transportation plan that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 CFR part 450.

Transportation project is a highway project or a transit project.

Written commitment for the purposes of this subpart means a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the applicable implementation plan.

§ 93.102 Applicability.

(a) *Action applicability.*

(1) Except as provided for in paragraph (c) of this section or § 93.126, conformity determinations are required for:

- (i) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT;
- (ii) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT; and
- (iii) The approval, funding, or implementation of FHWA/FTA projects.

(2) Conformity determinations are not required under this subpart for individual projects which are not FHWA/FTA projects. However, § 93.121 applies to such projects if they are regionally significant.

(b) *Geographic applicability.* The provisions of this subpart shall apply in all nonattainment and maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.

(1) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide

(NO₂), and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀).

(2) The provisions of this subpart apply with respect to emissions of the following precursor pollutants:

(i) Volatile organic compounds (VOC) and nitrogen oxides (NO_x) in ozone areas;

(ii) NO_x in NO₂ areas; and

(iii) VOC, NO_x, and PM₁₀ in PM₁₀ areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related precursor emissions within the nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes a budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

(3) The provisions of this subpart apply to maintenance areas for 20 years from the date EPA approves the area's request under section 107(d) of the CAA for redesignation to attainment, unless the applicable implementation plan specifies that the provisions of this subpart shall apply for more than 20 years.

(c) *Limitations.* (1) Projects subject to this subpart for which the NEPA process and a conformity determination have been completed by DOT may proceed toward implementation without further conformity determinations unless more than three years have elapsed since the most recent major step (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred. All phases of such projects which were considered in the conformity determination are also included, if those phases were for the purpose of funding final design, right-of-way acquisition, construction, or any combination of these phases.

(2) A new conformity determination for the project will be required if there is a significant change in project design concept and scope, if a supplemental environmental document for air quality purposes is initiated, or if three years have elapsed since the most recent major step to advance the project occurred.

(d) *Grace period for new nonattainment areas.* For areas or portions of areas which have been designated attainment for either ozone, CO, PM₁₀ or NO₂ since 1990 and are subsequently redesignated to nonattainment for any of these

pollutants, the provisions of this subpart shall not apply for 12 months following the date of final designation to nonattainment for such pollutant.

§ 93.103 Priority.

When assisting or approving any action with air quality-related consequences, FHWA and FTA shall give priority to the implementation of those transportation portions of an applicable implementation plan prepared to attain and maintain the NAAQS. This priority shall be consistent with statutory requirements for allocation of funds among States or other jurisdictions.

§ 93.104 Frequency of conformity determinations.

(a) Conformity determinations and conformity redeterminations for transportation plans, TIPs, and FHWA/FTA projects must be made according to the requirements of this section and the applicable implementation plan.

(b) *Frequency of conformity determinations for transportation plans.*

(1) Each new transportation plan must be demonstrated to conform before the transportation plan is approved by the MPO or accepted by DOT.

(2) All transportation plan revisions must be found to conform before the transportation plan revisions are approved by the MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in § 93.126 or § 93.127. The conformity determination must be based on the transportation plan and the revision taken as a whole.

(3) The MPO and DOT must determine the conformity of the transportation plan no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the transportation plan, the existing conformity determination will lapse.

(c) *Frequency of conformity determinations for transportation improvement programs.* (1) A new TIP must be demonstrated to conform before the TIP is approved by the MPO or accepted by DOT.

(2) A TIP amendment requires a new conformity determination for the entire TIP before the amendment is approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in § 93.126 or § 93.127.

(3) The MPO and DOT must determine the conformity of the TIP no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the

MPO and DOT determining conformity of the TIP, the existing conformity determination will lapse.

(4) After an MPO adopts a new or revised transportation plan, conformity of the TIP must be redetermined by the MPO and DOT within six months from the date of DOT's conformity determination for the transportation plan, unless the new or revised plan merely adds or deletes exempt projects listed in §§ 93.126 and 93.127.

Otherwise, the existing conformity determination for the TIP will lapse.

(d) *Projects.* FHWA/FTA projects must be found to conform before they are adopted, accepted, approved, or funded. Conformity must be redetermined for any FHWA/FTA project if three years have elapsed since the most recent major step to advance the project (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred.

(e) *Triggers for transportation plan and TIP conformity determinations.* Conformity of existing transportation plans and TIPs must be redetermined within 18 months of the following, or the existing conformity determination will lapse, and no new project-level conformity determinations may be made until conformity of the transportation plan and TIP has been determined by the MPO and DOT:

(1) November 24, 1993;

(2) The date of the State's initial submission to EPA of each control strategy implementation plan or maintenance plan establishing a motor vehicle emissions budget;

(3) EPA approval of a control strategy implementation plan revision or maintenance plan which establishes or revises a motor vehicle emissions budget;

(4) EPA approval of an implementation plan revision that adds, deletes, or changes TCMs; and

(5) EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget or adds, deletes, or changes TCMs.

§ 93.105 Consultation.

(a) *General.* The implementation plan revision required under § 51.390 of this chapter shall include procedures for interagency consultation (Federal, State, and local), resolution of conflicts, and public consultation as described in paragraphs (a) through (e) of this section. Public consultation procedures will be developed in accordance with the requirements for public involvement in 23 CFR part 450.

(1) The implementation plan revision shall include procedures to be undertaken by MPOs, State departments of transportation, and DOT with State and local air quality agencies and EPA before making conformity determinations, and by State and local air agencies and EPA with MPOs, State departments of transportation, and DOT in developing applicable implementation plans.

(2) Before EPA approves the conformity implementation plan revision required by § 51.390 of this chapter, MPOs and State departments of transportation must provide reasonable opportunity for consultation with State air agencies, local air quality and transportation agencies, DOT, and EPA, including consultation on the issues described in paragraph (c)(1) of this section, before making conformity determinations.

(b) *Interagency consultation procedures: General factors.* (1) States shall provide well-defined consultation procedures in the implementation plan whereby representatives of the MPOs, State and local air quality planning agencies, State and local transportation agencies, and other organizations with responsibilities for developing, submitting, or implementing provisions of an implementation plan required by the CAA must consult with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the transportation plan, the TIP, and associated conformity determinations.

(2) Interagency consultation procedures shall include at a minimum the following general factors and the specific processes in paragraph (c) of this section:

(i) The roles and responsibilities assigned to each agency at each stage in the implementation plan development process and the transportation planning process, including technical meetings;

(ii) The organizational level of regular consultation;

(iii) A process for circulating (or providing ready access to) draft documents and supporting materials for comment before formal adoption or publication;

(iv) The frequency of, or process for convening, consultation meetings and responsibilities for establishing meeting agendas;

(v) A process for responding to the significant comments of involved agencies; and

(vi) A process for the development of a list of the TCMs which are in the applicable implementation plan.

(c) *Interagency consultation procedures: Specific processes.* Interagency consultation procedures shall also include the following specific processes:

(1) A process involving the MPO, State and local air quality planning agencies, State and local transportation agencies, EPA, and DOT for the following:

(i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

(ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP;

(iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see §§ 93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

(iv) Making a determination, as required by § 93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

(v) Identifying, as required by § 93.123(b), projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis;

(vi) Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in § 93.126 or § 93.127; and

(vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by § 93.109(g)(2)(iii).

(2) A process involving the MPO and State and local air quality planning agencies and transportation agencies for the following:

(i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in § 93.104; and

(ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins.

(3) Where the metropolitan planning area does not include the entire nonattainment or maintenance area, a process involving the MPO and the State department of transportation for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area.

(4) A process to ensure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered), including those by recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws, are disclosed to the MPO on a regular basis, and to ensure that any changes to those plans are immediately disclosed.

(5) A process involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws for assuming the location and design concept and scope of projects which are disclosed to the MPO as required by paragraph (c)(4) of this section but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of § 93.122.

(6) A process for consulting on the design, schedule, and funding of research and data collection efforts and regional transportation model development by the MPO (e.g., household/ travel transportation surveys).

(7) A process for providing final documents (including applicable implementation plans and implementation plan revisions) and supporting information to each agency after approval or adoption. This process is applicable to all agencies described in paragraph (a)(1) of this section, including Federal agencies.

(d) *Resolving conflicts.* Conflicts among State agencies or between State agencies and an MPO shall be escalated to the Governor if they cannot be resolved by the heads of the involved agencies. The State air quality has 14

calendar days to appeal to the Governor after the State DOT or MPO has notified the State air agency head of the resolution of his or her comments. The implementation plan revision required by § 51.390 of this chapter shall define the procedures for starting the 14-day clock. If the State air agency appeals to the Governor, the final conformity determination must have the concurrence of the Governor. If the State air agency does not appeal to the Governor within 14 days, the MPO or State department of transportation may proceed with the final conformity determination. The Governor may delegate his or her role in this process, but not to the head or staff of the State or local air agency, State department of transportation, State transportation commission or board, or an MPO.

(e) *Public consultation procedures.* Affected agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a conformity determination for all transportation plans and TIPs, consistent with these requirements and those of 23 CFR 450.316(b). Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.95. In addition, these agencies must specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. These agencies shall also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

§ 93.106 Content of transportation plans.

(a) *Transportation plans adopted after January 1, 1997 in serious, severe, or extreme ozone nonattainment areas and in serious CO nonattainment areas.* If the metropolitan planning area contains an urbanized area population greater than 200,000, the transportation plan must specifically describe the transportation system envisioned for certain future years which shall be called horizon years.

(1) The agency or organization developing the transportation plan may

choose any years to be horizon years, subject to the following restrictions:

(i) Horizon years may be no more than 10 years apart;

(ii) The first horizon year may be no more than 10 years from the base year used to validate the transportation demand planning model;

(iii) If the attainment year is in the time span of the transportation plan, the attainment year must be a horizon year; and

(iv) The last horizon year must be the last year of the transportation plan's forecast period.

(2) For these horizon years:

(i) The transportation plan shall quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts, in accordance with implementation plan provisions and the consultation requirements specified by § 93.105;

(ii) The highway and transit system shall be described in terms of the regionally significant additions or modifications to the existing transportation network which the transportation plan envisions to be operational in the horizon years. Additions and modifications to the highway network shall be sufficiently identified to indicate intersections with existing regionally significant facilities, and to determine their effect on route options between transportation analysis zones. Each added or modified highway segment shall also be sufficiently identified in terms of its design concept and design scope to allow modeling of travel times under various traffic volumes, consistent with the modeling methods for area-wide transportation analysis in use by the MPO. Transit facilities, equipment, and services envisioned for the future shall be identified in terms of design concept, design scope, and operating policies that are sufficient for modeling of their transit ridership. Additions and modifications to the transportation network shall be described sufficiently to show that there is a reasonable relationship between expected land use and the envisioned transportation system; and

(iii) Other future transportation policies, requirements, services, and activities, including intermodal activities, shall be described.

(b) *Moderate areas reclassified to serious.* Ozone or CO nonattainment areas which are reclassified from moderate to serious and have an urbanized population greater than 200,000 must meet the requirements of paragraph (a) of this section within two years from the date of reclassification.

(c) *Transportation plans for other areas.* Transportation plans for other areas must meet the requirements of paragraph (a) of this section at least to the extent it has been the previous practice of the MPO to prepare plans which meet those requirements. Otherwise, the transportation system envisioned for the future must be sufficiently described within the transportation plans so that a conformity determination can be made according to the criteria and procedures of §§ 93.109 through 93.119.

(d) *Savings.* The requirements of this section supplement other requirements of applicable law or regulation governing the format or content of transportation plans.

§ 93.107 Relationship of transportation plan and TIP conformity with the NEPA process.

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 process or other project development studies. Should the NEPA process result in a project with design concept and scope significantly different from that in the transportation plan or TIP, the project must meet the criteria in §§ 93.109 through 93.119 for projects not from a TIP before NEPA process completion.

§ 93.108 Fiscal constraints for transportation plans and TIPs.

Transportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity.

§ 93.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.

(a) In order for each transportation plan, program, and FHWA/FTA project to be found to conform, the MPO and DOT must demonstrate that the applicable criteria and procedures in this subpart are satisfied, and the MPO and DOT must comply with all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity. The criteria for making conformity determinations differ based on the action under review (transportation plans, TIPs, and FHWA/FTA projects), the relevant pollutant(s), and the status of the implementation plan.

(b) Table 1 in this paragraph indicates the criteria and procedures in §§ 93.110 through 93.119 which apply for transportation plans, TIPs, and FHWA/

FTA projects. Paragraphs (c) through (f) of this section explain when the budget, emission reduction, and hot spot tests are required for each pollutant. Paragraph (g) of this section addresses isolated rural nonattainment and maintenance areas. Table 1 follows:

TABLE 1.—CONFORMITY CRITERIA

All Actions at all times: § 93.110 § 93.111 § 93.112	Latest planning assumptions. Latest emissions model. Consultation.
Transportation Plan: § 93.113(b) § 93.118 or § 93.119	TCMs. Emissions budget or Emission reduction.
TIP: § 93.113(c) § 93.118 or § 93.119	TCMs. Emissions budget or Emission reduction.
Project (From a Conforming Plan and TIP): § 93.114	Currently conforming plan and TIP.
§ 93.115	Project from a conforming plan and TIP.
§ 93.116 § 93.117	CO and PM ₁₀ hot spots. PM ₁₀ control measures.
Project (Not From a Conforming Plan and TIP): § 93.113(d) § 93.114	TCMs. Currently conforming plan and TIP.
§ 93.116 § 93.117	CO and PM ₁₀ hot spots. PM ₁₀ control measures.
§ 93.118 or § 93.119	Emissions budget or Emission reduction.

(c) *Ozone nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(1) In ozone nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or

maintenance plan is adequate for transportation conformity purposes.

(2) In ozone nonattainment areas that are required to submit a control strategy implementation plan revision (usually moderate and above areas), the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(3) An ozone nonattainment area must satisfy the emission reduction test for NO_x, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO_x. The implementation plan will be considered to establish a motor vehicle emissions budget for NO_x if the implementation plan or plan submission contains an explicit NO_x motor vehicle emissions budget that is intended to act as a ceiling on future NO_x emissions, and the NO_x motor vehicle emissions budget is a net reduction from NO_x emissions levels in 1990.

(4) Ozone nonattainment areas that have not submitted a maintenance plan and that are not required to submit a control strategy implementation plan revision (usually marginal and below areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by § 93.119; or

(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by § 93.118 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (c)(1) of this section).

(5) Notwithstanding paragraphs (c)(1) and (c)(2) of this section, moderate and above ozone nonattainment areas with

three years of clean data that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements must satisfy one of the following requirements:

(i) The emission reduction tests as required by § 93.119;

(ii) The budget test as required by § 93.118, using the motor vehicle emissions budgets in the submitted control strategy implementation plan (subject to the timing requirements of paragraph (c)(1) of this section); or

(iii) The budget test as required by § 93.118, using the motor vehicle emissions of ozone precursors in the most recent year of clean data as motor vehicle emissions budgets, if such budgets are established by the EPA rulemaking that determines that the area has clean data.

(d) *CO nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in CO nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following:

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot spot test required by § 93.116(a) at all times. Until a CO attainment demonstration or maintenance plan is approved by EPA, FHWA/FTA projects must also satisfy the hot spot test required by § 93.116(b).

(2) In CO nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) Except as provided in paragraph (d)(4) of this section, in CO nonattainment areas the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions

budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(4) CO nonattainment areas that have not submitted a maintenance plan and that are not required to submit an attainment demonstration (e.g., moderate CO areas with a design value of 12.7 ppm or less or not classified CO areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by § 93.119; or

(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by § 93.118 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (d)(2) of this section).

(e) *PM₁₀ nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in *PM₁₀* nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following:

(1) FHWA/FTA projects in *PM₁₀* nonattainment or maintenance areas must satisfy the hot spot test required by § 93.116(a).

(2) In *PM₁₀* nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) In *PM₁₀* nonattainment areas the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes;

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan; or

(iii) If the submitted implementation plan revision is a demonstration of impracticability under CAA section 189(a)(1)(B)(ii) and does not demonstrate attainment.

(f) *NO₂ nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in *NO₂* nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(1) In *NO₂* nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In *NO₂* nonattainment areas the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved

implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(g) *Isolated rural nonattainment and maintenance areas.* This paragraph applies to any nonattainment or maintenance area (or portion thereof) which does not have a metropolitan transportation plan or TIP and whose projects are not part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. This paragraph does not apply to "donut" areas which are outside the metropolitan planning boundary and inside the nonattainment/maintenance area boundary.

(1) FHWA/FTA projects in all isolated rural nonattainment and maintenance areas must satisfy the requirements of §§ 93.110, 93.111, 93.112, 93.113(d), 93.116, and 93.117. Until EPA approves the control strategy implementation plan or maintenance plan for a rural CO nonattainment or maintenance area, FHWA/FTA projects must also satisfy the requirements of § 93.116(b) ("Localized CO and *PM₁₀* violations (hot spots)").

(2) Isolated rural nonattainment and maintenance areas are subject to the budget and/or emission reduction tests as described in paragraphs (c) through (f) of this section, with the following modifications:

(i) When the requirements of §§ 93.118 and 93.119 apply to isolated rural nonattainment and maintenance areas, references to "transportation plan" or "TIP" should be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the rural nonattainment or maintenance area.

(ii) In isolated rural nonattainment and maintenance areas that are subject to § 93.118, FHWA/FTA projects must be consistent with motor vehicle emissions budget(s) for the years in the timeframe of the attainment demonstration or maintenance plan. For years after the attainment year (if a maintenance plan has not been submitted) or after the last year of the maintenance plan, FHWA/FTA projects must satisfy one of the following requirements:

(A) § 93.118;

(B) § 93.119 (including regional emissions analysis for *NO_x* in all ozone nonattainment and maintenance areas, notwithstanding § 93.119(d)(2)); or

(C) As demonstrated by the air quality dispersion model or other air quality modeling technique used in the attainment demonstration or maintenance plan, the FHWA/FTA project, in combination with all other

regionally significant projects expected in the area in the timeframe of the statewide transportation plan, must not cause or contribute to any new violation of any standard in any areas; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area. Control measures assumed in the analysis must be enforceable.

(iii) The choice of requirements in paragraph (g)(2)(ii) of this section and the methodology used to meet the requirements of paragraph (g)(2)(ii)(C) of this section must be determined through the interagency consultation process required in § 93.105(c)(1)(vii) through which the relevant recipients of title 23 U.S.C. or Federal Transit Laws funds, the local air quality agency, the State air quality agency, and the State department of transportation should reach consensus about the option and methodology selected. EPA and DOT must be consulted through this process as well. In the event of unresolved disputes, conflicts may be escalated to the Governor consistent with the procedure in § 93.105(d), which applies for any State air agency comments on a conformity determination.

§ 93.110 Criteria and procedures: Latest planning assumptions.

(a) The conformity determination, with respect to all other applicable criteria in §§ 93.111 through 93.119, must be based upon the most recent planning assumptions in force at the time of the conformity determination. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section.

(b) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations.

(c) The conformity determination for each transportation plan and TIP must discuss how transit operating policies (including fares and service levels) and assumed transit ridership have changed since the previous conformity determination.

(d) The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(e) The conformity determination must use the latest existing information

regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(f) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public consultation required by § 93.105.

§ 93.111 Criteria and procedures: Latest emissions model.

(a) The conformity determination must be based on the latest emission estimation model available. This criterion is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. Where EMFAC is the motor vehicle emissions model used in preparing or revising the applicable implementation plan, new versions must be approved by EPA before they are used in the conformity analysis.

(b) EPA will consult with DOT to establish a grace period following the specification of any new model.

(1) The grace period will be no less than three months and no more than 24 months after notice of availability is published in the **Federal Register**.

(2) The length of the grace period will depend on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the **Federal Register**.

(c) Transportation plan and TIP conformity analyses for which the emissions analysis was begun during the grace period or before the **Federal Register** notice of availability of the latest emission model may continue to use the previous version of the model. Conformity determinations for projects may also be based on the previous model if the analysis was begun during the grace period or before the **Federal Register** notice of availability, and if the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document.

§ 93.112 Criteria and procedures: Consultation.

Conformity must be determined according to the consultation procedures in this subpart and in the applicable implementation plan, and according to the public involvement procedures established in compliance with 23 CFR part 450. Until the implementation plan revision required

by § 51.390 of this chapter is fully approved by EPA, the conformity determination must be made according to § 93.105 (a)(2) and (e) and the requirements of 23 CFR part 450.

§ 93.113 Criteria and procedures: Timely Implementation of TCMs.

(a) The transportation plan, TIP, or any FHWA/FTA project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.

(b) For transportation plans, this criterion is satisfied if the following two conditions are met:

(1) The transportation plan, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the applicable implementation plan which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws, consistent with schedules included in the applicable implementation plan.

(2) Nothing in the transportation plan interferes with the implementation of any TCM in the applicable implementation plan.

(c) For TIPs, this criterion is satisfied if the following conditions are met:

(1) An examination of the specific steps and funding source(s) needed to fully implement each TCM indicates that TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws are on or ahead of the schedule established in the applicable implementation plan, or, if such TCMs are behind the schedule established in the applicable implementation plan, the MPO and DOT have determined that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control, including projects in locations outside the nonattainment or maintenance area.

(2) If TCMs in the applicable implementation plan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs, or if there are no other TCMs in the TIP, if the funds are reallocated to projects in the TIP other than projects which are eligible for Federal funding intended for air quality

improvement projects, e.g., the Congestion Mitigation and Air Quality Improvement Program.

(3) Nothing in the TIP may interfere with the implementation of any TCM in the applicable implementation plan.

(d) For FHWA/FTA projects which are not from a conforming transportation plan and TIP, this criterion is satisfied if the project does not interfere with the implementation of any TCM in the applicable implementation plan.

§ 93.114 Criteria and procedures: Currently conforming transportation plan and TIP.

There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval.

(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements specified in § 93.104.

(b) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the applicable implementation plan, provided that all other relevant criteria of this subpart are satisfied.

§ 93.115 Criteria and procedures: Projects from a plan and TIP.

(a) The project must come from a conforming plan and program. If this criterion is not satisfied, the project must satisfy all criteria in Table 1 of § 93.109(b) for a project not from a conforming transportation plan and TIP. A project is considered to be from a conforming transportation plan if it meets the requirements of paragraph (b) of this section and from a conforming program if it meets the requirements of paragraph (c) of this section. Special provisions for TCMs in an applicable implementation plan are provided in paragraph (d) of this section.

(b) A project is considered to be from a conforming transportation plan if one of the following conditions applies:

(1) For projects which are required to be identified in the transportation plan in order to satisfy § 93.106 ("Content of transportation plans"), the project is specifically included in the conforming transportation plan and the project's design concept and scope have not changed significantly from those which were described in the transportation

plan, or in a manner which would significantly impact use of the facility; or

(2) For projects which are not required to be specifically identified in the transportation plan, the project is identified in the conforming transportation plan, or is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.

(c) A project is considered to be from a conforming program if the following conditions are met:

(1) The project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and the project design concept and scope have not changed significantly from those which were described in the TIP; and

(2) If the TIP describes a project design concept and scope which includes project-level emissions mitigation or control measures, written commitments to implement such measures must be obtained from the project sponsor and/or operator as required by § 93.125(a) in order for the project to be considered from a conforming program. Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the design concept and scope of the project.

(d) TCMs. This criterion is not required to be satisfied for TCMs specifically included in an applicable implementation plan.

§ 93.116 Criteria and procedures: Localized CO and PM₁₀ violations (hot spots).

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO or PM₁₀ violations or increase the frequency or severity of any existing CO or PM₁₀ violations in CO and PM₁₀ nonattainment and maintenance areas. This criterion is satisfied if it is demonstrated that no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

(b) This paragraph applies for CO nonattainment areas as described in § 93.109(d)(1). Each FHWA/FTA project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the

project (in CO nonattainment areas). This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that existing localized CO violations will be eliminated or reduced in severity and number as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

§ 93.117 Criteria and procedures: Compliance with PM₁₀ control measures.

The FHWA/FTA project must comply with PM₁₀ control measures in the applicable implementation plan. This criterion is satisfied if the project-level conformity determination contains a written commitment from the project sponsor to include in the final plans, specifications, and estimates for the project those control measures (for the purpose of limiting PM₁₀ emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.

§ 93.118 Criteria and procedures: Motor vehicle emissions budget.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies as described in § 93.109(c) through (g). This criterion is satisfied if it is demonstrated that emissions of the pollutants or pollutant precursors described in paragraph (c) of this section are less than or equal to the motor vehicle emissions budget(s) established in the applicable implementation plan or implementation plan submission.

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes motor vehicle emissions budget(s), for the last year of the transportation plan's forecast period, and for any intermediate years as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

(1) Until a maintenance plan is submitted:

(i) Emissions in each year (such as milestone years and the attainment year) for which the control strategy implementation plan revision establishes motor vehicle emissions budget(s) must be less than or equal to that year's motor vehicle emissions budget(s); and

(ii) Emissions in years for which no motor vehicle emissions budget(s) are specifically established must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year. For example, emissions in years after the attainment year for which the implementation plan does not establish a budget must be less than or equal to the motor vehicle emissions budget(s) for the attainment year.

(2) When a maintenance plan has been submitted:

(i) Emissions must be less than or equal to the motor vehicle emissions budget(s) established for the last year of the maintenance plan, and for any other years for which the maintenance plan establishes motor vehicle emissions budgets. If the maintenance plan does not establish motor vehicle emissions budgets for any years other than the last year of the maintenance plan, the demonstration of consistency with the motor vehicle emissions budget(s) must be accompanied by a qualitative finding that there are no factors which would cause or contribute to a new violation or exacerbate an existing violation in the years before the last year of the maintenance plan. The interagency consultation process required by § 93.105 shall determine what must be considered in order to make such a finding;

(ii) For years after the last year of the maintenance plan, emissions must be less than or equal to the maintenance plan's motor vehicle emissions budget(s) for the last year of the maintenance plan; and

(iii) If an approved control strategy implementation plan has established motor vehicle emissions budgets for years in the timeframe of the transportation plan, emissions in these years must be less than or equal to the control strategy implementation plan's motor vehicle emissions budget(s) for these years.

(c) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each pollutant or pollutant precursor in § 93.102(b) for which the area is in nonattainment or maintenance and for which the applicable implementation plan (or implementation plan submission) establishes a motor vehicle emissions budget.

(d) Consistency with the motor vehicle emissions budget(s) must be demonstrated by including emissions from the entire transportation system, including all regionally significant projects contained in the transportation plan and all other regionally significant highway and transit projects expected in

the nonattainment or maintenance area in the timeframe of the transportation plan.

(1) Consistency with the motor vehicle emissions budget(s) must be demonstrated with a regional emissions analysis that meets the requirements of §§ 93.122 and 93.105(c)(1)(i).

(2) The regional emissions analysis may be performed for any years in the timeframe of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the transportation plan) and the last year of the plan's forecast period. Emissions in years for which consistency with motor vehicle emissions budgets must be demonstrated, as required in paragraph (b) of this section, may be determined by interpolating between the years for which the regional emissions analysis is performed.

(e) *Motor vehicle emissions budgets in submitted control strategy implementation plan revisions and submitted maintenance plans.* (1) Consistency with the motor vehicle emissions budgets in submitted control strategy implementation plan revisions or maintenance plans must be demonstrated if EPA has declared the motor vehicle emissions budget(s) adequate for transportation conformity purposes, or beginning 45 days after the control strategy implementation plan revision or maintenance plan has been submitted (unless EPA has declared the motor vehicle emissions budget(s) inadequate for transportation conformity purposes). However, submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the period of years addressed by the approved implementation plan.

(2) If EPA has declared an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes, the inadequate budget(s) shall not be used to satisfy the requirements of this section. Consistency with the previously established motor vehicle emissions budget(s) must be demonstrated. If there are no previous approved implementation plans or implementation plan submissions with motor vehicle emissions budgets, the emission reduction tests required by § 93.119 must be satisfied.

(3) If EPA declares an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes more than 45 days after its submission to EPA, and conformity of a

transportation plan or TIP has already been determined by DOT using the budget(s), the conformity determination will remain valid. Projects included in that transportation plan or TIP could still satisfy §§ 93.114 and 93.115, which require a currently conforming transportation plan and TIP to be in place at the time of a project's conformity determination and that projects come from a conforming transportation plan and TIP.

(4) EPA will not find a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan to be adequate for transportation conformity purposes unless the following minimum criteria are satisfied:

(i) The submitted control strategy implementation plan revision or maintenance plan was endorsed by the Governor (or his or her designee) and was subject to a State public hearing;

(ii) Before the control strategy implementation plan or maintenance plan was submitted to EPA, consultation among federal, State, and local agencies occurred; full implementation plan documentation was provided to EPA; and EPA's stated concerns, if any, were addressed;

(iii) The motor vehicle emissions budget(s) is clearly identified and precisely quantified;

(iv) The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins (see § 93.101 for definition); and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

(5) Before determining the adequacy of a submitted motor vehicle emissions budget, EPA will review the State's compilation of public comments and response to comments that are required to be submitted with any implementation plan. EPA will document its consideration of such

comments and responses in a letter to the State indicating the adequacy of the submitted motor vehicle emissions budget.

(6) When the motor vehicle emissions budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by EPA, the MPO and DOT's conformity determinations will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; increase the frequency or severity of any existing violation of any standard; or delay timely attainment of any standard or any required interim emission reductions or other milestones.

§ 93.119 Criteria and procedures: Emission reductions in areas without motor vehicle emissions budgets.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must contribute to emissions reductions. This criterion applies as described in § 93.109(c) through (g). It applies to the net effect of the action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) on motor vehicle emissions from the entire transportation system.

(b) This criterion may be met in moderate and above ozone nonattainment areas that are subject to the reasonable further progress requirements of CAA section 182(b)(1) and in moderate with design value greater than 12.7 ppm and serious CO nonattainment areas if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(2) The emissions predicted in the "Action" scenario are lower than 1990 emissions by any nonzero amount.

(c) This criterion may be met in PM₁₀ and NO₂ nonattainment areas; marginal and below ozone nonattainment areas and other ozone nonattainment areas that are not subject to the reasonable further progress requirements of CAA section 182(b)(1); and moderate with design value less than 12.7 ppm and below CO nonattainment areas if a

regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(2) The emissions predicted in the "Action" scenario are not greater than baseline emissions. Baseline emissions are those estimated to have occurred during calendar year 1990, unless the conformity implementation plan revision required by § 51.390 of this chapter defines the baseline emissions for a PM₁₀ area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(d) *Pollutants.* The regional emissions analysis must be performed for the following pollutants:

(1) VOC in ozone areas;

(2) NO_x in ozone areas, unless the EPA Administrator determines that additional reductions of NO_x would not contribute to attainment;

(3) CO in CO areas;

(4) PM₁₀ in PM₁₀ areas;

(5) Transportation-related precursors of PM₁₀ in PM₁₀ nonattainment and maintenance areas if the EPA Regional Administrator or the director of the State air agency has made a finding that such precursor emissions from within the area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT; and

(6) NO_x in NO₂ areas.

(e) *Analysis years.* The regional emissions analysis must be performed for analysis years that are no more than ten years apart. The first analysis year must be no more than five years beyond the year in which the conformity determination is being made. The last year of transportation plan's forecast period must also be an analysis year.

(f) *"Baseline" scenario.* The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Baseline" scenario in each analysis year. The "Baseline" scenario must be defined for each of the analysis years. The "Baseline" scenario is the future transportation system that will result from current programs, including the following (except that exempt projects listed in § 93.126 and projects exempt from regional emissions

analysis as listed in § 93.127 need not be explicitly considered):

(1) All in-place regionally significant highway and transit facilities, services and activities;

(2) All ongoing travel demand management or transportation system management activities; and

(3) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for hardship acquisition and protective buying); come from the first year of the previously conforming transportation plan and/or TIP; or have completed the NEPA process.

(g) *"Action" scenario.* The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Action" scenario in each analysis year. The "Action" scenario must be defined for each of the analysis years. The "Action" scenario is the transportation system that would result from the implementation of the proposed action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) and all other expected regionally significant projects in the nonattainment area. The "Action" scenario must include the following (except that exempt projects listed in § 93.126 and projects exempt from regional emissions analysis as listed in § 93.127 need not be explicitly considered):

(1) All facilities, services, and activities in the "Baseline" scenario;

(2) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) specifically identified in the proposed transportation plan which will be operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;

(3) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination;

(4) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any

Federal funding or approval, which were adopted and/or funded prior to the date of the last conformity determination, but which have been modified since then to be more stringent or effective;

(5) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and

(6) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(h) *Projects not from a conforming transportation plan and TIP.* For the regional emissions analysis required by paragraphs (b) and (c) of this section, if the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the plan or TIP, the 'Baseline' scenario must include the project with its original design concept and scope, and the 'Action' scenario must include the project with its new design concept and scope.

§ 93.120 Consequences of control strategy implementation plan failures.

(a) *Disapprovals.* (1) If EPA disapproves any submitted control strategy implementation plan revision (with or without a protective finding), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the CAA. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined.

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, then beginning 120 days after such disapproval, only projects in the first three years of the currently conforming transportation plan and TIP may be found to conform. This means that beginning 120 days after disapproval without a protective finding, no transportation plan, TIP, or project not in the first three years of the currently conforming plan and TIP may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined. During the first 120 days

following EPA's disapproval without a protective finding, transportation plan, TIP, and project conformity determinations shall be made using the motor vehicle emissions budget(s) in the disapproved control strategy implementation plan, unless another control strategy implementation plan revision has been submitted and its motor vehicle emissions budget(s) applies for transportation conformity purposes, pursuant to § 93.109.

(3) In disapproving a control strategy implementation plan revision, EPA would give a protective finding where a submitted plan contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

(b) *Failure to submit and incompleteness.* In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan or submission of an incomplete control strategy implementation plan revision (either of which initiates the sanction process under CAA sections 179 or 110(m)), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the CAA, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(c) *Federal implementation plans.* If EPA promulgates a Federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

§ 93.121 Requirements for adoption or approval of projects by other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws.

(a) Except as provided in paragraph (b) of this section, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(1) The project was included in the first three years of the most recently conforming transportation plan and TIP (or the conformity determination's regional emissions analyses), even if conformity status is currently lapsed; and the project's design concept and

scope has not changed significantly from those analyses; or

(2) There is a currently conforming transportation plan and TIP, and a new regional emissions analysis including the project and the currently conforming transportation plan and TIP demonstrates that the transportation plan and TIP would still conform if the project were implemented (consistent with the requirements of §§ 93.118 and/or 93.119 for a project not from a conforming transportation plan and TIP).

(b) In isolated rural nonattainment and maintenance areas subject to § 93.109(g), no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(1) The project was included in the regional emissions analysis supporting the most recent conformity determination for the portion of the statewide transportation plan and TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly; or

(2) A new regional emissions analysis including the project and all other regionally significant projects expected in the nonattainment or maintenance area demonstrates that those projects in the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area would still conform if the project were implemented (consistent with the requirements of §§ 93.118 and/or 93.119 for projects not from a conforming transportation plan and TIP).

§ 93.122 Procedures for determining regional transportation-related emissions.

(a) *General requirements.* (1) The regional emissions analysis required by §§ 93.118 and 93.119 for the transportation plan, TIP, or project not from a conforming plan and TIP must include all regionally significant projects expected in the nonattainment or maintenance area. The analysis shall include FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO as required by § 93.105. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMs and similar projects that are not regionally

significant may also be estimated in accordance with reasonable professional practice.

(2) The emissions analysis may not include for emissions reduction credit any TCMs or other measures in the applicable implementation plan which have been delayed beyond the scheduled date(s) until such time as their implementation has been assured. If the measure has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.

(3) Emissions reduction credit from projects, programs, or activities which require a regulatory action in order to be implemented may not be included in the emissions analysis unless:

- (i) The regulatory action is already adopted by the enforcing jurisdiction;
- (ii) The project, program, or activity is included in the applicable implementation plan;
- (iii) The control strategy implementation plan submission or maintenance plan submission that establishes the motor vehicle emissions budget(s) for the purposes of § 93.118 contains a written commitment to the project, program, or activity by the agency with authority to implement it; or

(iv) EPA has approved an opt-in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe standards), or the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(4) Emissions reduction credit from control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.

(i) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

(ii) The conformity implementation plan revision required in § 51.390 of this chapter must provide that written commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(5) A regional emissions analysis for the purpose of satisfying the requirements of § 93.119 must make the same assumptions in both the "Baseline" and "Action" scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(6) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to establish the emissions budget in the applicable implementation plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the applicable implementation plan, unless modified after interagency consultation according to § 93.105(c)(1)(i) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

(7) Reasonable methods shall be used to estimate nonattainment or maintenance area VMT on off-network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

(b) Regional emissions analysis in serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas must meet the requirements of paragraphs (b)(1) through (3) of this section if their metropolitan planning area contains an urbanized area population over 200,000.

(1) By January 1, 1997, estimates of regional transportation-related emissions used to support conformity determinations must be made at a minimum using network-based travel models according to procedures and methods that are available and in practice and supported by current and available documentation. These procedures, methods, and practices are available from DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency consultation process, as required by § 93.105(c)(1)(i). Network-based travel models must at a minimum satisfy the following requirements:

(i) Network-based travel models must be validated against observed counts (peak and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and

compared to historical trends and other factors, and the results must be documented;

(ii) Land use, population, employment, and other network-based travel model assumptions must be documented and based on the best available information;

(iii) Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable;

(iv) A capacity-sensitive assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak link volumes and speeds and uses speeds based on final assigned volumes;

(v) Zone-to-zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits; and

(vi) Network-based travel models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

(2) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network-based travel model.

(3) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network-based travel models, a factor (or factors) may be developed to reconcile and calibrate the network-based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future VMT. In this factoring process, consideration will be given to differences between HPMS and network-based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count-

based programs and other departures from these procedures are permitted subject to the interagency consultation procedures of § 93.105(c)(1)(i).

(c) In all areas not otherwise subject to paragraph (b) of this section, regional emissions analyses must use those procedures described in paragraph (b) of this section if the use of those procedures has been the previous practice of the MPO. Otherwise, areas not subject to paragraph (b) of this section may estimate regional emissions using any appropriate methods that account for VMT growth by, for example, extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for VMT per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.

(d) *PM₁₀ from construction-related fugitive dust.* (1) For areas in which the implementation plan does not identify construction-related fugitive PM₁₀ as a contributor to the nonattainment problem, the fugitive PM₁₀ emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

(2) In PM₁₀ nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM₁₀ as a contributor to the nonattainment problem, the regional PM₁₀ emissions analysis shall consider construction-related fugitive PM₁₀ and shall account for the level of construction activity, the fugitive PM₁₀ control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

(e) *Reliance on previous regional emissions analysis.* (1) The TIP may be demonstrated to satisfy the requirements of §§ 93.118 ("Motor vehicle emissions budget") or 93.119 ("Emission reductions in areas without motor vehicle emissions budgets") without new regional emissions analysis if the regional emissions analysis already performed for the plan also applies to the TIP. This requires a demonstration that:

(i) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the transportation plan;

(ii) All TIP projects which are regionally significant are included in the transportation plan with design concept and scope adequate to determine their contribution to the transportation plan's regional emissions

at the time of the transportation plan's conformity determination; and

(iii) The design concept and scope of each regionally significant project in the TIP is not significantly different from that described in the transportation plan.

(2) A project which is not from a conforming transportation plan and a conforming TIP may be demonstrated to satisfy the requirements of § 93.118 or § 93.119 without additional regional emissions analysis if allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the transportation plan, and if the project is either:

(i) Not regionally significant; or

(ii) Included in the conforming transportation plan (even if it is not specifically included in the latest conforming TIP) with design concept and scope adequate to determine its contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination, and the design concept and scope of the project is not significantly different from that described in the transportation plan.

§ 93.123 Procedures for determining localized CO and PM₁₀ concentrations (hot-spot analysis).

(a) *CO hot-spot analysis.* (1) The demonstrations required by § 93.116 ("Localized CO and PM₁₀ violations") must be based on quantitative analysis using the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51, Appendix W (Guideline on Air Quality Models). These procedures shall be used in the following cases, unless different procedures developed through the interagency consultation process required in § 93.105 and approved by the EPA Regional Administrator are used:

(i) For projects in or affecting locations, areas, or categories of sites which are identified in the applicable implementation plan as sites of violation or possible violation;

(ii) For projects affecting intersections that are at Level-of-Service D, E, or F, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes related to the project;

(iii) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with highest traffic volumes, as identified in the applicable implementation plan; and

(iv) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with the worst level of service, as identified in the applicable implementation plan.

(2) In cases other than those described in paragraph (a)(1) of this section, the demonstrations required by § 93.116 may be based on either:

(i) Quantitative methods that represent reasonable and common professional practice; or

(ii) A qualitative consideration of local factors, if this can provide a clear demonstration that the requirements of § 93.116 are met.

(b) *PM₁₀ hot-spot analysis.* (1) The hot-spot demonstration required by § 93.116 must be based on quantitative analysis methods for the following types of projects:

(i) Projects which are located at sites at which violations have been verified by monitoring;

(ii) Projects which are located at sites which have vehicle and roadway emission and dispersion characteristics that are essentially identical to those of sites with verified violations (including sites near one at which a violation has been monitored); and

(iii) New or expanded bus and rail terminals and transfer points which increase the number of diesel vehicles congregating at a single location.

(2) Where quantitative analysis methods are not required, the demonstration required by § 93.116 may be based on a qualitative consideration of local factors.

(3) The identification of the sites described in paragraph (b)(1)(i) and (ii) of this section, and other cases where quantitative methods are appropriate, shall be determined through the interagency consultation process required in § 93.105. DOT may choose to make a categorical conformity determination on bus and rail terminals or transfer points based on appropriate modeling of various terminal sizes, configurations, and activity levels.

(4) The requirements for quantitative analysis contained in this paragraph (b) will not take effect until EPA releases modeling guidance on this subject and announces in the *Federal Register* that these requirements are in effect.

(c) *General requirements.* (1) Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the

area substantially affected by the project.

(2) Hot-spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. The future background concentration should be estimated by multiplying current background by the ratio of future to current traffic and the ratio of future to current emission factors.

(3) Hot-spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.

(4) PM₁₀ or CO mitigation or control measures shall be assumed in the hot-spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by § 93.125(a).

(5) CO and PM₁₀ hot-spot analyses are not required to consider construction-related activities which cause temporary increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established "Guideline" methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.

§ 93.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).

(a) In interpreting an applicable implementation plan (or implementation plan submission) with respect to its motor vehicle emissions budget(s), the MPO and DOT may not infer additions to the budget(s) that are not explicitly intended by the implementation plan (or submission). Unless the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the milestone, attainment, or maintenance requirement and explicitly states an intent that some or all of this additional amount should be available to the MPO and DOT in the emissions budget for conformity purposes, the MPO may not interpret the budget to be higher than the implementation plan's estimate of future emissions. This applies in particular to applicable implementation plans (or submissions) which demonstrate that after implementation of control measures in the implementation plan:

(1) Emissions from all sources will be less than the total emissions that would

be consistent with a required demonstration of an emissions reduction milestone;

(2) Emissions from all sources will result in achieving attainment prior to the attainment deadline and/or ambient concentrations in the attainment deadline year will be lower than needed to demonstrate attainment; or

(3) Emissions will be lower than needed to provide for continued maintenance.

(b) If an applicable implementation plan submitted before November 24, 1993, demonstrates that emissions from all sources will be less than the total emissions that would be consistent with attainment and quantifies that "safety margin," the State may submit an implementation plan revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such an implementation plan revision, once it is endorsed by the Governor and has been subject to a public hearing, may be used for the purposes of transportation conformity before it is approved by EPA.

(c) A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the implementation plan establishes appropriate mechanisms for such trades.

(d) If the applicable implementation plan (or implementation plan submission) estimates future emissions by geographic subarea of the nonattainment area, the MPO and DOT are not required to consider this to establish subarea budgets, unless the applicable implementation plan (or implementation plan submission) explicitly indicates an intent to create such subarea budgets for the purposes of conformity.

(e) If a nonattainment area includes more than one MPO, the implementation plan may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

§ 93.125 Enforceability of design concept and scope and project-level mitigation and control measures.

(a) Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws, FHWA, or FTA must obtain from the project sponsor

and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local PM₁₀ or CO impacts. Before a conformity determination is made, written commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and are included in the project design concept and scope which is used in the regional emissions analysis required by §§ 93.118 ("Motor vehicle emissions budget") and 93.119 ("Emission reductions in areas without motor vehicle emissions budgets") or used in the project-level hot-spot analysis required by § 93.116.

(b) Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(c) The implementation plan revision required in § 51.390 of this chapter shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(d) If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of § 93.116, emission budget requirements of § 93.118, and emission reduction requirements of § 93.119 are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under § 93.105. The MPO and DOT must find that the transportation plan and TIP still satisfy the applicable requirements of §§ 93.118 and/or 93.119 and that the project still satisfies the requirements of § 93.116, and therefore that the conformity determinations for the transportation plan, TIP, and project are still valid. This finding is subject to the applicable public consultation requirements in § 93.105(e) for conformity determinations for projects.

§ 93.126 Exempt projects.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 2 of this section are exempt from the requirement to determine

conformity. Such projects may proceed toward implementation even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 2 of this section is not exempt if the MPO in consultation

with other agencies (see § 93.105(c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any

reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation. Table 2 follows:

TABLE 2.—EXEMPT PROJECTS

Safety

Railroad/highway crossing.
Hazard elimination program.
Safer non-Federal-aid system roads.
Shoulder improvements.
Increasing sight distance.
Safety improvement program.
Traffic control devices and operating assistance other than signalization projects.
Railroad/highway crossing warning devices.
Guardrails, median barriers, crash cushions.
Pavement resurfacing and/or rehabilitation.
Pavement marking demonstration.
Emergency relief (23 U.S.C. 125).
Fencing.
Skid treatments.
Safety roadside rest areas.
Adding medians.
Truck climbing lanes outside the urbanized area.
Lighting improvements.
Widening narrow pavements or reconstructing bridges (no additional travel lanes).
Emergency truck pullovers.

Mass Transit

Operating assistance to transit agencies.
Purchase of support vehicles.
Rehabilitation of transit vehicles¹.
Purchase of office, shop, and operating equipment for existing facilities.
Purchase of operating equipment for vehicles (e.g., radios, fareboxes, lifts, etc.).
Construction or renovation of power, signal, and communications systems.
Construction of small passenger shelters and information kiosks.
Reconstruction or renovation of transit buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures).
Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way.
Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet¹.
Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR part 771.

Air Quality

Continuation of ride-sharing and van-pooling promotion activities at current levels.
Bicycle and pedestrian facilities.

Other

Specific activities which do not involve or lead directly to construction, such as:
Planning and technical studies.
Grants for training and research programs.
Planning activities conducted pursuant to titles 23 and 49 U.S.C.
Federal-aid systems revisions.
Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.
Noise attenuation.
Emergency or hardship advance land acquisitions (23 CFR 712.204(d)).
Acquisition of scenic easements.
Plantings, landscaping, etc.
Sign removal.
Directional and informational signs.
Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).
Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.

Note: ¹In PM₁₀ nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

§ 93.127 Projects exempt from regional emissions analyses.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 3 of this section are exempt from regional emissions analysis requirements. The local effects of these

projects with respect to CO or PM₁₀ concentrations must be considered to determine if a hot-spot analysis is required prior to making a project-level conformity determination. These projects may then proceed to the project development process even in the absence of a conforming transportation

plan and TIP. A particular action of the type listed in Table 3 of this section is not exempt from regional emissions analysis if the MPO in consultation with other agencies (see § 93.105(c)(1)(iii)), the EPA, and the FHWA (in the

case of a highway project) or the FTA that it has potential regional impacts for
 (in the case of a transit project) concur any reason. Table 3 follows:

TABLE 3.—PROJECTS EXEMPT FROM REGIONAL EMISSIONS ANALYSES

Intersection channelization projects.
 Intersection signalization projects at individual intersections.
 Interchange reconfiguration projects.
 Changes in vertical and horizontal alignment.
 Truck size and weight inspection stations.
 Bus terminals and transfer points.

§ 93.128 Traffic signal synchronization projects.

Traffic signal synchronization projects may be approved, funded, and implemented without satisfying the requirements of this subpart. However,

all subsequent regional emissions analyses required by §§ 93.118 and 93.119 for transportation plans, TIPs, or projects not from a conforming plan and TIP must include such regionally

significant traffic signal synchronization projects.

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