

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

West Virginia Division of Environmental Protection
AGENCY: Office of Air Quality TITLE NUMBER: 45CSR36
RULE TYPE: Legislative; CITE AUTHORITY W. Va. Code §§22-5-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 45CSR36

TITLE OF RULE BEING PROPOSED: "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, To Applicable Air
Quality Implementation Plans".

DATE OF PUBLIC HEARING: August 9, 1994 TIME: 9:00 a.m.

LOCATION OF PUBLIC HEARING: Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311

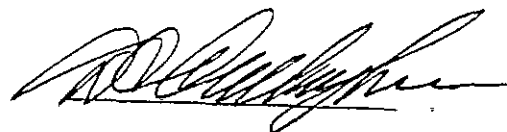
COMMENTS LIMITED TO: ORAL WRITTEN, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Same as above.

The Department requests that persons wishing to make
comments at the hearing make an effort to submit written
comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL



13.60

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 ACT, TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS (TRANSPORTATION CONFORMITY)

Statement of Circumstance

40 CFR Part 51, Subpart T, Section 51.396 requires that states adopt criteria and procedures for making transportation conformity determinations that are consistent with the federal transportation conformity 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 Act". West Virginia is required to adopt transportation conformity procedures and requirements consistent with the federal rule to meet the State's obligation under the Clean Air Act, as amended.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 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 Act, 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	Thereafter
Estimated Total Cost	\$ 56,000	\$ ----	\$ -0-	\$ 56,000	\$ 60,000
Personal Services	50,000	----	-0-	50,000	54,000
Current Expense	6,000	----	-0-	6,000	6,000
Repairs and Alterations	----	----	-0-	----	----
Equipment	----	----	-0-	----	----
Other	----	----	-0-	----	----

2. **Explanation of above estimates:** The Office of Air Quality of the DEP projects that the proposed rule will require 1.0 man-year of professional staff time and the commitment of a small portion of clerical support for DEP/OAQ administration. Some office expenses and travel will also be involved. In addition, professional and clerical staff within the WV DOT and affected Metropolitan Planning Organizations (MPO's) will be involved completing conformity determinations. However, these organizations are currently required to perform conformity determinations under the federal Transportation Conformity rules (40 CFR 93, Subpart A).

3. **Objectives of these rules:** This rule sets forth state policy, criteria, and procedures for demonstrating and assuring conformity of such activities to all applicable implementation plans developed pursuant to Section 110 and part D of the CAA. Proposed Rule 45CSR36 adopts the federal Transportation Conformity Rules, 40 CFR 93, Subpart A, by reference.

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 cancelled under a finding of non-conformity. The 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. It should be noted, however, that the economic impact of failure to comply with Clean Air Act Transportation Conformity requirements could have far greater negative economic impact in these areas.

C. **Economic impact on citizens/public at large.**

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

Date: July 6, 1994

Signature of agency head or authorized representative:



G. Dale Farley
Chief, Office of Air Quality

**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, TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS
(TRANSPORTATION CONFORMITY)**

Summary

New Rule: This rule applies only to areas which are designated nonattainment or maintenance areas under the Clean Air Act, as amended. 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 Act". 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. 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.). West Virginia is required to adopt transportation conformity procedures and requirements consistent with the federal rule to meet the State's obligation under the CAA, as amended.

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. All transportation plans, programs, and projects developed, funded or approved in West Virginia, under title 23 U.S.C. or the federal transit act, 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 use the consultation procedures specified in memorandums of understanding established among WVDOT, WVDEP and Metropolitan Planning Organizations (MPO's) which are located in designated air quality nonattainment and maintenance areas.

TITLE 45

**LEGISLATIVE RULE
BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY**

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, 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". 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 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Incorporation by Reference - Federal Counterpart Regulations - This rule is necessary for the State to fulfill its responsibility under the Clean Air Act, as amended, and, with the exceptions noted, incorporates by reference the federal counterpart rule [40 CFR Part 93, Subpart A], in accordance with the Director's recommendation.

1.6. Determination of Stringency - Federal Counterpart Regulations - The Director has determined that this rule is no more or no less stringent than the federal counterpart rule.

1.7. Constitutional Takings Determination - The Director has determined that this rule will not result in the constitutional taking of real property.

§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" or "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 contained 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 provisions of 40 CFR Part 93, Subpart A, including associated criteria, procedures and requirements contained in 40 CFR Part 93, Subpart A, as in effect on December 27, 1993 for the purpose of meeting the requirements of 40 CFR Part 51, Subpart T, Section 51.396.

§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, 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 use the consultation procedures specified below.

§45-36-5. Consultation.

5.1 The consultation requirements of CFR 40 Part 93, Subpart A, Section 93.105 are hereby addressed and replaced 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). These agreements address and comply with the requirements of CFR 40 Part 93, Subpart A, Section 93.105. See §45-36-7.

§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.

§45-36-7. Memorandums of Understanding (MOU's)

7.1 MOU among WVDEP, WVDOT and the Brooke-Hancock-Jefferson Metropolitan Planning Commission (BHI)

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

Federal regulations (40 CFR §51.396) 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 (BHI), herein referred to as the "Metropolitan Planning Organization" or "MPO". BHI 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 and when necessary, the text will specify which procedures apply to the primary responsible MPO (BHI), other responsible MPO's or adjacent MPO's.

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". 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 related Transportation Improvement Program (TIP); and 3) conformity analysis for new or amended 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. WVDEP will provide reasonable opportunity for comment from the MPO and WVDOT 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 (TCM's) 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.

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 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 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.

Some nonattainment areas or maintenance areas may have no specific MPO charged with transportation planning responsibilities. Under that circumstance, WVDOT will assume the responsibilities normally designated for the MPO in this

memorandum of understanding.

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 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 (TCM's) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, in the event that WVDEP proposes to include TCM's in a SIP revision, WVDEP 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 items which must be addressed by the consultation process. The process for handling each of these items, numbered consistently with the federal regulation, is as follows:

- 1) i) Evaluating and choosing a model 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. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analysis. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

- ii) Determining which projects are regionally significant and which have had significant change in design concept and scope from the Plan or TIP:

In preparing a Plan or TIP, the MPO, with project input from WVDOT, will determine which projects to include in the plan or tip.

- iii) It is expected that any project consistent with 40 CFR §93.134 or 40 CFR §93.135 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) Historically, there have not been any TCM's pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCM's are not applicable at this time. However, if WVDEP proposes to include TCM's 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) 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) 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 to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

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 any project consistent with 40 CFR §93.134 or 40 CFR §93.135 will not have significant regional air quality impacts. However, any of the parties may initiate a review of the project impact if there is reason to believe that a particular project warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the project(s) may have significant impact. 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; adjacent MPO's; WVDOT; and WVDEP for transportation activities that cross the borders of MPO's or nonattainment areas or basins. The parties of this agreement and any party so notified above, may 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 assist in selecting a suitable place and time for the meeting and have representatives 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. 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.

- 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 proposal 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. 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 One Consultation and Level Two Consultation, the issue may be moved to a Level Three Consultation. Upon receipt of the written response to comments generated from Level Two Consultation, the Director of WVDEP 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.

Public Consultation

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.

This Memorandum of Understanding becomes effective on the date of the final signature below:

Date: _____
David C. Callaghan, Director
WV Division of Environmental Protection

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

Date: _____
John R. Beck, Executive Director
Brooke-Hancock-Jefferson Metropolitan
Planning Commission

7.2 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 §51.396) 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 MPO's and when necessary, the text will specify which procedures apply to the primary responsible MPO (KYOVA), other responsible MPO's or adjacent MPO's.

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". 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 related Transportation Improvement Program (TIP); and 3) conformity analysis for new or amended

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. WVDEP will provide reasonable opportunity for comment from the MPO and WVDOT 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 (TCM's) 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.

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 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 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.

Some nonattainment areas or maintenance areas may have no specific MPO charged with transportation planning responsibilities. Under that circumstance, WVDOT will assume the responsibilities normally designated for the MPO in this memorandum of understanding.

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 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 (TCM's) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, in the event that WVDEP proposes to include TCM's in a SIP revision, WVDEP 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 items which must be addressed by the consultation process. The process for handling each of these items, numbered consistently with the federal regulation, is as follows:

- 1) i) Evaluating and choosing a model 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. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analysis. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

- ii) Determining which projects are regionally significant and which have had significant change in design concept and scope from the Plan or TIP:

In preparing a Plan or TIP, the MPO, with project input from WVDOT, will determine which projects to include in the plan or tip.

- iii) It is expected that any project consistent with 40 CFR §93.134 or 40 CFR §93.135 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) Historically, there have not been any TCM's pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCM's are not applicable at this time. However, if WVDEP proposes to include TCM's 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) 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) 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 to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

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 any project consistent with 40 CFR §93.134 or 40 CFR §93.135 will not have significant regional air quality impacts. However, any of the parties may initiate a review of the project impact if there is reason to believe that a particular project warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the project(s) may have significant impact. 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; adjacent MPO's; WVDOT; and WVDEP for transportation activities that cross the borders of MPO's or nonattainment areas or basins. The parties of this agreement and any party so notified above, may 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 assist in selecting a suitable place and time for the meeting and have representatives 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. 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.

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 proposal 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. 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 One Consultation and Level Two Consultation, the issue may be moved to a Level Three Consultation. Upon receipt of the written response to comments generated from Level Two Consultation, the Director of WVDEP 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.

Public Consultation

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.

This Memorandum of Understanding becomes effective on the date of the final signature below:

Date: _____
David C. Callaghan, Director
WV Division of Environmental Protection

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

Date: _____
Michele P. Craig, Executive Director
KYOVA Interstate Planning Commission

7.3 MOU among WVDEP, WVDOT and the Regional Intergovernmental Council (RIC)

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING

Parties: WVDEP, WVDOT and RIC

Federal regulations (40 CFR §51.396) 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 Regional Intergovernmental Council (RIC), herein referred to as the "Metropolitan Planning Organization" or "MPO", 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 MPO's and when necessary, the text will specify which procedures apply to the primary responsible MPO (RIC), other responsible MPO's or adjacent MPO's.

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". 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 related Transportation Improvement Program (TIP); and 3) conformity analysis for new or amended 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. WVDEP will provide reasonable opportunity for comment from the MPO and WVDOT 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 (TCM's) 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.

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 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 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.

Some nonattainment areas or maintenance areas may have no specific MPO charged with transportation planning responsibilities. Under that circumstance, WVDOT will assume the responsibilities normally designated for the MPO in this memorandum of understanding.

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 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 (TCM's) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, in the event that WVDEP proposes to include TCM's in a SIP revision, WVDEP 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 items which must be addressed by the consultation process. The process for handling each of these items, numbered consistently with the federal regulation, is as follows:

- 1) i) Evaluating and choosing a model 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. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analysis. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

- ii) Determining which projects are regionally significant and which have had significant change in design concept and scope from the Plan or TIP:

In preparing a Plan or TIP, the MPO, with project input from WVDOT, will determine which projects to include in the plan or tip.

- iii) It is expected that any project consistent with 40 CFR §93.134 or 40 CFR §93.135 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) Historically, there have not been any TCM's pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCM's are not applicable at this time. However, if WVDEP proposes to include TCM's 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) 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) 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 to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

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 any project consistent with 40 CFR §93.134 or 40 CFR §93.135 will not have significant regional air quality impacts. However, any of the parties may initiate a review of the project impact if there is reason to believe that a particular project warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the project(s) may have significant impact. 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; adjacent MPO's; WVDOT; and WVDEP for transportation activities that cross the borders of MPO's or nonattainment areas or basins. The parties of this agreement and any party so notified above, may 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 assist in selecting a suitable place and time for the meeting and have representatives 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. 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.

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 proposal 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. 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 One Consultation and Level Two Consultation, the issue may be moved to a Level Three Consultation. Upon receipt of the written response to comments generated from Level Two Consultation, the Director of WVDEP 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.

Public Consultation

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.

This Memorandum of Understanding becomes effective on the date of the final signature below:

Date: _____
David C. Callaghan, Director
WV Division of Environmental Protection

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

Date: _____
John L. Romano, Executive Director
Regional Intergovernmental Council

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

TRANSPORTATION CONFORMITY
MEMORANDUM OF UNDERSTANDING

Parties: WVDEP, WVDOT and WWW

Federal regulations (40 CFR §51.396) 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 MPO's and when necessary, the text will specify which procedures apply to the primary responsible MPO (WWW), other responsible MPO's or adjacent MPO's.

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". 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 related Transportation Improvement Program (TIP); and 3) conformity analysis for new or amended

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. WVDEP will provide reasonable opportunity for comment from the MPO and WVDOT 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 (TCM's) 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.

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 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 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.

Some nonattainment areas or maintenance areas may have no specific MPO charged with transportation planning responsibilities. Under that circumstance, WVDOT will assume the responsibilities normally designated for the MPO in this memorandum of understanding.

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 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 (TCM's) in the SIP relating to the nonattainment or maintenance area and none are anticipated. However, in the event that WVDEP proposes to include TCM's in a SIP revision, WVDEP 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 items which must be addressed by the consultation process. The process for handling each of these items, numbered consistently with the federal regulation, is as follows:

- 1) i) Evaluating and choosing a model 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. Directives from USEPA and USDOT will form the foundation for making decisions regarding emissions analysis. All parties will use the most current USEPA guidance and policy as the primary determining factor for making such choices.

- ii) Determining which projects are regionally significant and which have had significant change in design concept and scope from the Plan or TIP:

In preparing a Plan or TIP, the MPO, with project input from WVDOT, will determine which projects to include in the plan or tip.

- iii) It is expected that any project consistent with 40 CFR §93.134 or 40 CFR §93.135 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) Historically, there have not been any TCM's pertaining to the designated nonattainment/maintenance area in the SIP. Therefore, consultation requirements relating to timely implementation of TCM's are not applicable at this time. However, if WVDEP proposes to include TCM's 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) 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) 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 to WVDEP and WVDOT. Each project which is exempt under 40 CFR §93.134 or 40 CFR §93.135 will be so noted.

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 any project consistent with 40 CFR §93.134 or 40 CFR §93.135 will not have significant regional air quality impacts. However, any of the parties may initiate a review of the project impact if there is reason to believe that a particular project warrants closer scrutiny. Level One contacts of the three parties will evaluate relevant information and attempt to reach a consensus on whether the project(s) may have significant impact. 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; adjacent MPO's; WVDOT; and WVDEP for transportation activities that cross the borders of MPO's or nonattainment areas or basins. The parties of this agreement and any party so notified above, may 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 assist in selecting a suitable place and time for the meeting and have representatives 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. 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.

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 proposal 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. 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 One Consultation and Level Two Consultation, the issue may be moved to a Level Three Consultation. Upon receipt of the written response to comments generated from Level Two Consultation, the Director of WVDEP 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.

Public Consultation

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.

This Memorandum of Understanding becomes effective on the date of the final signature below:

Date: _____
David C. Callaghan, Director
WV Division of Environmental Protection

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

Date: _____
James P. Mylott, Executive Director
Wood-Washington-Wirt Interstate
Planning Commission

TABLE 2.—EXEMPT PROJECTS—Continued

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.

¹ PM₁₀ nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

§ 51.462 Projects exempt from regional emissions analyses.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 3 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 is not exempt from regional emissions analysis if the MPO in consultation with other agencies (see § 51.402(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 potential regional impacts for any reason.

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.

§ 51.464 Special provisions for nonattainment areas which are not required to demonstrate reasonable further progress and attainment.

(a) *Application.* This section applies in the following areas:

- (1) Rural transport ozone nonattainment areas;
- (2) Marginal ozone areas;
- (3) Submarginal ozone areas;
- (4) Transitional ozone areas;
- (5) Incomplete data ozone areas;
- (6) Moderate CO areas with a design value of 12.7 ppm or less; and
- (7) Not classified CO areas.

(b) *Default conformity procedures.*

The criteria and procedures in §§ 51.436 through 51.440 will remain in effect throughout the control strategy period for transportation plans, TIPs, and

projects (not from a conforming plan and TIP) in lieu of the procedures in §§ 51.428 through 51.432, except as otherwise provided in paragraph (c) of this section.

(c) *Optional conformity procedures.* The State or MPO may voluntarily develop an attainment demonstration and corresponding motor vehicle emissions budget like those required in areas with higher nonattainment classifications. In this case, the State must submit an implementation plan revision which contains that budget and attainment demonstration. Once EPA has approved this implementation plan revision, the procedures in §§ 51.428 through 51.432 apply in lieu of the procedures in §§ 51.436 through 51.440.

3. A new part 93 is added to read as follows:

PART 93—DETERMINING 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

Sec.

- 93.100 Purpose.
- 93.101 Definitions.
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Sec.

- 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 (transportation plan).
- 93.119 Criteria and procedures: Motor vehicle emissions budget (TIP).
- 93.120 Criteria and procedures: Motor vehicle emissions budget (project not from a plan and TIP).
- 93.121 Criteria and procedures: Localized CO violations (hot spots) in the interim period.
- 93.122 Criteria and procedures: Interim period reductions in ozone and CO areas (transportation plan).
- 93.123 Criteria and procedures: Interim period reductions in ozone and CO areas (TIP).
- 93.124 Criteria and procedures: Interim period reductions for ozone and CO areas (project not from a plan and TIP).
- 93.125 Criteria and procedures: Interim period reductions for PM₁₀ and NO₂ areas (transportation plan).
- 93.126 Criteria and procedures: Interim period reductions for PM₁₀ and NO₂ areas (TIP).
- 93.127 Criteria and procedures: Interim period reductions for PM₁₀ and NO₂ areas (project not from a plan and TIP).
- 93.128 Transition from the interim period to the control strategy period.
- 93.129 Requirements for adoption or approval of projects by other recipients of funds designated under title 23 U.S.C. or the Federal Transit Act.
- 93.130 Procedures for determining regional transportation-related emissions.
- 93.131 Procedures for determining localized CO and PM₁₀ concentrations (hot-spot analysis).
- 93.132 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).
- 93.133 Enforceability of design concept and scope and project-level mitigation and control measures.
- 93.134 Exempt projects.
- 93.135 Projects exempt from regional emissions analyses.
- 93.136 Special provisions for nonattainment areas which are not required to demonstrate reasonable further progress and attainment.

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

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

§ 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 Act (49 U.S.C. 1601 *et seq.*). 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.

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.

Control strategy implementation plan revision is the applicable 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).

Control strategy period with respect to particulate matter less than 10 microns in diameter (PM₁₀), carbon monoxide (CO), nitrogen dioxide (NO₂), and/or ozone precursors (volatile organic compounds and oxides of nitrogen), means that period of time after EPA approves control strategy implementation plan revisions containing strategies for controlling PM₁₀, NO₂, CO, and/or ozone, as appropriate. This period ends when a State submits and EPA approves a request under section 107(d) of the CAA for redesignation to an attainment area.

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 interchange, 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.

FTA means the Federal Transit Administration of DOT.

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

Highway project is an undertaking to improve 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. Pollutant concentrations to be estimated should be based on the total emissions burden which may result from the implementation of a single, specific project, summed together with future background concentrations (which can be estimated using the ratio of future to current traffic multiplied by the ratio of future to current emission factors) expected in the area. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project. 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.

Incomplete data area means any ozone nonattainment area which EPA has classified, in 40 CFR part 81, as an incomplete data area.

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.

ISTEA means the Intermodal Surface Transportation Efficiency Act of 1991.

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 period with respect to a pollutant or pollutant precursor means

that period of time beginning when a State submits and EPA approves a request under section 107(d) of the CAA for redesignation to an attainment area, and lasting for 20 years, unless the applicable implementation plan specifies that the maintenance period shall last for more than 20 years.

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. 1607. 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 a revision to the applicable implementation plan (or in an implementation plan revision which was endorsed by the Governor or his or her designee, subject to a public hearing, and submitted to EPA, but not yet approved by EPA) for a certain date for the purpose of meeting reasonable further progress milestones or attainment or maintenance demonstrations, for any criteria pollutant or its precursors, allocated by the applicable implementation plan to highway and transit vehicles. The applicable implementation plan for an ozone nonattainment area may also designate a motor vehicle emissions budget for oxides of nitrogen (NO_x) for a reasonable further progress milestone year if the applicable implementation plan demonstrates that this NO_x budget will be achieved with measures in the implementation plan (as an implementation plan must do for VOC milestone requirements). The applicable implementation plan for an ozone nonattainment area includes a NO_x budget if NO_x reductions are being substituted for reductions in volatile organic compounds in milestone years required for reasonable further progress.

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.

Not classified area means any carbon monoxide nonattainment area which EPA has not classified as either moderate or serious.

Phase II of the interim period with respect to a pollutant or pollutant precursor means that period of time after the effective date of this rule, lasting until the earlier of the following: submission to EPA of the relevant control strategy implementation plan revisions which have been endorsed by the Governor (or his or her designee) and have been subject to a public hearing, or the date that the Clean Air Act requires relevant control strategy implementation plans to be submitted to EPA, provided EPA has notified the State, MPO, and DOT of the State's failure to submit any such plans. The precise end of Phase II of the interim period is defined in § 93.128.

Project means a highway project or transit project.

Recipient of funds designated under title 23 U.S.C. or the Federal Transit Act means any agency at any level of State, county, city, or regional government that routinely receives title 23 U.S.C. or Federal Transit Act 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.

Rural transport ozone nonattainment area means an ozone nonattainment

area that does not include, and is not adjacent to, any part of a Metropolitan Statistical Area or, where one exists, a Consolidated Metropolitan Statistical Area (as defined by the United States Bureau of the Census) and is classified under Clean Air Act section 182(h) as a rural transport area.

Standard means a national ambient air quality standard.

Submarginal area means any ozone nonattainment area which EPA has classified as submarginal in 40 CFR part 81.

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.

Transitional area means any ozone nonattainment area which EPA has classified as transitional in 40 CFR part 81.

Transitional period with respect to a pollutant or pollutant precursor means that period of time which begins after submission to EPA of the relevant control strategy implementation plan which has been endorsed by the Governor (or his or her designee) and has been subject to a public hearing. The transitional period lasts until EPA takes final approval or disapproval action on the control strategy implementation plan submission or finds it to be incomplete. The precise beginning and end of the transitional period is defined in § 93.128.

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 § 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 above, 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.

§ 93.102 Applicability.

(a) *Action applicability.* (1) Except as provided for in paragraph (c) of this section or § 93.134, conformity determinations are required for:

(i) The adoption, acceptance, approval or support of transportation plans 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 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 rule for individual projects which are not FHWA/FTA projects. However, § 93.129 applies to such projects if they are regionally significant.

(b) *Geographic applicability.* (1) 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.

(2) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀).

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

(i) Volatile organic compounds and nitrogen oxides in ozone areas (unless

the Administrator determines under section 182(f) of the CAA that additional reductions of NO_x would not contribute to attainment);

(ii) Nitrogen oxides in nitrogen dioxide areas; and

(iii) Volatile organic compounds, nitrogen oxides, and PM₁₀ in PM₁₀ areas if:

(A) During the interim period, 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

(B) During the transitional, control strategy, and maintenance periods, 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.

(c) *Limitations.* (1) Projects subject to this regulation for which the NEPA process and a conformity determination have been completed by FHWA or FTA may proceed toward implementation without further conformity determinations if one of the following major steps has occurred within the past three years: 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. 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 no major steps to advance the project have occurred within the past three years.

§ 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) *Transportation plans.* (1) Each new transportation plan must be found 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 MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in § 93.134. The conformity determination must be based on the transportation plan and the revision taken as a whole.

(3) Conformity of existing transportation plans must be redetermined within 18 months of the following, or the existing conformity determination will lapse:

(i) November 24, 1993;

(ii) EPA approval of an implementation plan revision which:

(A) Establishes or revises a transportation-related emissions budget (as required by CAA sections 175A(a), 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); or

(B) Adds, deletes, or changes TCMs; and

(iii) EPA promulgation of an implementation plan which establishes or revises a transportation-related emissions budget or adds, deletes, or changes TCMs.

(4) In any case, conformity determinations must be made no less frequently than every three years, or the existing conformity determination will lapse.

(c) *Transportation improvement programs.* (1) A new TIP must be found 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 § 93.134.

(3) After an MPO adopts a new or revised transportation plan, conformity must be redetermined by the MPO and DOT within six months from the date of adoption of the plan, unless the new or revised plan merely adds or deletes exempt projects listed in § 93.134. Otherwise, the existing conformity determination for the TIP will lapse.

(4) In any case, conformity determinations must be made no less frequently than every three years or the existing conformity determination 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 none of the following major steps has occurred within the past three years: 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.

§ 93.105 Consultation.

(a) *General.* The implementation plan revision required under § 51.396 of this chapter will include procedures for interagency consultation (Federal, State, and local), and resolution of conflicts.

(1) The implementation plan revision will 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 the implementation plan revision is approved by EPA, MPOs and State departments of transportation before making conformity determinations 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.

(b) *Interagency consultation procedures: General factors.* (1) States will provide in the implementation plan well-defined consultation procedures 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 will include at a minimum the general factors listed below 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 will 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 §§ 93.134 and 93.135) 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 § 93.131(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

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

(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 Act, 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 Act 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 § 93.130.

(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 (including Federal agencies) for providing final documents (including applicable implementation plans and implementation plan revisions) and supporting information to each agency after approval or adoption.

(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 agency 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 § 93.106 of this chapter shall define the procedures for starting of 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 prior to taking formal action on a conformity determination for all transportation plans and TIPs, consistent with the requirements of 23 CFR part 450. 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, 1995 in serious, severe, or extreme ozone nonattainment areas and in serious carbon monoxide nonattainment areas.* 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.

(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 § 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 sufficiently to allow modeling of their transit ridership. The description of additions and modifications to the transportation network shall also be sufficiently specific 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 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, transportation plans must describe the transportation system envisioned for the future specifically enough to allow determination of conformity according to the criteria and procedures of §§ 93.109 through 93.127.

(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 93.127 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 to be found to conform, each transportation plan, program, and FHWA/FTA project must satisfy the applicable criteria and procedures in §§ 93.110 through 93.127 as listed in Table 1 in paragraph (b) of this section, and must comply with all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity determination requirements. The criteria for making conformity determinations differ based on the action under review (transportation plans, TIPs, and FHWA/FTA projects), the time period in which the conformity determination is made, and the relevant pollutant.

(b) The following table indicates the criteria and procedures in §§ 93.110

through 93.127 which apply for each action in each time period.

TABLE 1.—CONFORMITY CRITERIA

Action	Criteria
All Periods	
Transportation Plan —	§§ 93.110, 93.111, 93.112, 93.113(b).
TIP —	§§ 93.110, 93.111, 93.112, 93.113(c).
Project (From a conforming plan and TIP).	§§ 93.110, 93.111, 93.112, 93.114, 93.115, 93.116, 93.117.
Project (Not from a conforming plan and TIP).	§§ 93.110, 93.111, 93.112, 93.113(c), 93.114, 93.116, 93.117.
Phase II of the Interim Period	
Transportation Plan —	§§ 93.122, 93.125.
TIP —	§§ 93.123, 93.125.
Project (From a conforming plan and TIP).	§ 93.121.
Project (Not from a conforming plan and TIP).	§§ 93.121, 93.124, 93.127.
Transitional Period	
Transportation Plan —	§§ 93.118, 93.122, 93.125.
TIP —	§§ 93.119, 93.123, 93.126.
Project (From a conforming plan and TIP).	§ 93.121.
Project (Not from a conforming plan and TIP).	§§ 93.120, 93.121, 93.124, 93.127.
Control Strategy and Maintenance Periods	
Transportation Plan —	§ 93.118.
TIP —	§ 93.119.
Project (From a conforming plan and TIP).	No additional criteria.
Project (Not from a conforming plan and TIP).	§ 93.120.

93.110 The conformity determination must be based on the latest planning assumptions.

93.111 The conformity determination must be based on the latest emission estimation model available.

93.112 The MPO must make the conformity determination according to the consultation procedures of this rule and the implementation plan revision required by § 51.396 of this chapter.

93.113 The transportation plan, TIP, or 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.

93.114 There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval.

93.115 The project must come from a conforming transportation plan and program.

93.116 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.

93.117 The FHWA/FTA project must comply with PM₁₀ control measures in the applicable implementation plan.

93.118 The transportation plan must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan or implementation plan submission.

93.119 The TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan or implementation plan submission.

93.120 The project which is not from a conforming transportation plan and conforming TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan or implementation plan submission.

93.121 The 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).

93.122 The transportation plan must contribute to emissions reductions in ozone and CO nonattainment areas.

93.123 The TIP must contribute to emissions reductions in ozone and CO nonattainment areas.

93.124 The project which is not from a conforming transportation plan and TIP must contribute to emissions reductions in ozone and CO nonattainment areas.

93.125 The transportation plan must contribute to emission reductions or must not increase emissions in PM₁₀ and NO₂ nonattainment areas.

93.126 The TIP must contribute to emission reductions or must not increase emissions in PM₁₀ and NO₂ nonattainment areas.

93.127 The project which is not from a conforming transportation plan and TIP must contribute to emission reductions or must not increase emissions in PM₁₀ and NO₂ nonattainment areas.

§ 93.110 Criteria and procedures: Latest planning assumptions.

(a) The conformity determination, with respect to all other applicable criteria in §§ 93.111 through 93.127, must be based upon the most recent planning assumptions in force at the time of the conformity determination. This criterion applies during all periods. 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 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 applies during all periods. It 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) 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

for transportation plans and TIPs. The previous model may also be used for projects if the analysis was begun during the grace period or before the Federal Register notice of availability, provided no more than three years have passed since the draft environmental document was issued.

§ 93.112 Criteria and procedures: Consultation.

The MPO must make the conformity determination according to the consultation procedures in this rule and in the implementation plan revision required by § 51.396 of this chapter, and according to the public involvement procedures established by the MPO in compliance with 23 CFR part 450. This criterion applies during all periods. Until the implementation plan revision required by § 51.396 of this chapter is approved by EPA, the conformity determination must be made according to the procedures in §§ 93.105(a)(2) and 93.105(e). Once the implementation plan revision has been approved by EPA, this criterion is satisfied if the conformity determination is made consistent with the implementation plan's consultation requirements.

§ 93.113 Criteria and procedures: Timely implementation of TCMs.

(a) The transportation plan, TIP, or 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. This criterion applies during all periods.

(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 Act, 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 Act 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 under ISTEA's 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. This criterion applies during all periods. It is satisfied if the current transportation plan and TIP have been found to conform to the applicable implementation plan by the MPO and DOT according to the procedures of this subpart. 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 of § 93.104.

§ 93.115 Criteria and procedures: Projects from a plan and TIP.

(a) The project must come from a conforming plan and program. This criterion applies during all periods. If

this criterion is not satisfied, the project must satisfy all criteria in Table 1 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.

(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, 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 have not changed significantly from those which were described in the TIP, or in a manner which would significantly impact use of the facility; 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 § 93.133(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.

§ 93.116 Criteria and procedures: Localized CO and PM₁₀ violations (hot spots).

(a) 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 applies during all periods. 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.

(b) The demonstration must be performed according to the requirements of §§ 93.105(c)(1)(i) and 93.131.

(c) For projects which are not of the type identified by § 93.131(a) or § 93.131(d), this criterion may be satisfied if consideration of local factors clearly demonstrates that no local violations presently exist and no new local violations will be created as a result of the project. Otherwise, in CO nonattainment and maintenance areas, a quantitative demonstration must be performed according to the requirements of § 93.131(b).

§ 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 applies during all periods. It is satisfied if control measures (for the purpose of limiting PM₁₀ emissions from the construction activities and/or normal use and operation associated with the project) contained in the applicable implementation plan are included in the final plans, specifications, and estimates for the project.

§ 93.118 Criteria and procedures: Motor vehicle emissions budget (transportation plan).

(a) The transportation plan must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies during the transitional period and the control strategy and maintenance periods, except as provided in § 93.136. This criterion may be satisfied if the requirements in paragraphs (b) and (c) of this section are met:

(b) A regional emissions analysis shall be performed as follows:

(1) The regional analysis shall estimate emissions of any of the following pollutants and pollutant precursors for which the area is in nonattainment or maintenance and for which the applicable implementation plan (or implementation plan submission) establishes an emissions budget:

(i) VOC as an ozone precursor;

(ii) NO_x as an ozone precursor, unless the Administrator determines that additional reductions of NO_x would not contribute to attainment;

(iii) CO;

(iv) PM₁₀ (and its precursors VOC and/or NO_x if the applicable implementation plan or implementation plan submission identifies transportation-related precursor emissions within the nonattainment area as a significant contributor to the PM₁₀ nonattainment problem or establishes a budget for such emissions); or

(v) NO_x (in NO₂ nonattainment or maintenance areas);

(2) The regional emissions analysis shall estimate 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;

(3) The emissions analysis methodology shall meet the requirements of § 93.130;

(4) For areas with a transportation plan that meets the content requirements of § 93.106(a), the emissions analysis shall be performed for each horizon year. Emissions in milestone years which are between the horizon years may be determined by interpolation; and

(5) For areas with a transportation plan that does not meet the content requirements of § 93.106(a), the emissions analysis shall be performed for any years in the time span of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the last year of the plan's forecast period. If the attainment year is in the time span of the transportation plan, the emissions analysis must also be performed for the attainment year. Emissions in milestone years which are between these analysis years may be determined by interpolation.

(c) The regional emissions analysis shall demonstrate that for each of the applicable pollutants or pollutant precursors in paragraph (b)(1) of this section the emissions are less than or equal to the motor vehicle emissions budget as established in the applicable implementation plan or implementation plan submission as follows:

(1) If the applicable implementation plan or implementation plan submission establishes emissions budgets for milestone years, emissions in each milestone year are less than or equal to the motor vehicle emissions budget established for that year;

(2) For nonattainment areas, emissions in the attainment year are less than or equal to the motor vehicle emissions budget established in the applicable implementation plan or implementation plan submission for that year;

(3) For nonattainment areas, emissions in each analysis or horizon year after the attainment year are less than or equal to the motor vehicle emissions budget established by the applicable implementation plan or implementation plan submission for the attainment year. If emissions budgets are established for years after the attainment year, emissions in each analysis year or horizon year must be less than or equal to the motor vehicle emissions budget for that year, if any, or the motor vehicle emissions budget for the most recent budget year prior to the analysis year or horizon year; and

(4) For maintenance areas, emissions in each analysis or horizon year are less than or equal to the motor vehicle emissions budget established by the maintenance plan for that year, if any, or the emissions budget for the most recent budget year prior to the analysis or horizon year.

§ 93.119 Criteria and procedures: Motor vehicle emissions budget (TIP).

(a) The TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies during the transitional period and the control strategy and maintenance periods, except as provided in § 93.136. This criterion may be satisfied if the requirements in paragraphs (b) and (c) of this section are met.

(b) For areas with a conforming transportation plan that fully meets the content requirements of § 93.106(a), this criterion may be satisfied without additional regional analysis if:

(1) Each program year of the TIP is consistent with the Federal funding which may be reasonably expected for that year, and required State/local matching funds and funds for State/local funding-only projects are consistent with the revenue sources expected over the same period; and

(2) The TIP is consistent with the conforming transportation plan such that the regional emissions analysis already performed for the plan applies to the TIP also. 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 in each of its horizon years;

(ii) All TIP projects which are regionally significant are part of the specific highway or transit system envisioned in the transportation plan's horizon years; 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.

(3) If the requirements in paragraphs (b)(1) and (b)(2) of this section are not met, then:

(i) The TIP may be modified to meet those requirements; or

(ii) The transportation plan must be revised so that the requirements in paragraphs (b)(1) and (b)(2) of this section are met. Once the revised plan has been found to conform, this criterion is met for the TIP with no additional analysis except a demonstration that the TIP meets the requirements of paragraphs (b)(1) and (b)(2) of this section.

(c) For areas with a transportation plan that does not meet the content requirements of § 93.106(a), a regional emissions analysis must meet all of the following requirements:

(1) The regional emissions analysis shall estimate emissions from the entire transportation system, including all projects contained in the proposed TIP, 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;

(2) The analysis methodology shall meet the requirements of § 93.130(c); and

(3) The regional analysis shall satisfy the requirements of §§ 93.118(b)(1), 93.118(b)(5), and 93.118(c).

§ 93.120 Criteria and procedures: Motor vehicle emissions budget (project not from a plan and TIP).

(a) The project which is not from a conforming transportation plan and a conforming TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies during the transitional period and the control strategy and maintenance periods, except as provided in § 93.136. It is satisfied if emissions from the implementation of the project, when considered with the emissions from the projects in the conforming transportation plan and TIP and all other regionally significant projects expected in the area, do not exceed the motor vehicle emissions budget(s) in the applicable

implementation plan (or implementation plan submission).

(b) For areas with a conforming transportation plan that meets the content requirements of § 93.106(a):

(1) This criterion may be satisfied without additional regional analysis if the project is included in the conforming transportation plan, even if it is not specifically included in the latest conforming TIP. This requires a demonstration that:

(i) 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 in each of its horizon years;

(ii) The project is not regionally significant or is part of the specific highway or transit system envisioned in the transportation plan's horizon years; and

(iii) The design concept and scope of the project is not significantly different from that described in the transportation plan.

(2) If the requirements in paragraph (b)(1) of this section are not met, a regional emissions analysis must be performed as follows:

(i) The analysis methodology shall meet the requirements of § 93.130;

(ii) The analysis shall estimate emissions from the transportation system, including the proposed project and all other regionally significant projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan. The analysis must include emissions from all previously approved projects which were not from a transportation plan and TIP; and

(iii) The emissions analysis shall meet the requirements of §§ 93.118(b)(1), 93.118(b)(4), and 93.118(c).

(c) For areas with a transportation plan that does not meet the content requirements of § 93.106(a), a regional emissions analysis must be performed for the project together with the conforming TIP and all other regionally significant projects expected in the nonattainment or maintenance area. This criterion may be satisfied if:

(1) The analysis methodology meets the requirements of § 93.130(c);

(2) The analysis estimates emissions from the transportation system, including the proposed project, and all other regionally significant projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan; and

(3) The regional analysis satisfies the requirements of §§ 93.118(b)(1), 93.118(b)(5), and 93.118(c).

§ 93.121 Criteria and procedures: Localized CO violations (hot spots) in the interim period.

(a) 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 applies during the interim and transitional periods only. 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.

(b) The demonstration must be performed according to the requirements of §§ 93.105(c)(1)(i) and 93.131.

(c) For projects which are not of the type identified by § 93.131(a), this criterion may be satisfied if consideration of local factors clearly demonstrates that existing CO violations will be eliminated or reduced in severity and number. Otherwise, a quantitative demonstration must be performed according to the requirements of § 93.131(b).

§ 93.122 Criteria and procedures: Interim period reductions in ozone and CO areas (transportation plan).

(a) A transportation plan must contribute to emissions reductions in ozone and CO nonattainment areas. This criterion applies during the interim and transitional periods only, except as otherwise provided in § 93.136. It applies to the net effect on emissions of all projects contained in a new or revised transportation plan. This criterion may be satisfied if a regional emissions analysis is performed as described in paragraphs (b) through (f) of this section.

(b) Determine the analysis years for which emissions are to be estimated. Analysis years shall be no more than ten years apart. The first analysis year shall be no later than the first milestone year (1995 in CO nonattainment areas and 1996 in ozone nonattainment areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.

(c) Define the 'Baseline' scenario for each of the analysis years to be the future transportation system that would result from current programs, composed of the following (except that project listed in §§ 93.134 and 93.135 need 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 three years of the previously conforming transportation plan and/or TIP; or have completed the NEPA process. (For the first conformity determination on the transportation plan after November 24, 1993, a project may not be included in the "Baseline" scenario if one of the following major steps has not occurred within the past three years: 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. Such a project must be included in the "Action" scenario, as described in paragraph (d) of this section.)

(d) Define the "Action" scenario for each of the analysis years as the transportation system that will result in that year from the implementation of the proposed transportation plan, TIPs adopted under it, and other expected regionally significant projects in the nonattainment area. It will include the following (except that projects listed in §§ 93.134 and 93.135 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 on the transportation plan;

(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 on the transportation plan, 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.

(e) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios and determine the difference in regional VOC and NO_x emissions (unless the Administrator determines that additional reductions in NO_x would not contribute to attainment) between the two scenarios for ozone nonattainment areas and the difference in CO emissions between the two scenarios for CO nonattainment areas. The analysis must be performed for each of the analysis years according to the requirements of § 93.130. Emissions in milestone years which are between the analysis years may be determined by interpolation.

(f) This criterion is met if the regional VOC and NO_x emissions (for ozone nonattainment areas) and CO emissions (for CO nonattainment areas) predicted in the "Action" scenario are less than the emissions predicted from the "Baseline" scenario in each analysis year, and if this can reasonably be expected to be true in the periods between the first milestone year and the analysis years. The regional analysis must show that the "Action" scenario contributes to a reduction in emissions from the 1990 emissions by any nonzero amount.

§ 93.123 Criteria and procedures: Interim period reductions in ozone and CO areas (TIP).

(a) A TIP must contribute to emissions reductions in ozone and CO nonattainment areas. This criterion applies during the interim and transitional periods only, except as otherwise provided in § 93.136. It applies to the net effect on emissions of all projects contained in a new or revised TIP. This criterion may be satisfied if a regional emissions analysis is performed as described in paragraphs (b) through (f) of this section.

(b) Determine the analysis years for which emissions are to be estimated. The first analysis year shall be no later than the first milestone year (1995 in CO nonattainment areas and 1996 in ozone nonattainment areas). The analysis years shall be no more than ten years apart. The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.

(c) Define the "Baseline" scenario as the future transportation system that would result from current programs, composed of the following (except that projects listed in §§ 93.134 and 93.135 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 three years of the previously conforming TIP; or have completed the NEPA process. (For the first conformity determination on the TIP after November 24, 1993, a project may not be included in the "Baseline" scenario if one of the following major steps has not occurred within the past three years: 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. Such a project must be included in the "Action" scenario, as described in paragraph (d) of this section.)

(d) Define the "Action" scenario as the future transportation system that will result from the implementation of the proposed TIP and other expected regionally significant projects in the nonattainment area in the timeframe of the transportation plan. It will include the following (except that projects listed in §§ 93.134 and 93.135 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) included in the proposed TIP, 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

contained 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 on the TIP;

(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 on the TIP, 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.

(e) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the 'Baseline' and 'Action' scenarios, and determine the difference in regional VOC and NO_x emissions (unless the Administrator determines that additional reductions of NO_x would not contribute to attainment) between the two scenarios for ozone nonattainment areas and the difference in CO emissions between the two scenarios for CO nonattainment areas. The analysis must be performed for each of the analysis years according to the requirements of § 93.130. Emissions in milestone years which are between analysis years may be determined by interpolation.

(f) This criterion is met if the regional VOC and NO_x emissions in ozone nonattainment areas and CO emissions in CO nonattainment areas predicted in the 'Action' scenario are less than the emissions predicted from the 'Baseline' scenario in each analysis year, and if this can reasonably be expected to be true in the period between the analysis years. The regional analysis must show that the 'Action' scenario contributes to a reduction in emissions from the 1990 emissions by any nonzero amount.

§ 93.124 Criteria and procedures: Interim period reductions for ozone and CO areas (project not from a plan and TIP).

A transportation project which is not from a conforming transportation plan and TIP must contribute to emissions reductions in ozone and CO nonattainment areas. This criterion applies during the interim and transitional periods only, except as otherwise provided in § 93.136. This criterion is satisfied if a regional emissions analysis is performed which meets the requirements of § 93.122 and which includes the transportation plan and project in the 'Action' scenario. 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.

§ 93.125 Criteria and procedures: Interim period reductions for PM₁₀ and NO₂ areas (transportation plan).

(a) A transportation plan must contribute to emission reductions or must not increase emissions in PM₁₀ and NO₂ nonattainment areas. This criterion applies only during the interim and transitional periods. It applies to the net effect on emissions of all projects contained in a new or revised transportation plan. This criterion may be satisfied if the requirements of either paragraph (b) or (c) of this section are met.

(b) Demonstrate that implementation of the plan and all other regionally significant projects expected in the nonattainment area will contribute to reductions in emissions of PM₁₀ in a PM₁₀ nonattainment area (and of each transportation-related precursor of PM₁₀ in PM₁₀ nonattainment 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 nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT) and of NO₂ in an NO₂ nonattainment area, by performing a regional emissions analysis as follows:

(1) Determine the analysis years for which emissions are to be estimated. Analysis years shall be no more than ten years apart. The first analysis year shall be no later than 1996 (for NO₂ areas) or four years and six months following the date of designation (for PM₁₀ areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first

analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.

(2) Define for each of the analysis years the 'Baseline' scenario, as defined in § 93.122(c), and the 'Action' scenario, as defined in § 93.122(d).

(3) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the 'Baseline' and 'Action' scenarios and determine the difference between the two scenarios in regional PM₁₀ emissions in a PM₁₀ nonattainment area (and transportation-related precursors of PM₁₀ in PM₁₀ nonattainment 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 nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT) and in NO₂ emissions in an NO₂ nonattainment area. The analysis must be performed for each of the analysis years according to the requirements of § 93.130. The analysis must address the periods between the analysis years and the periods between 1990, the first milestone year (if any), and the first of the analysis years. Emissions in milestone years which are between the analysis years may be determined by interpolation.

(4) Demonstrate that the regional PM₁₀ emissions and PM₁₀ precursor emissions, where applicable, (for PM₁₀ nonattainment areas) and NO₂ emissions (for NO₂ nonattainment areas) predicted in the 'Action' scenario are less than the emissions predicted from the 'Baseline' scenario in each analysis year, and that this can reasonably be expected to be true in the periods between the first milestone year (if any) and the analysis years.

(c) Demonstrate that when the projects in the transportation plan and all other regionally significant projects expected in the nonattainment area are implemented, the transportation system's total highway and transit emissions of PM₁₀ in a PM₁₀ nonattainment area (and transportation-related precursors of PM₁₀ in PM₁₀ nonattainment 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 nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT) and of NO₂ in an NO₂ nonattainment area will not be greater than baseline levels, by performing a regional emissions analysis as follows:

(1) Determine the baseline regional emissions of PM_{10} and PM_{10} precursors, where applicable (for PM_{10} nonattainment areas) and NO_x (for NO_2 nonattainment areas) from highway and transit sources. Baseline emissions are those estimated to have occurred during calendar year 1990, unless the implementation plan revision required by § 51.396 of this chapter defines the baseline emissions for a PM_{10} 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.

(2) Estimate the emissions of the applicable pollutant(s) from the entire transportation system, including projects in the transportation plan and TIP and all other regionally significant projects in the nonattainment area, according to the requirements of § 93.130. Emissions shall be estimated for analysis years which are no more than ten years apart. The first analysis year shall be no later than 1996 (for NO_2 areas) or four years and six months following the date of designation (for PM_{10} areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.

(3) Demonstrate that for each analysis year the emissions estimated in paragraph (c)(2) of this section are no greater than baseline emissions of PM_{10} and PM_{10} precursors, where applicable (for PM_{10} nonattainment areas) or NO_x (for NO_2 nonattainment areas) from highway and transit sources.

§ 93.126 Criteria and procedures: Interim period reductions for PM_{10} and NO_2 areas (TIP).

(a) A TIP must contribute to emission reductions or must not increase emissions in PM_{10} and NO_2 nonattainment areas. This criterion applies only during the interim and transitional periods. It applies to the net effect on emissions of all projects contained in a new or revised TIP. This criterion may be satisfied if the requirements of either paragraph (b) or paragraph (c) of this section are met.

(b) Demonstrate that implementation of the plan and TIP and all other regionally significant projects expected in the nonattainment area will contribute to reductions in emissions of PM_{10} in a PM_{10} nonattainment area (and transportation-related precursors of PM_{10} in PM_{10} nonattainment 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 nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT) and of NO_x in an NO_2 nonattainment area, by performing a regional emissions analysis as follows:

(1) Determine the analysis years for which emissions are to be estimated, according to the requirements of § 93.125(b)(1).

(2) Define for each of the analysis years the "Baseline" scenario, as defined in § 93.123(c), and the "Action" scenario, as defined in § 93.123(d).

(3) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios as required by § 93.125(b)(3), and make the demonstration required by § 93.125(b)(4).

(c) Demonstrate that when the projects in the transportation plan and TIP and all other regionally significant projects expected in the area are implemented, the transportation system's total highway and transit emissions of PM_{10} in a PM_{10} nonattainment area (and transportation-related precursors of PM_{10} in PM_{10} nonattainment 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 nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT) and of NO_x in an NO_2 nonattainment area will not be greater than baseline levels, by performing a regional emissions analysis as required by § 93.125(c) (1) through (3).

§ 93.127 Criteria and procedures: Interim period reductions for PM_{10} and NO_2 areas (project not from a plan and TIP).

A transportation project which is not from a conforming transportation plan and TIP must contribute to emission reductions or must not increase emissions in PM_{10} and NO_2 nonattainment areas. This criterion applies during the interim and transitional periods only. This criterion is met if a regional emissions analysis is performed which meets the requirements of § 93.125 and which includes the transportation plan and project in the "Action" scenario. If the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the transportation plan or TIP, and § 93.125(b) is used to demonstrate satisfaction of this criterion, 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.

§ 93.128 Transition from the interim period to the control strategy period.

(a) Areas which submit a control strategy implementation plan revision after November 24, 1993. (1) The transportation plan and TIP must be demonstrated to conform according to transitional period criteria and procedures by one year from the date the Clean Air Act requires submission of such control strategy implementation plan revision. Otherwise, the conformity status of the transportation plan and TIP will lapse, and no new project-level conformity determinations may be made.

(i) The conformity of new transportation plans and TIPs may be demonstrated according to Phase II interim period criteria and procedures for 90 days following submission of the control strategy implementation plan revision, provided the conformity of such transportation plans and TIPs is redetermined according to transitional period criteria and procedures as required in paragraph (a)(1) of this section.

(ii) Beginning 90 days after submission of the control strategy implementation plan revision, new transportation plans and TIPs shall demonstrate conformity according to transitional period criteria and procedures.

(2) If EPA disapproves the submitted control strategy implementation plan revision and so notifies the State, MPO, and DOT, which initiates the sanction process under Clean Air Act sections 179 or 110(m), the conformity status of the transportation plan and TIP shall lapse 120 days after EPA's disapproval, and no new project-level conformity determinations may be made. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision is submitted and conformity is demonstrated according to transitional period criteria and procedures.

(3) Notwithstanding paragraph (a)(2) of this section, if EPA disapproves the submitted control strategy implementation plan revision but determines that the control strategy contained in the revision would have been considered approvable with respect to requirements for emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A), the provisions of paragraph

(a)(1) of this section shall apply for 12 months following the date of disapproval. The conformity status of the transportation plan and TIP shall lapse 12 months following the date of disapproval unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

(b) *Areas which have not submitted a control strategy implementation plan revision.* (1) For areas whose Clean Air Act deadline for submission of the control strategy implementation plan revision is after November 24, 1993 and EPA has notified the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan revision, which initiates the sanction process under Clean Air Act sections 179 or 110(m):

(i) No new transportation plans or TIPs may be found to conform beginning 120 days after the Clean Air Act deadline; and

(ii) The conformity status of the transportation plan and TIP shall lapse one year after the Clean Air Act deadline, and no new project-level conformity determinations may be made.

(2) For areas whose Clean Air Act deadline for submission of the control strategy implementation plan was before November 24, 1993 and EPA has made a finding of failure to submit a control strategy implementation plan revision, which initiates the sanction process under Clean Air Act sections 179 or 110(m), the following apply unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator:

(i) No new transportation plans or TIPs may be found to conform beginning March 24, 1994; and

(ii) The conformity status of the transportation plan and TIP shall lapse November 25, 1994, and no new project-level conformity determinations may be made.

(c) *Areas which have not submitted a complete control strategy implementation plan revision.* (1) For areas where EPA notifies the State, MPO, and DOT after November 24, 1993 that the control strategy implementation plan revision submitted by the State is incomplete, which initiates the sanction process under Clean Air Act sections 179 or 110(m), the following apply unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator:

(i) No new transportation plans or TIPs may be found to conform beginning 120 days after EPA's incompleteness finding; and

(ii) The conformity status of the transportation plan and TIP shall lapse one year after the Clean Air Act deadline, and no new project-level conformity determinations may be made.

(iii) Notwithstanding paragraphs (c)(1) (i) and (ii) of this section, if EPA notes in its incompleteness finding that the submittal would have been considered complete with respect to requirements for emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A), the provisions of paragraph (a)(1) of this section shall apply for a period of 12 months following the date of the incompleteness determination. The conformity status of the transportation plan and TIP shall lapse 12 months following the date of the incompleteness determination unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

(2) For areas where EPA has determined before November 24, 1993 that the control strategy implementation plan revision is incomplete, which initiates the sanction process under Clean Air Act sections 179 or 110(m), the following apply unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator:

(i) No new transportation plans or TIPs may be found to conform beginning March 24, 1994; and

(ii) The conformity status of the transportation plan and TIP shall lapse November 25, 1994, and no new project-level conformity determinations may be made.

(iii) Notwithstanding paragraphs (c)(2) (i) and (ii) of this section, if EPA notes in its incompleteness finding that the submittal would have been considered complete with respect to requirements for emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A), the provisions of paragraph (d)(1) of this section shall apply for a period of 12 months following the date of the incompleteness determination. The conformity status of the transportation plan and TIP shall lapse 12 months following the date of the incompleteness determination unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

(d) *Areas which submitted a control strategy implementation plan before November 24, 1993.* (1) The transportation plan and TIP must be demonstrated to conform according to

transitional period criteria and procedures by November 25, 1994. Otherwise, their conformity status will lapse, and no new project-level conformity determinations may be made.

(i) The conformity of new transportation plans and TIPs may be demonstrated according to Phase II interim period criteria and procedures until February 22, 1994, provided the conformity of such transportation plans and TIPs is redetermined according to transitional period criteria and procedures as required in paragraph (d)(1) of this section.

(ii) Beginning February 22, 1994, new transportation plans and TIPs shall demonstrate conformity according to transitional period criteria and procedures.

(2) If EPA has disapproved the most recent control strategy implementation plan submission, the conformity status of the transportation plan and TIP shall lapse March 24, 1994, and no new project-level conformity determinations may be made. No new transportation plans, TIPs, or projects may be found to conform until another control strategy implementation plan revision is submitted and conformity is demonstrated according to transitional period criteria and procedures.

(3) Notwithstanding paragraph (d)(2) of this section, if EPA has disapproved the submitted control strategy implementation plan revision but determines that the control strategy contained in the revision would have been considered approvable with respect to requirements for emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act § 110(a)(2)(A), the provisions of paragraph (d)(1) of this section shall apply for 12 months following November 24, 1993. The conformity status of the transportation plan and TIP shall lapse 12 months following November 24, 1993 unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

(e) *Projects.* If the currently conforming transportation plan and TIP have not been demonstrated to conform according to transitional period criteria and procedures, the requirements of paragraphs (e) (1) and (2) of this section must be met.

(1) Before a FHWA/FTA project which is regionally significant and increases single-occupant vehicle capacity (a new general purpose highway on a new location or adding general purpose lanes) may be found to conform, the State air agency must be

consulted on how the emissions which the existing transportation plan and TIP's conformity determination estimates for the "Action" scenario (as required by §§ 93.122 through 93.127) compare to the motor vehicle emissions budget in the implementation plan submission or the projected motor vehicle emissions budget in the implementation plan under development.

(2) In the event of unresolved disputes on such project-level conformity determinations, the State air agency may escalate the issue to the Governor consistent with the procedure in § 93.105(d), which applies for any State air agency comments on a conformity determination.

(f) *Redetermination of conformity of the existing transportation plan and TIP according to the transitional period criteria and procedures.* (1) The redetermination of the conformity of the existing transportation plan and TIP according to transitional period criteria and procedures (as required by paragraphs (a)(1) and (d)(1) of this section) does not require new emissions analysis and does not have to satisfy the requirements of §§ 93.110 and 93.111 if:

(i) The control strategy implementation plan revision submitted to EPA uses the MPO's modeling of the existing transportation plan and TIP for its projections of motor vehicle emissions; and

(ii) The control strategy implementation plan does not include any transportation projects which are not included in the transportation plan and TIP.

(2) A redetermination of conformity as described in paragraph (f)(1) of this section is not considered a conformity determination for the purposes of § 93.104(b)(4) or § 93.104(c)(4) regarding the maximum intervals between conformity determinations. Conformity must be determined according to all the applicable criteria and procedures of § 93.109 within three years of the last determination which did not rely on paragraph (f)(1) of this section.

(g) *Ozone nonattainment areas.* (1) The requirements of paragraph (b)(1) of this section apply if a serious or above ozone nonattainment area has not submitted the implementation plan revisions which Clean Air Act sections 182(c)(2)(A) and 182(c)(2)(B) require to be submitted to EPA November 15, 1994, even if the area has submitted the implementation plan revision which Clean Air Act section 182(b)(1) requires to be submitted to EPA November 15, 1993.

(2) The requirements of paragraph (b)(1) of this section apply if a moderate

ozone nonattainment area which is using photochemical dispersion modeling to demonstrate the "specific annual reductions as necessary to attain" required by Clean Air Act section 182(b)(1), and which has permission from EPA to delay submission of such demonstration until November 15, 1994, does not submit such demonstration by that date. The requirements of paragraph (b)(1) of this section apply in this case even if the area has submitted the 15% emission reduction demonstration required by Clean Air Act section 182(b)(1).

(3) The requirements of paragraph (a) of this section apply when the implementation plan revisions required by Clean Air Act sections 182(c)(2)(A) and 182(c)(2)(B) are submitted.

(h) *Nonattainment areas which are not required to demonstrate reasonable further progress and attainment.* If an area listed in § 93.136 submits a control strategy implementation plan revision, the requirements of paragraphs (a) and (e) of this section apply. Because the areas listed in § 93.136 are not required to demonstrate reasonable further progress and attainment and therefore have no Clean Air Act deadline, the provisions of paragraph (b) of this section do not apply to these areas at any time.

(i) *Maintenance plans.* If a control strategy implementation plan revision is not submitted to EPA but a maintenance plan required by Clean Air Act section 175A is submitted to EPA, the requirements of paragraph (a) or (d) of this section apply, with the maintenance plan submission treated as a "control strategy implementation plan revision" for the purposes of those requirements.

§ 93.129 Requirements for adoption or approval of projects by other recipients of funds designated under title 23 U.S.C. or the Federal Transit Act.

No recipient of federal funds designated under title 23 U.S.C. or the Federal Transit Act shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless there is a currently conforming transportation plan and TIP consistent with the requirements of § 93.114 and the requirements of one of the following paragraphs (a) through (e) of this section are met:

(a) The project comes from a conforming plan and program consistent with the requirements of § 93.115;

(b) The project is included in the regional emissions analysis supporting the currently conforming TIP's conformity determination, even if the

project is not strictly "included" in the TIP for the purposes of MPO project selection or endorsement, and the project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility;

(c) During the control strategy or maintenance period, the project is consistent with the motor vehicle emissions budget(s) in the applicable implementation plan consistent with the requirements of § 93.120;

(d) During Phase II of the interim period, the project contributes to emissions reductions or does not increase emissions consistent with the requirements of § 93.124 (in ozone and CO nonattainment areas) or § 93.127 (in PM₁₀ and NO₂ nonattainment areas); or

(e) During the transitional period, the project satisfies the requirements of both paragraphs (c) and (d) of this section.

§ 93.130 Procedures for determining regional transportation-related emissions.

(a) *General requirements.* (1) The regional emissions analysis for the transportation plan, TIP, or project not from a conforming plan and TIP shall include all regionally significant projects expected in the nonattainment or maintenance area, including 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 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 which have been delayed beyond the scheduled date(s) until such time as implementation has been assured. If the TCM 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 regulation in order to be implemented may not be included in the emissions analysis unless the regulation is already adopted by the enforcing jurisdiction. Adopted regulations are required for demand management strategies for reducing

emissions which are not specifically identified in the applicable implementation plan, and for control programs which are external to the transportation system itself, such as tailpipe or evaporative emission standards, limits on gasoline volatility, inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel. A regulatory program may also be considered to be adopted if an opt-in to a Federally enforced program has been approved by EPA, if EPA has promulgated the program (if the control program is a Federal responsibility, such as tailpipe standards), or if 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) Notwithstanding paragraph (a)(3) of this section, during the transitional period, control measures or programs which are committed to in an implementation plan submission as described in §§ 93.118 through 93.120, but which has not received final EPA action in the form of a finding of incompleteness, approval, or disapproval may be assumed for emission reduction credit for the purpose of demonstrating that the requirements of §§ 93.118 through 93.120 are satisfied.

(5) A regional emissions analysis for the purpose of satisfying the requirements of §§ 93.122 through 93.124 may account for the programs in paragraph (a)(4) of this section, but the same assumptions about these programs shall be used for both the "Baseline" and "Action" scenarios.

(b) *Serious, severe, and extreme ozone nonattainment areas and serious carbon monoxide areas after January 1, 1995.* Estimates of regional transportation-related emissions used to support conformity determinations must be made according to procedures which meet the requirements in paragraphs (b) (1) through (5) of this section.

(1) A network-based transportation demand model or models relating travel demand and transportation system performance to land-use patterns, population demographics, employment, transportation infrastructure, and transportation policies must be used to estimate travel within the metropolitan planning area of the nonattainment area. Such a model shall possess the following attributes:

(i) The modeling methods and the functional relationships used in the model(s) shall in all respects be in accordance with acceptable professional

practice, and reasonable for purposes of emission estimation;

(ii) The network-based model(s) must be validated against ground counts for a base year that is not more than 10 years prior to the date of the conformity determination. Land use, population, and other inputs must be based on the best available information and appropriate to the validation base year;

(iii) For peak-hour or peak-period traffic assignments, a capacity sensitive assignment methodology must be used;

(iv) Zone-to-zone travel times used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times which result from the process of assignment of trips to network links. 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;

(v) Free-flow speeds on network links shall be based on empirical observations;

(vi) Peak and off-peak travel demand and travel times must be provided;

(vii) Trip distribution and mode choice must be sensitive to pricing, where pricing is a significant factor, if the network model is capable of such determinations and the necessary information is available;

(viii) The model(s) must utilize and document a logical correspondence between the assumed scenario of land development and use and the future transportation system for which emissions are being estimated. Reliance on a formal land-use model is not specifically required but is encouraged;

(ix) A dependence of trip generation on the accessibility of destinations via the transportation system (including pricing) is strongly encouraged but not specifically required, unless the network model is capable of such determinations and the necessary information is available;

(x) A dependence of regional economic and population growth on the accessibility of destinations via the transportation system is strongly encouraged but not specifically required, unless the network model is capable of such determinations and the necessary information is available; and

(xi) Consideration of emissions increases from construction-related congestion is not specifically required.

(2) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled shall be considered the primary measure of vehicle miles traveled 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. A factor (or factors) shall be developed to reconcile and calibrate the network-based model estimates of vehicle miles traveled in the base year of its validation to the HPMS estimates for the same period, and these factors shall be applied to model estimates of future vehicle miles traveled. In this factoring process, consideration will be given to differences in the facility coverage of the HPMS and the modeled network description. Departure from these procedures is permitted with the concurrence of DOT and EPA.

(3) Reasonable methods shall be used to estimate nonattainment area vehicle travel on off-network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

(4) 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 model.

(5) Ambient temperatures shall be consistent with those used to establish the emissions budget in the applicable implementation plan. Factors other than temperatures, for example the fraction of travel in a hot stabilized engine mode, may be modified after interagency consultation according to § 93.105 if the newer estimates 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.

(c) *Areas which are not serious, severe, or extreme ozone nonattainment areas or serious carbon monoxide areas, or before January 1, 1995.* (1) Procedures which satisfy some or all of the requirements of paragraph (a) of this section shall be used in all areas not subject to paragraph (a) of this section in which those procedures have been the previous practice of the MPO.

(2) Regional emissions may be estimated by methods which do not explicitly or comprehensively account for the influence of land use and transportation infrastructure on vehicle miles traveled and traffic speeds and congestion. Such methods must account for VMT growth by extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for vehicle miles travelled per person. These methods must also consider future economic activity, transit

alternatives, and transportation system policies.

(d) *Projects not from a conforming plan and TIP in isolated rural nonattainment and maintenance areas.* This paragraph applies to any nonattainment or maintenance area or any 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 (because the nonattainment or maintenance area or portion thereof does not contain a metropolitan planning area or portion of a metropolitan planning area and is not part of a Metropolitan Statistical Area or Consolidated Metropolitan Statistical Area which is or contains a nonattainment or maintenance area).

(1) Conformity demonstrations for projects in these areas may satisfy the requirements of §§ 93.120, 93.124, and 93.127 with one regional emissions analysis which includes all the regionally significant projects in the nonattainment or maintenance area (or portion thereof).

(2) The requirements of § 93.120 shall be satisfied according to the procedures in § 93.120(c), with references to the "transportation plan" taken to mean the statewide transportation plan.

(3) The requirements of §§ 93.124 and 93.127 which reference "transportation plan" or "TIP" shall be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the nonattainment or maintenance area (or portion thereof).

(4) The requirement of § 93.129(b) shall be satisfied if:

(i) The project is included in the regional emissions analysis which includes all regionally significant highway and transportation projects in the nonattainment or maintenance area (or portion thereof) and supports the most recent conformity determination made according to the requirements of §§ 93.120, 93.124, or 93.127 (as modified by paragraphs (d)(2) and (d)(3) of this section), as appropriate for the time period and pollutant; and

(ii) The project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility.

(e) *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.

§ 93.131 Procedures for determining localized CO and PM₁₀ concentrations (hot-spot analysis).

(a) In the following cases, CO hot-spot analyses must be based on the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51, Appendix W ("Guideline on Air Quality Models (Revised)" (1988), supplement A (1987) and supplement B (1993), EPA publication no. 450/2-78-027R), unless, after the interagency consultation process described in § 93.105 and with the approval of the EPA Regional Administrator, these models, data bases, and other requirements are determined to be inappropriate:

(1) For projects in or affecting locations, areas, or categories of sites which are identified in the applicable implementation plan as sites of current violation or possible current violation;

(2) For those intersections 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 a new project in the vicinity;

(3) For any project involving or affecting any of the intersections which the applicable implementation plan identifies as the top three intersections in the nonattainment or maintenance area based on the highest traffic volumes;

(4) For any project involving or affecting any of the intersections which the applicable implementation plan identifies as the top three intersections in the nonattainment or maintenance area based on the worst Level-of-Service; and

(5) Where use of the "Guideline" models is practicable and reasonable given the potential for violations.

(b) In cases other than those described in paragraph (a) of this section, other quantitative methods may be used if they represent reasonable and common professional practice.

(c) CO hot-spot analyses must include the entire project, and may be performed only after the major design

features which will significantly impact CO concentrations have been identified. The background concentration can be estimated using the ratio of future to current traffic multiplied by the ratio of future to current emission factors.

(d) PM₁₀ hot-spot analysis must be performed for projects which are located at sites at which violations have been verified by monitoring, and at sites which have essentially identical vehicle and roadway emission and dispersion characteristics (including sites near one at which a violation has been monitored). The projects which require PM-10 hot-spot analysis shall be determined through the interagency consultation process required in § 93.105. In PM-10 nonattainment and maintenance areas, new or expanded bus and rail terminals and transfer points which increase the number of diesel vehicles congregating at a single location require hot-spot analysis. 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. The requirements of this paragraph for quantitative hot-spot analysis will not take effect until EPA releases modeling guidance on this subject and announces in the Federal Register that these requirements are in effect.

(e) Hot-spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.

(f) 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 the implementation of such measures, as required by § 93.133(a).

(g) 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.

§ 93.132 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 emission 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 a SIP revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such a SIP 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, without a SIP revision or a SIP which establishes 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 SIP may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

§ 93.133 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 Act, 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 making conformity determinations 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 included in the project design concept and scope which is used in the regional emissions analysis required by §§ 93.118 through 93.120 and §§ 93.122–93.124 or used in the project-level hot-spot analysis required by §§ 93.116 and 93.121.

(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 § 51.396 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) During the control strategy and maintenance periods, 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 requirements of §§ 93.116, 93.118, and 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 confirm that the transportation plan and TIP still satisfy the requirements of §§ 93.118 and 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.

§ 93.134 Exempt projects.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 2 are exempt from the requirement that a conformity determination be made. 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 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.—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.

TABLE 2.—EXEMPT PROJECTS—Continued

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 vehicles.¹
 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, static is, 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 fleet.
 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.

Advance land acquisitions (23 CFR part 712 or 23 CFR part 771).

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.

¹ In PM₁₀ nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

§ 93.135 Projects exempt from regional emissions analyses.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 3 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 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 (in the case of a transit project) concur that it has potential regional impacts for any reason.

TABLE 3.—PROJECTS EXEMPT FROM REGIONAL EMISSIONS ANALYSES

D

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.

§ 93.136 Special provisions for nonattainment areas which are not required to demonstrate reasonable further progress and attainment.

(a) *Application.* This section applies in the following areas:

- (1) Rural transport ozone nonattainment areas;
- (2) Marginal ozone areas;
- (3) Submarginal ozone areas;
- (4) Transitional ozone areas;
- (5) Incomplete data ozone areas;
- (6) Moderate CO areas with a design value of 12.7 ppm or less; and
- (7) Not classified CO areas.

(b) *Default conformity procedures.* The criteria and procedures in §§ 93.122 through 93.124 will remain in effect throughout the control strategy period for transportation plans, TIPs, and projects (not from a conforming plan and TIP) in lieu of the procedures in §§ 93.118 through 93.120, except as otherwise provided in paragraph (c) of this section.

(c) *Optional conformity procedures.* The State or MPO may voluntarily develop an attainment demonstration

and corresponding motor vehicle emissions budget like those required in areas with higher nonattainment classifications. In this case, the State must submit an implementation plan

revision which contains that budget and attainment demonstration. Once EPA has approved this implementation plan revision, the procedures in §§ 93.118

through 93.120 apply in lieu of the procedures in §§ 93.122 through 93.124.
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control strategy implementation plan which has been endorsed by the Governor (or his or her designee) and has been subject to a public hearing. The transitional period lasts until EPA takes final approval or disapproval action on the control strategy implementation plan submission or finds it to be incomplete. The precise beginning and end of the transitional period is defined in § 51.448.

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 § 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 above, 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.

§ 51.394 Applicability.

(a) **Action applicability.** (1) Except as provided for in paragraph (c) of this section or § 51.460, conformity determinations are required for:

(i) The adoption, acceptance, approval or support of transportation plans 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 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 rule for individual projects which are not FHWA/FTA projects. However, § 51.450 applies to such projects if they are regionally significant.

(c) **Geographic applicability.** (1) 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.

(2) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀).

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

(i) Volatile organic compounds and nitrogen oxides in ozone areas (unless the Administrator determines under section 182(f) of the CAA that additional reductions of NO_x would not contribute to attainment);

(ii) Nitrogen oxides in nitrogen dioxide areas; and

(iii) Volatile organic compounds, nitrogen oxides, and PM₁₀ in PM₁₀ areas if:

(A) During the interim period, 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

(B) During the transitional, control strategy, and maintenance periods, 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.

(c) **Limitations.** (1) Projects subject to this regulation for which the NEPA process and a conformity determination have been completed by FHWA or FTA may proceed toward implementation without further conformity determinations if one of the following major steps has occurred within the past three years: 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. 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 no major

steps to advance the project have occurred within the past three years.

§ 51.395 Implementation plan revision.

(a) States with areas subject to this rule 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 these regulations. 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). 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 these regulations only if the State's conformity provisions apply equally to non-federal as well as Federal entities.

(b) The Federal conformity rules under this subpart and 40 CFR part 93, 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 the required conformity implementation plan revision is approved by EPA. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable implementation plan, the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in 40 CFR part 93 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 requirements relating to conformity remain enforceable until the State revises its applicable implementation plan to specifically remove them and that revision is approved by EPA.

(c) To be approvable by EPA, the implementation plan revision submitted to EPA and DOT under this section shall address all requirements of this subpart in a manner which gives them full legal effect. In particular, the revision shall incorporate the provisions of the following sections of this subpart in verbatim form, except insofar as needed to give effect to a stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in these sections:

§§ 51.392, 51.394, 51.398, 51.400, 51.404, 51.410, 51.412, 51.414, 51.416, 51.418, 51.420, 51.422, 51.424, 51.426, 51.428, 51.430, 51.432, 51.434, 51.436, 51.438, 51.440, 51.442, 51.444, 51.446, 51.448, 51.450, 51.460, and 51.462.

§ 51.398 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.

§ 51.400 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) **Transportation plans.** (1) Each new transportation plan must be found 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 MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in § 51.460. The conformity determination must be based on the transportation plan and the revision taken as a whole.

(3) Conformity of existing transportation plans must be redetermined within 18 months of the following, or the existing conformity determination will lapse:

(i) November 24, 1993;

(ii) EPA approval of an implementation plan revision which:

(A) Establishes or revises a transportation-related emissions budget (as required by CAA sections 175A(a), 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 182(a) and 182(b) for nitrogen dioxide); or

(B) Adds, deletes, or changes TCMs; and

(iii) EPA promulgation of an implementation plan which establishes or revises a transportation-related emissions budget or adds, deletes, or changes TCMs.

(4) In any case, conformity determinations must be made no less frequently than every three years, or the existing conformity determination will lapse.