WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #3

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NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: WV Dept. of Environmental Protection - Div. of Air Quality TITLE NUMBER: 45

CITE AUTHORITY: W. V. Code §22-5-4

AMENDMENT TO AN EXISTING RULE: YES X NO __

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 45CSR36

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ________

TITLE OF RULE BEING PROPOSED: ________

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Stephanie R. Timmermeyer
Authorized Signature

Stephanie R. Timmermeyer, Secretary

WEST VIRGINIA SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #1

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2003 JUN 11 P 3:07

OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV DEP - Division of Air Quality TITLE NUMBER: 45

RULE TYPE: Legislative CITE AUTHORITY: W.V. Code §22-5-4

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 36

TITLE OF RULE BEING AMENDED: 45CSR36 - "Requirements for Determining Conformity of Transportation Plans, Programs, and Projects Developed, Funded or Approved under Title 23 U.S.C. or the Federal Transit Laws, to Applicable Air Quality Implementation Plans" (Transportation Conformity)

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

DATE OF PUBLIC HEARING: July 15, 2003 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: Division of Air Quality
7012 MacCorkle Avenue, S.E.
Charleston, WV 25304-2943

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

John A. Benedict, Director
Division of Air Quality
7012 MacCorkle Avenue, S.E.
Charleston, WV 25304-2943

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

Stephanie R. Timmermeyer

Authorized Signature

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

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 Laws, to Applicable Air Quality Implementation Plans" (Transportation Conformity)

A. AUTHORITY: W.Va. Code §22-5-4

B. SUMMARY OF RULE:

This rule establishes and adopts the requirements of 40 CFR Part 93, Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws". This rule codifies general 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 Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.). This rule adopts by reference the transportation conformity requirements of 40 CFR Part 93, Subpart A promulgated by the United States Environmental Protection Agency (U.S. EPA) as of June 1, 2003. All transportation plans, programs, and projects developed, funded or approved in West Virginia, under Title 23 U.S.C. or the Federal Transit Laws, must conform to applicable air quality implementation plans in West Virginia. Any agency, organization or party responsible for making transportation conformity determinations or is involved in transportation conformity-related activities shall do so pursuant to the provisions of 40 CFR Part 93, Subpart A and this rule. The federal regulation 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.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

40 CFR §51.390 requires that states adopt criteria and procedures for making transportation conformity determinations that are consistent with federal transportation conformity rule 40 CFR Part 93, Subpart A. Promulgation of this rule by the Legislature is necessary for the State to fulfill its responsibilities under the CAA, as amended. Revisions to the rule include general rule updates, incorporation by reference rule structure and language clarification; revised definitions and language which provide for Memorandums

of Understanding to be approved under the State Implementation Plan submitted to U.S. EPA as required by 40 CFR §51.390.

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

A federal counterpart to this proposed rule exists. In accordance with the Secretary's recommendation, and with limited exception, the Division of Air Quality proposes that the rule incorporate by reference the federal counterparts. Because the proposed rule incorporates by reference the federal counterpart, no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its June 3, 2003 meeting, the Environmental Protection Advisory Council reviewed and discussed this proposed rule. The Council's comments are contained in the attached minutes.

Advisory Council Meeting
Minutes
June 3, 2003

Attendees:

Rick Roberts, Advisory Council Member	John Benedict, WVDEP
Larry Harris, Advisory Council Member	Lucy Pontiveros, WVDEP
Bill Raney, Advisory Council Member	Jim Mason, WVDEP
Lisa Dooley, Advisory Council Member	Allyn Turner, WVDEP
Jackie Hallinan, Advisory Council Member	Bill Brannon, WVDEP
Stephanie R. Timmermeyer, WVDEP	Mike Dorsey, WVDEP
Joseph M. Dawley, WVDEP	Mike Zeto, WVDEP
Karen G. Watson, WVDEP	Pam Nixon, WVDEP
Jessica Greathouse, WVDEP	Lewis Halstead, WVDEP
Cathy Marcum, Tinney Law Firm	Charlie Sturey, WVDEP

The meeting was called to order at 9:15 a.m. by Joseph M. Dawley, General Counsel for the West Virginia Department of Environmental Protection.

PRESENTATION OF PROPOSED RULES FOR THE 2004 LEGISLATIVE SESSION

Division of Air Quality

John Benedict, Director of DAQ presented the following rules:

45CSR1 - No_X Trading Program as a means of control and reduction of nitrogen oxides from non-electric generating units.

Bill Raney inquired about 45CSR1 and wanted to know how this rule had been lost in the shuffle during the 2003 session? Jim Mason explained that the delay was from a legislative clerical error.

Jackie Hallinan asked what would happen if there were additional clerical errors like what happened during this legislative session? John Benedict responded it would not present a serious problem, he thought the agency could work the matter out with the EPA

45CSR15- Emission standards for hazardous air pollutants pursuant to 40 CFR Part 61.

45CSR 16 - Standards of performance for new stationary sources pursuant to 40 CFR part 60

45CSR25 - To prevent and control air pollution from hazardous waste treatment, storage, or disposal facilities

45CSR34 - Emission standards for hazardous air pollutants for sources categories pursuant to 40 CFR Part 63

45CSR36 - Requirements for determining conformity of transportation plans, program, and projects developed, funded or approved under title 23 U.S.C. or the federal transit laws, to applicable air quality implementation plans (transportation Conformity)

Rick Roberts questioned how the rule relates to "political subdivisions?" John Benedict explained that DAQ prepares emission budgets and works with Metropolitan Planning Organizations. He also said that the Memorandums of Understanding (MOU) with these organizations will no longer be appended to rule 45CSR36.

Rick Roberts also asked if the rule only addresses emissions from vehicles? John Benedict answered yes.

General Air Rule Questions:

Larry Harris asked if the rules include emission limits? John responded the rules incorporate by reference the emission limitations contained in federal regulations.

Bill Raney asked if the air rules contained anything different from the federal counterpart regulations? John responded they do not.

Although not a Rulemaking issue, Larry Harris stated that he had recently reviewed a agency letter regarding Longview Power and its proposed SO_2 emissions and inquired on the environmental impacts of this facility.

John Benedict said that the facility is going to be a "state of the art" facility and there will be a 95-98% reduction in emissions.

Division of Water and Waste Management

Bill Brannon, Assistant Director, presented the following rule:

47CSR26 - Water pollution control permit fee schedules.

Rick Roberts asked if the 50% increase in fees would be used to provide direct assistance to municipalities or would it be used only for agency paperwork?

Bill Brannon responded that the 50% fee increase will provide additional support for municipalities which otherwise is not currently available and that there will probably be a mixture of direct assistance and paperwork provided by the two additional FTE's paid for by the 50% fee increase.

Lisa Dooley stated she shares many of the same concerns that Mr. Roberts expressed and that she believes municipalities have to pass along fee increases to the public and for that reason her organization may not support the rule.

Bill Raney wanted to know if this was the first time this was proposed? Bill Brannon informed him that this was the first official time that the fee increase was proposed.

Bill Raney along with Lisa Dooley and Jackie Hallinan believe that rule information should be sent to them sooner so they can get this information to their constituents for comments.

Mike Dorsey, Assistant Director presented the following rules:

33CSR20 - Hazardous Waste Management

No comments by the advisory committee.

33CSR1 - Solid Waste Management Rule

Lisa Dooley wanted to know if the only change being made to Class D Permits are to limit expansion of the facilities. Mike Dorsey replied that the changes do limit the siting of these facilities.

Jackie Hallinan asked what recourse a person would have to object to the

cost of a background investigation. Mike Dorsey replied the person could appeal to the Environmental Quality Board.

Lisa Dooley wanted Mike Dorsey to describe the sewage sludge provisions. Mike said the revisions recognize that there other types of sludge that are as beneficial as sewage sludge.

Division of Mining and Reclamation

Lewis Halstead, Assistant Director presented the following rule:

47CSR30 - WV/NPDES Rules for Coal Mining Facilities

Bill Raney wanted to know the number of Inspectors and Inspectible units.

DEP will provide Mr. Raney with this information.

38CSR2 - West Virginia Surface Mining Reclamation Rule

Rick Roberts asked if the revisions would relax the compaction requirements in all cases or just for the forestry use.

Bill Raney asked what is going to happen to the incentidental coal provision

Lewis Halstead responded it will be available for government financed projects. Other projects will have to get a full permit.

Bill Raney asked why is the agency revising the forestry requirement? Is there a problem with the exciting requirements?

Lewis Halstead responded the agency is trying to improve forestry land use.

Bill Raney also asked why companies are being required to use these new forestry provisions when they are using alternative materials?

Lewis Halstead responded the faster the company established a canopy of trees the better, it would be.

Bill Raney also request concern about the maximum bond on contemporaneous reclamation and why is it necessary. Bill Raney stated OSM does not have a contemporaneous reclamation standard. Charlie Sturey responded OSM never

approved the deletion of this language and so the agency proposes to keep it in the rule.

Bill Raney asked about the proposed changes in inspection frequency for revoked permits?

Lewis Halstead responded OSM has certain criteria for inspections to identify if there are any health & safety issues. He also said that the rule tracks the federal counterpart regulation with regard to public notice procedures.

Larry Harris made a general comment about valley fills, he was opposed to filling in the headwaters on streams, especially trout streams.

Larry Harris asked if we have any idea of the number of streams impacted?

Lewis Halstead responded the recent Environmental Impact Statement (EIS) stated there are currently 724 miles impacted by valley fills.

Larry Harris wanted to know if DEP is monitoring to see what impacts there are downstream waters and express that there are long range-cumulative affects on such waters.

Rick Roberts asked about OSM's role in the program.

Lewis Halstead said OSM has alternate oversight program and referred to a court ruling that said the state could not implement it's rules until OSM approves them.

Other Business

Bill Raney inquired if the agency was suppose to be doing a annual report for the council. Secretary Timmermeyer stated that a report is required and that the DEP would assist the council with its efforts.

Bill Raney also asked if there is a way to keep the council informed of amendments to the rules made later in the process.

Joe Dawley responded that the agency would try to keep the council informed of any amendments at its quarterly meetings.

Jackie Hallinan stated that the DEP has had numerous leaders in the past - she feels that DEP could utilize the advisory council members more.

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 Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)"

Type of Rule: _X_ Legislative ________ Interpretive _______ Procedural

Agency: Division of Air Quality

Address: 7012 MacCorkle Avenue, SE

Charleston, WV 25304-2943

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

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

3. Objectives of these rules: This rule adopts the requirements of 40 CFR Part 93, Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws" promulgated as of June 1, 2003. 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 Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.).

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 Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)"

4. Explanation of Overall Economic Impact of Proposed Rule:

   A. Economic Impact on State Government:

   See section 2.

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

   The continued adoption of the federal Transportation Conformity regulations as state rules, as required by the Clean Air Act, would not necessarily impose additional impacts beyond the federal requirements. In fact, the revised federal rule allows more flexibility and should be less burdensome than present requirements

   C. Economic Impact on Citizens/Public at Large.

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

Date: June 11, 2003

Signature of Agency Head or Authorized Representative:

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 30, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:(*Agency Name, Address & Phone No.*) West Virginia Divison of Air Quality

7012 MacCorkle Avenue, S.E.

Charleston, WV 25304-2943
Phone No.: 926-3647

LEGISLATIVE 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 Laws, to Applicable Air Quality Implementation Plans" (Transportation Conformity)

1. Authorizing statute(s) citation W. Va. Code §22-5-4

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

   June 11, 2003

   b. What other notice, including advertising, did you give of the hearing?

   Class I Legal Advertisement; Charleston Daily Mail and Charleston Gazette
   Copy of Public Notice sent to DAQ mailing list
   Public Notice placed on DAQ's web site

   c. Date of Public Hearing(s) *or* Public Comment Period ended:

   Public hearing held and Public Comment Period Ended - July 15, 2003

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached X No comments received ____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 30, 2003

f. **Name, title, address and <u>phone/fax/e-mail numbers</u>** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

John A. Benedict, Director
7012 MacCorkle Avenue, S.E.
Charleston, WV 25304

Phone No.: (304) 926-3647 Fax: (304) 926-1713

E-mail: jbenedict@dep.state.wv.us

g. **<u>IF DIFFERENT</u> FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

See "f" above

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

TITLE 45
LEGISLATIVE RULE
~~DIVISION~~ DEPARTMENT OF ENVIRONMENTAL PROTECTION
~~OFFICE~~ DIVISION 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~~ LAWS, TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS (TRANSPORTATION CONFORMITY)

§45-36-1. General.

1.1. Scope. -- ~~The purpose of this rule is to adopt by reference~~ This rule establishes and adopts 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~~ or the Federal Transit ~~Act~~ Laws." ~~The federal rule~~ 40 CFR Part 93, Subpart A 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.)~~ Laws (49 U.S.C. Chapter 53). This rule ~~sets forth~~ codifies general 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. The Secretary hereby adopts these requirements by reference.

1.2. Authority. -- W.Va. Code ~~§22-1-3 and §§22-5-1 et seq~~ §22-5-4.

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

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

1.5. Incorporation by Reference -- Federal Counterpart Regulations~~-~~. The ~~Director~~ Secretary has determined that a federal counterpart regulation exists, and in accordance with the ~~Director's~~ Secretary's recommendation, with limited exception, this rule incorporates by reference 40 CFR Part 93, Subpart A, effective July 1, 2002, as amended by the Federal Register through June 1, 2003.

1.6. Former Rules. -- This legislative rule amends 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)" which was filed April 28, 1995 and became effective May 1, 1995.

§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.~~ 2.1. "Applicable State Implementation Plan" ~~(SIP), [also referred to as "applicable air quality implementation plan(s)," "applicable implementation plan(s)," or "applicable SIP"]~~ or "Applicable Air Quality Implementation Plan," specifically means the West Virginia State Implementation Plan (SIP) including the most current revisions approved by the ~~United States Environmental Protection Agency (USEPA)~~ USEPA and any Federal Implementation Plan implemented in the ~~State~~ state of West Virginia.

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

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

2.2. "Memorandum of Understanding" or "MOU" means a signed, mutual and binding agreement between specific parties which details procedures for meeting the interagency consultation (Federal, State and local), resolution of conflicts, and public consultation requirements set forth in 40 CFR §93.105 and section 5 of this rule.

~~2.5.~~ 2.3. "Party" or "parties" means the ~~agencies and organizations expressly listed in the individual Memorandums of Understanding referred to in Section 7 of this rule~~ West Virginia Department of Environmental Protection, the West Virginia Department of Transportation, the Boone-Clay-Kanawha-Putnam Regional Intergovernmental Council, the KYOVA Interstate Planning Commission, and the Wood-Washington-Wirt Interstate Planning Commission, as identified in an MOU.

~~2.6.~~ 2.4. "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, 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.

2.5. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W.Va. Code §22-1-6 or §22-1-8.

~~2.7.~~ 2.5. "State Governor" or "Governor" means the Governor of West Virginia or his or her designated representative.

~~2.8.~~ 2.6. "State and Local Air Quality Agency(ies)" or "State Air Agency" means the West Virginia ~~Division~~ Department of Environmental Protection, ~~Office~~ Division of Air Quality.

2.7. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in 40 CFR §93.101. Words and phrases not defined therein shall have the meaning given to them in the federal Clean Air Act.

§45-36-3. Requirements.

3.1. All transportation plans, programs, and projects developed, funded or approved in West Virginia, under Title 23 U.S.C. or the Federal Transit Laws, must conform to applicable air quality implementation plans in West Virginia. Any agency, organization or party responsible for making transportation conformity determinations or that is involved in transportation conformity-related activities shall do so pursuant to the provisions of 40 CFR Part 93, Subpart A and this rule. All such agencies, organizations or parties shall follow the consultation procedures set forth in section 5.

~~§45-36-3.~~ §45-36-4. Adoption of Policies, Criteria, and Procedures ~~and Requirements~~.

3.1. 4.1. Policies, Criteria and Procedures. -- The Director Secretary 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 policies, criteria, and 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 effective July 1, 2002, as amended by the Federal Register through June 1, 2003, for the purpose of meeting the transportation conformity requirements of 40 CFR §51.390, except that 40 CFR §93.105(e) is amended to provide that information shall be available to the public in accordance with 40 CFR §51.102, W.Va. Code §§22-5-1 et seq. and 29B-1-1 et seq.

§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 40 CFR Part 93, Subpart A, Section 93.105 are hereby addressed and fulfilled by state-specific consultation agreements (Memorandums of Understanding) mutually established by and among the W. Va Division of Environmental Protection (WVDEP), the W. Va Department of Transportation (WVDOT), and the appropriate Metropolitan Planning Organizations (MPO's), which agreements are included in Appendix A and are hereby incorporated by reference into this rule. These agreements address and comply with the requirements of 40 CFR Part 93, Subpart A, Section 93.105. The interagency consultation, resolution of conflict, and public consultation procedures set forth in 40 CFR §93.105 shall be established, detailed and fulfilled using Memorandums of Understanding, as appropriate. The specific parties identified in a MOU shall mutually agree to adopt, implement and abide by such procedures. As required by 40 CFR §93.105(a), these mutually agreed and established procedures (MOUs) shall be included in any SIP revision submitted to USEPA under 40 CFR §51.390.

§45-36-6. Severability.

6.1. The provisions of this rule 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, or their application to any persons or circumstances.

§45-36-6. Inconsistency Between Rules.

6.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, such inconsistency shall be resolved by the determination of the Secretary and such determination shall be based upon the application of the more stringent provision, term, condition, method or rule.

The actions in this document are taken pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 1-90 (55 FR 9033), and 29 CFR part 1911.

Signed at Washington, DC., this 2nd day of February, 1995.

Joseph A. Dear,

Assistant Secretary of Labor.

For the reasons set forth above, 29 CFR part 1910 is hereby amended as follows:

PART 1910—[AMENDED]

1. The Authority citation for subpart R of 29 CFR part 1910 continues to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), or 1-90 (55 FR 9033), as applicable.

Sections 1910.261, 1910.262, 1910.265, 1910.266, 1910.267, 1910.268, 1910.272, 1910.274, and 1910.275 also issued under 29 CFR part 1911.

Section 1910.272 also issued under 5 U.S.C. 553.

2. A note is added at the end of § 1910.266, to read as follows:

§ 1910.266 Logging operations.

* * * * *

Note: In the **Federal Register** of February 8, 1995, OSHA stayed the following paragraphs of § 1910.266 from February 9, 1995 until August 9, 1995:

1. (d)(1)(v) insofar as it requires foot protection to be chain-saw resistant.
2. (d)(1)(vii) insofar as it requires face protection.
3. (d)(2)(iii).
4. (f)(2)(iv).
5. (f)(2)(xi).
6. (f)(3)(ii).
7. (f)(3)(vii).
8. (f)(3)(viii).
9. (f)(7)(ii) insofar as it requires that parking brakes be able to stop the machine.
10. (g)(1) and (g)(2) insofar as they require inspection and maintenance of employee-owned vehicles.
11. (h)(2)(vii) insofar as it precludes backcuts at the level of the horizontal cut of the undercut when the Humboldt cutting method is used.

[FR Doc. 95-3041 Filed 2-7-95; 8:45 am]

BILLING CODE 4510-26-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL-5149-8]

Transportation Conformity Rule Amendments: Transition to the Control Strategy Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: This action aligns the timing of certain transportation conformity consequences with the imposition of Clean Air Act highway sanctions for a six-month period. For ozone nonattainment areas with an incomplete 15% emissions-reduction state implementation plan with a protective finding; incomplete ozone attainment/3% rate-of-progress plan; or finding of failure to submit an ozone attainment/3% rate-of-progress plan, and areas whose control strategy implementation plan for ozone, carbon monoxide, particulate matter, or nitrogen dioxide is disapproved with a protective finding, the conformity status of the transportation plan and program will not lapse as a result of such failure until highway sanctions for such failure are effective under other Clean Air Act sections.

This action delays the lapse in conformity status, which would otherwise prevent approval of new highway and transit projects, and allows States more time to prevent the lapse by submitting complete control strategy implementation plans. EPA is issuing this interim final rule, effective for a six-month period, without prior proposal in order to prevent previously unforeseeable delays in State ozone implementation plan development from causing widespread conformity lapsing. In a parallel action in this **Federal Register**, EPA is requesting comment on this interim final rule and on similar but permanent rule changes.

EFFECTIVE DATE: This interim final rule is effective on February 8, 1995 until August 8, 1995.

ADDRESSES: Materials relevant to this rulemaking are contained in Docket No. A-95-02. The docket is located in room M-1500 Waterside Mall (ground floor) at the Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket may be inspected from 8 a.m. to 4 p.m., Monday through Friday, including all non-government holidays.

FOR FURTHER INFORMATION CONTACT: Kathryn Sargeant, Emission Control Strategies Branch, Emission Planning and Strategies Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105. (313) 668-4441.

SUPPLEMENTARY INFORMATION:

I. Background

A. Transportation Conformity Rule

The final transportation conformity rule, "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act," was published November 24, 1993 (58 FR 62188) and amended 40 CFR parts 51 and 93. The Notice of Proposed Rulemaking was published on January 11, 1993 (58 FR 3768).

Required under section 176(c) of the Clean Air Act, as amended in 1990, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration, the Federal Transit Administration, and metropolitan planning organizations determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state implementation plans (SIPs). According to the Clean Air Act, federally supported activities must conform to the implementation plan's purpose of attaining and maintaining the national ambient air quality standards.

The final transportation conformity rule requires that conformity determinations use the motor vehicle emissions budget(s) in a submitted "control strategy" SIP (defined below), and the rule includes special provisions to address failures in control strategy SIP development. These failures include failure to submit a control strategy SIP, submission of an incomplete control strategy SIP, or disapproval of a control strategy SIP. Specifically, according to 40 CFR 51.448 (and 40 CFR 93.128), following these SIP development failures, no new or amended transportation plans or transportation improvement programs (TIPs) may be found to conform to the SIP after a certain grace period (i.e., the existing transportation plan and TIP are "frozen"), and eventually, the conformity status of the existing transportation plan and TIP lapses.

When the conformity status of the transportation plan and TIP lapses, no new project-level conformity determinations may be made, and the only federal highway and transit projects which may proceed are exempt or grandfathered projects. Non-federal

highway or transit projects may be adopted or approved by recipients of funds designated under title 23 U.S.C. or the Federal Transit Act only if they are not regionally significant.

As described in the preamble to the final transportation conformity rule (58 FR 62191–3), EPA developed these requirements in response to public comments which claimed that the proposed interim period conformity criteria (e.g., the "build/no-build test") did not ensure emissions reductions consistent with Clean Air Act requirements for reasonable further progress and attainment, and which emphasized the importance of emissions budgets in determining conformity. EPA imposed restrictions such as conformity lapsing where the State failed to establish emission budgets in a timely fashion, because EPA believed that in the prolonged absence of a control strategy SIP, preventing new conformity determinations and postponing new commitments of funds would prevent uncontrolled emissions increases while the State was establishing its control strategies.

B. Control Strategy SIP Requirements

Control strategy SIPs include 15% rate-of-progress plans, reasonable further progress plans, and attainment demonstrations.

Clean Air Act section 182(b)(1) required moderate and above ozone nonattainment areas to submit a 15% volatile organic compound emission reduction rate-of-progress plan by November 15, 1993. Moderate ozone areas were also required by that section to submit an attainment demonstration by this date if they were not using photochemical grid modeling to develop the demonstration.

Serious and above ozone nonattainment areas (and moderate ozone nonattainment areas using photochemical grid modeling under EPA's interpretation of section 182(b)(1)) were required to submit an attainment demonstration by November 15, 1994 under Clean Air Act section 182(c)(2)(A). Clean Air Act section 182(c)(2)(B) also required serious and above ozone nonattainment areas to submit by this date a reasonable-further-progress (or rate-of-progress) plan for 3% annual emission reductions until the attainment date.

Carbon monoxide (CO) nonattainment areas classified as moderate with design value greater than 12.7 parts per million or serious were required by Clean Air Act section 187(a)(7) to submit an attainment demonstration by November 15, 1992.

Areas in nonattainment for particulate matter less than a nominal 10 microns in aerodynamic diameter (PM–10) were required to submit an attainment demonstration at varying dates depending upon their date of classification, but Clean Air Act section 189(a)(1)(B) required many areas to submit the attainment demonstration by November 15, 1991.

Nitrogen dioxide (NO_2) areas were required by Clean Air Act section 191 to submit an attainment demonstration by May 15, 1992.

II. Description of Interim Final Rule

A. Incomplete 15% SIPs and Disapprovals With Protective Findings

This interim final rule delays the lapse in transportation plan/TIP conformity until Clean Air Act section 179(b) highway sanctions are effective, for areas with a 15% SIP which EPA found incomplete but noted in the finding (according to 40 CFR 51.448(c)(1)(iii)) 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) (i.e., incomplete with a "protective finding"). EPA is also similarly delaying the conformity lapse which results from EPA disapproval of a control strategy SIP with a "protective finding" as described in 40 CFR 51.448(a)(3) and (d)(3). Clean Air Act highway sanctions will become effective in both types of areas two years following the date of EPA's incompleteness determination or disapproval, unless the State remedies the failure.

Under the November 1993 transportation conformity rule, the conformity status of the transportation plan and TIP lapses in such areas twelve months following the incompleteness determination or disapproval, unless another SIP is submitted to EPA and found to be complete. This interim final rule delays the transportation plan/TIP conformity lapse. It also restores the conformity status of transportation plans and TIPs for which twelve months have already elapsed since EPA made the incompleteness determination or disapproval with protective finding, provided conformity has not lapsed for other reasons under the transportation conformity rule. A list of areas with incomplete 15% SIPs with protective findings (and the dates of those EPA findings) is in the docket.

EPA is delaying the transportation plan/TIP conformity lapse in these areas because the agency now believes that a twelve-month period to make these control strategy SIPs fully enforceable is a too stringent definition of "timely" SIP development in this particular context, given the lengthy legislative and administrative processes of many States. Although EPA believed this time period was appropriate at the time EPA promulgated the transportation conformity rule, EPA has now seen that in practice the time was too short to be reasonable for purposes of determining when transportation plans and TIPs should lapse following SIP development failures.

EPA believes it is appropriate to allow States more time to complete these SIPs before negative conformity consequences are imposed, particularly because in these areas with incompleteness findings or disapprovals with protective findings, the State has developed motor vehicle emissions budget(s) which are part of an overall strategy to achieve the required emission reductions and therefore are appropriate for use in conformity determinations. In these areas, lapsing is not necessary in the short term to prevent uncontrolled motor vehicle emissions increases while the State completes the SIP, because the motor vehicle emissions budget(s) are already applying in conformity determinations as a constraint.

However, EPA continues to believe that a conformity lapse is appropriate in the prolonged absence of a complete control strategy SIP. In such cases, EPA can no longer remain confident that states will be able to adopt and implement the rules necessary to support the SIP emissions budget. EPA believes that the application of Clean Air Act highway sanctions signifies that SIP development has not proceeded in a timely fashion and, therefore, that the conformity process should ensure that significant new transportation projects will not be undertaken.

B. Ozone Attainment/3% Rate-of-Progress SIPs

For ozone nonattainment areas which fail to submit an attainment SIP due November 15, 1994 (including moderate areas using photochemical grid modeling) and/or a 3% rate-of-progress SIP revision (hereafter called an "attainment/3% rate-of-progress SIP"), this interim final rule similarly delays the transportation plan/TIP conformity lapse until Clean Air Act highway sanctions are effective. Clean Air Act highway sanctions apply in these areas two years following the date of EPA's finding of failure to submit, unless the State remedies the failure. This rule also

eliminates the transportation plan/TIP "freeze" in these areas.

Under the November 1993 transportation conformity rule, in ozone nonattainment areas where EPA finds a failure to submit the attainment/3% rate-of-progress SIP, no new or amended transportation plans or TIPs could be adopted after March 15, 1995 (i.e., the existing transportation plan/TIP would be "frozen"). The conformity status of the transportation plan and TIP would have lapsed November 15, 1995.

This interim final rule also delays the transportation plan/TIP conformity lapse until the application of Clean Air Act highway sanctions for ozone nonattainment areas with incomplete attainment/3% rate-of-progress SIPs. This rule also eliminates the transportation plan/TIP "freeze" for these areas.

Under the November 1993 transportation conformity rule, if EPA found an area's ozone attainment/3% rate-of-progress SIP incomplete without a protective finding, the transportation plan/TIP would have "frozen" 120 days following EPA's incompleteness finding, and the conformity status of the transportation plan/TIP would have lapsed November 15, 1995. For areas for which EPA made an incompleteness determination with a protective finding, the conformity status of the transportation plan/TIP would have lapsed twelve months from the date of the incompleteness finding (no "freeze" would have occurred).

Under this interim final rule, in any ozone nonattainment area with an incomplete attainment/3% rate-of-progress SIP, the conformity status of the transportation plan/TIP will not lapse until Clean Air Act section 179(b)(1) highway sanctions are effective as a result of the incompleteness (provided the conformity status of the transportation plan and TIP does not lapse for other reasons under the transportation conformity rule). Consequently, there will be no distinction among incompleteness determinations regarding protective findings.

EPA is delaying the transportation plan/TIP conformity lapse due to failure to submit and incomplete ozone attainment/3% rate-of-progress SIPs because unforeseeable delays in the development of these SIPs, including delays beyond the control of state air quality planning agencies due to the complexity of required modeling, have convinced the agency that the grace periods in the November 1993 rule constitute a too stringent definition of "timely" establishment of emissions budgets in this particular context. Since states have been proceeding towards SIP development and delays have not been within their control, EPA now believes that the original grace period is unreasonable.

However, EPA continues to believe that conformity lapsing is appropriate in the prolonged absence of a complete ozone attainment/3% rate-of-progress SIP. EPA believes that the application of Clean Air Act highway sanctions signifies that SIP development has not proceeded in a timely fashion and, therefore, that the conformity process should ensure that significant new transportation projects will not be undertaken.

C. Other Control Strategy SIPs

This interim final rule does not change the consequences in 40 CFR 51.448 for disapproval of any control strategy SIP without a protective finding; for failure to submit or submission of incomplete CO, PM-10, or NO_2 attainment demonstrations; or for failure to submit or submission of incomplete 15% SIPs without protective findings. EPA believes that transportation plan/TIP "freeze" and conformity lapse is appropriate as currently required because in these cases adequate emissions budgets have not been established in a timely fashion.

III. Rulemaking Process

A. Rulemaking Procedures

This rule is being published as an interim final rule without benefit of a prior proposal and public comment period because EPA finds that "good cause" exists for deferring those procedures until after publishing the changes as an interim final rule. Good cause exists for two reasons. First, it is contrary to the public interest for the transportation conformity rule to halt implementation of transportation plans, programs, and projects when for the reasons described above EPA believes that such delay is not necessary at this time for the lawful and effective implementation of Clean Air Act section 176(c).

Furthermore, the conformity consequences for ozone areas which this interim final rule delays would have occurred before full notice-and-comment rulemaking could have been completed. EPA could not have initiated full notice-and-comment rulemaking far enough in advance to effectively delay the conformity consequences at issue because it was first necessary to evaluate the States' progress in control strategy SIP development and submission, and to determine whether the existing grace periods were appropriate. In addition, it is possible that a disapproval with a protective finding could have occurred during the full notice-and-comment rulemaking process. Thus, it was impracticable to provide notice-and-comment procedures prior to the time by which EPA needs to implement these changes to avoid the conformity consequences that would otherwise result under the existing rule.

Although prior notice-and-comment rulemaking was impracticable, a draft of this rule was distributed to representatives of affected State and local transportation and air quality planning agencies and the public, and a conference call was held with stakeholders such as the State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials, the American Association of State Highway and Transportation Officials, the American Public Transit Association, the National Association of Regional Councils, the American Association of Metropolitan Planning Organizations, the National Governors' Association, the Surface Transportation Policy Project, the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club Legal Defense Fund, the Highway Users Federation, and the American Road and Transportation Builders Association to solicit input on the interim final rule prior to promulgation.

In addition, the Secretary of Transportation reviewed and concurred with this interim final rule.

This interim final rule is taking effect immediately upon publication because, as described above, conformity lapsing which is contrary to the public interest would otherwise be occurring during the 30-day period between publication and the effective date ordinarily provided under the Administrative Procedures Act (APA), 5 U.S.C. 553(d). EPA finds good cause to make this interim final rule effective immediately for the same reasons described above in justification of taking final action without prior proposal. In addition, this rule relieves a restriction and, therefore, qualifies for an exception from the APA's 30-day advance-notice period under 5 U.S.C. 553(d)(1).

The provisions of this interim final rule shall apply only for six months, during which time EPA will conduct full notice-and-comment rulemaking on these provisions and whether to make these provisions permanent. A proposed rule is published in the proposed rule section of this **Federal Register**, and the public comment period on this proposal will last until March 10, 1995. Public

comments will be addressed in a subsequent final rule, which will be promulgated before the six-month limit on the applicability of this interim final rule expires.

B. Future Amendments to the Transportation Conformity Rule

EPA intends to make additional limited amendments to the transportation conformity rule. EPA intends to clarify certain ambiguous language in 40 CFR 51.448 and 93.128 to ensure implementation consistent with the intent of EPA and the Department of Transportation (DOT), as expressed in guidance memoranda issued since November 1993. These changes are necessary to have legal certainty that the amendments promulgated today will continue to have their intended effect.

In addition, EPA intends to amend the transportation conformity rule in order to allow transportation control measures which are in an approved SIP and have been included in a conforming transportation plan and TIP to proceed even if the conformity status of the current transportation plan and TIP has lapsed.

EPA is not issuing these amendments in this interim final rule because prior notice-and-comment rulemaking is not impracticable in these cases. EPA intends to propose these amendments in a Notice of Proposed Rulemaking within the next several months, and representatives from the organizations listed above will be given an opportunity to comment on a draft NPRM this month.

Since publication of the transportation conformity rule in November 1993, EPA, DOT, and state and local air and transportation officials have had experience implementing the criteria and procedures in the rule. It is that mutual experience which leads to the amendments which EPA will be proposing today and in the very near future. In each case, the amendments are needed to clarify ambiguities, correct errors, or make the conformity process more logical and feasible.

There are many other issues which were debated in the original rulemaking, some of which are the subject of litigation at this time. EPA does not intend its issuance of back-to-back rulemakings to imply a willingness to open the conformity rule to amendments which suit one or the other petitioners' purpose. Both EPA and DOT, of course, are very willing and eager to assist transportation and air quality planners in complying with the rule and the statutory intent.

IV. Administrative Requirements

A. Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

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

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

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements from EPA which require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

C. Regulatory Flexibility Act

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

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

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

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate Matter, Reporting and Recordkeeping Requirements, Volatile organic compounds.

40 CFR Part 93

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Ozone.

Dated: January 31, 1995.

Carol M. Browner,

Administrator.

40 CFR parts 51 and 93 are amended as follows:

PARTS 51 AND 93—[AMENDED]

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

Authority: 42 U.S.C. 7401(a)(2), 7475(e), 7502 (a) and (b), 7503, 7601(a)(1) and 7602.

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

Authority: 42 U.S.C. 7401–7671p.

3. The identical texts of §§ 51.448 and 93.128 are amended as follows:

a. By redesignating paragraphs (b)(2) and (c)(2) as (b)(3) and (c)(3);

b. In the newly redeisgnated paragraph (c)(3)(iii) by revising the reference "paragraphs (c)(2)(i) and (ii)" to read "paragraphs (c)(3)(i) and (ii); and

c. By adding new paragraphs (a)(4), (b)(2), (c)(2), and (d)(4).

The identical text of additions reads as follows: § _____._____ Transition from the interim period to the control strategy period.

(a) * * *

(4) Until August 8, 1995, for areas otherwise subject to paragraph (a)(3) of this section, the conformity lapse imposed by the final sentence of paragraph (a)(3) of this section shall not apply. The conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act, unless another control strategy implementation

plan revision is submitted to EPA and found to be complete.

(b) * * *

(2) Until August 8, 1995, for ozone nonattainment areas where EPA has notified the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan revision required by Clean Air Act sections 182(c)(2)(A) and/or 182(c)(2)(B), failure to submit an attainment demonstration for an intrastate moderate ozone nonattainment area that chose to use the Urban Airshed Model for such demonstration, or failure to submit an attainment demonstration for a multistate moderate ozone nonattainment area, the following shall apply in lieu of the provisions of paragraph (b)(1) of this section:

(i) The conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the Clean Air Act, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator; and

(ii) The consequences described in paragraph (b)(1) of this section shall be nullified if such provisions have been applied as a result of a failure described in paragraph (b)(2) of this section, and paragraph (b)(2) of this section shall henceforth apply with respect to any such failure.

* * * * *

(c) * * *

(2) Until August 8, 1995, for the ozone nonattainment areas described in paragraph (c)(2)(i) of this section, the following shall apply in lieu of the provisions of paragraph (c)(1) of this section:

(i) The conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act for the failures described below, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator, in ozone nonattainment areas where EPA notifies the State, MPO, and DOT that any of the following control strategy implementation plan revisions are incomplete:

(A) The implementation plan revision due November 15, 1994, as required by Clean Air Act sections 182(c)(2)(A) and/or 182(c)(2)(B);

(B) The attainment demonstration required for moderate intrastate ozone nonattainment areas which chose to use the Urban Airshed Model for such demonstration and for multistate moderate ozone nonattainment areas; or

(C) The VOC reasonable further progress demonstration due November 15, 1993, as required by Clean Air Act section 182(b)(1), if EPA notes in its incompleteness finding as described in paragraph (c)(1)(iii) of this section 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); and

(ii) The consequences described in paragraph (c)(1) of this section shall be nullified if such provisions have been applied as a result of a failure described in paragraph (c)(2)(i) of this section, and paragraph (c)(2) of this section shall henceforth apply with respect to any such failure.

* * * * *

(d) * * *

(4) Until August 8, 1995, for areas otherwise subject to paragraph (d)(3) of this section, the conformity lapse imposed by the final sentence of paragraph (d)(3) of this section shall not apply. The conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act, unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

* * * * *

[FR Doc. 95-3003 Filed 2-7-95; 8:45 am]

BILLING CODE 6560-50-P

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40 CFR Parts 52 and 81

[OH06-2-6229, OH01-2-6230, OH32-2-6231; FRL-5151-1]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: USEPA is approving a redesignation request and maintenance plan for Preble, Columbiana, and Jefferson County, Ohio as a revision to Ohio's State Implementation Plan (SIP) for ozone.

The revision is based on a request from the State of Ohio to redesignate these areas, and approve their maintenance plans, and on the supporting data the State submitted. Under the Clean Air Act, designations can be changed if sufficient data are available to warrant such change.

EFFECTIVE DATE: This final rule becomes effective on March 10, 1995.

ADDRESSES: Copies of the requested redesignation, maintenance plan, and other materials relating to this rulemaking are available for public inspection during normal business hours at the following addresses: United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard (AE-17J), Chicago, Illinois 60604; and Jerry Kurtzweg (ANR-443), United States Environmental Protection, Agency, 401 M Street, S.W. Washington, D.C. 20460. (It is recommended that you telephone William Jones at (312) 886-6058, before visiting the Region 5 Office.)

FOR FURTHER INFORMATION CONTACT: William Jones, Regulation Development Section, Air Enforcement Branch (AE-17J), U.S. Environmental Protection Agency, Region 5, Chicago, Illinois 60604, (312) 886-6058.

SUPPLEMENTARY INFORMATION: Under Section 107(d) of the pre-amended Clean Air Act (CAA), the United States Environmental Protection Agency (USEPA) promulgated the ozone attainment status for each area of every State. For the State of Ohio, Preble, Columbiana, and Jefferson Counties were designated as nonattainment areas for ozone. See 43 FR 8962 (March 3, 1978), and 43 FR 45993 (October 5, 1978). On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Pub. L. No. 101-549, 104 Stat. 2399, codified at 42 U.S.C. 7401-7671q. Pursuant to Section 107(d)(1)(C)(i) of the amended CAA, Preble, Jefferson, and Columbiana Counties retained their designations of nonattainment for ozone by operation of law. See 56 FR 56694 (November 6, 1991). At the same time, Preble and Jefferson Counties were classified as transitional areas; and Columbiana County was classified as an incomplete data area.

The Ohio Environmental Protection Agency (OEPA) requested that Preble County be redesignated to attainment in a letter dated May 23, 1986; and that Jefferson and Columbiana Counties be redesignated to attainment in a letter dated July 14, 1986. On December 20, 1993, the United States Environmental Protection Agency (USEPA) proposed to disapprove the requested redesignations. See 58 FR 66334. The public comment period was from December 20, 1993, to January 19, 1994. Only one public comment was received on the proposed rulemaking to disapprove the redesignations. It was a January 18, 1994, letter from the State of Ohio requesting a 90-day extension of

Final Regulations

In consideration of the foregoing, the Coast Guard is amending part 117 of Title 33, Code of Federal Regulations to read as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g); Section 117.255 also issued under the authority of Pub. L. 102-587, 106 Stat. 5039.

2. Section 117.833 is revised to read as follows:

§ 117.833 Pasquotank River.

The draw of the Albemarle & Chesapeake railroad bridge, mile 47.7, at Elizabeth City, North Carolina, shall be maintained in the open position; the draw may close only for the crossing of trains and maintenance of the bridge. When the draw is closed, a bridgetender shall be present to reopen the draw after the train has cleared the bridge.

Dated: July 12, 1995.

N.V. Scurria, Jr.,

Captain, U.S. Coast Guard, Commander, Fifth Coast Guard District Acting.

[FR Doc. 95–19346 Filed 8–4–95; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL–5273–8]

Transportation Conformity Rule Amendments: Transition to the Control Strategy Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action permanently aligns the timing of certain consequences of state air quality planning failures under EPA's transportation conformity rule with the imposition of Clean Air Act highway sanctions. For ozone nonattainment areas with an incomplete 15% emissions-reduction state implementation plan with a protective finding; incomplete ozone attainment/3% rate-of-progress plan; or finding of failure to submit an ozone attainment/3% rate-of-progress plan; and areas whose control strategy implementation plan for ozone, carbon monoxide, particulate matter, or nitrogen dioxide is disapproved with a protective finding, the conformity status of the transportation plan and program will not lapse as a result of such failure until highway sanctions for such failure are effective under other Clean Air Act sections.

This action makes permanent the interim final rule issued on February 8, 1995 (60 FR 7449), which was effective for only six months. The lapse in conformity status which this action delays for some areas would otherwise prevent approval of new highway and transit projects.

EFFECTIVE DATE: This final rule is effective August 8, 1995.

ADDRESSES: Materials relevant to this rulemaking are contained in Docket No. A–95–02. The docket is located in room M–1500 Waterside Mall (ground floor) at the Environmental Protection Agency, 401 M Street S.W., Washington, DC 20460. The docket may be inspected from 8 a.m. to 4 p.m., Monday through Friday, including all non-government holidays.

FOR FURTHER INFORMATION CONTACT: Kathryn Sargeant, Emission Control Strategies Branch, Emission Planning and Strategies Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105. (313) 668–4441.

SUPPLEMENTARY INFORMATION:

I. Background

On February 8, 1995, EPA issued an interim final rule entitled, "Transportation Conformity Rule Amendments: Transition to the Control Strategy Period," which was effective from February 8, 1995, until August 8, 1995 (60 FR 7449). Because the interim final rule took effect without prior notice and comment, EPA limited its effectiveness to a six-month period, during which full notice and comment was to occur.

EPA also issued on February 8, 1995, a proposed rule to apply the provisions of the interim final rule permanently (60 FR 7508). The public comment period on the proposed rule lasted until March 10, 1995, and a public hearing was held on February 22, 1995.

The February 8, 1995, interim final rule delayed the conformity lapse imposed as a result of the following: an incomplete 15% rate-of-progress SIP with a "protective finding" (described below); a failure to submit or submission of an incomplete ozone attainment/3% rate-of-progress SIP; and a disapproval of any control strategy SIP (i.e., 15% rate-of-progress SIP, reasonable further progress SIP, or attainment demonstration) with a protective finding.

The interim final rule did not affect the timing of the conformity lapse which results from failure to determine conformity by the deadlines established in 40 CFR 51.400 (93.104) and 51.448(a) (93.128(a)), including deadlines to redetermine conformity with respect to submitted SIPs, following promulgation of the November 1993 rule, and following control strategy SIP approvals.

When the conformity status of the transportation plan and transportation improvement program (TIP) lapses, no new project-level conformity determinations may be made, and the only federal highway and transit projects which may proceed are exempt or grandfathered projects. Non-federal highway or transit projects may be adopted or approved by recipients of funds designated under title 23 U.S.C. or the Federal Transit Act only if they are not regionally significant.

EPA is delaying the conformity lapse resulting from the specific SIP deficiencies listed above because EPA has recognized that in practice, the twelve-month time period which the November 24, 1993, transportation conformity rule allowed for areas to correct those SIP deficiencies is too short to be reasonable for purposes of determining when transportation plans and TIPs should lapse following SIP development failures.

Today's final rule amends the transportation conformity rule, "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" (58 FR 62188, November 24, 1993). Required under section 176(c) of the Clean Air Act, as amended in 1990, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration, the Federal Transit Administration, and metropolitan planning organizations (MPOs) determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state implementation plans (SIPs). According to the Clean Air Act, federally supported activities must conform to the implementation plan's purpose of attaining and maintaining the national ambient air quality standards.

II. Description of Final Rule

This final rule makes no substantive changes from the proposed rule. This final rule permanently applies the provisions of the February 8, 1995, interim final rule by eliminating the six-month limit to the interim final rule's

applicability. The regulatory language is somewhat modified from the interim final rule's language as a result of the elimination of the six-month limit on applicability of certain provisions.

Like the interim final rule and proposed rule, this final rule affects areas with a 15% SIP which EPA found incomplete but noted in the finding (according to 40 CFR 51.448(c)(1)(iii)) 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) (i.e., incomplete with a "protective finding"); ozone nonattainment areas which fail to submit an ozone attainment SIP and/or a 3% rate-of-progress SIP revision; ozone nonattainment areas with an incomplete ozone attainment SIP and/or an incomplete 3% rate-of-progress SIP; and areas with a disapproved control strategy SIP with a "protective finding" as described in 40 CFR 51.448 (a)(3) and (d)(3). Conformity lapse as a result of these SIP failures is delayed until Clean Air Act section 179(b) highway sanctions for these failures are applied. If the interim final rule expired on August 8, 1995, without today's final rule, conformity would lapse immediately in approximately twenty areas without complete 15% SIPs.

Like the interim final rule and proposed rule, this final rule does not change the timing of conformity lapse for disapproval of any control strategy SIP without a protective finding; for failure to submit or submission of incomplete carbon monoxide (CO), particulate matter (PM–10), or nitrogen dioxide (NO_2) attainment demonstrations; for failure to submit 15% SIPs; or for submission of incomplete 15% SIPs without protective findings.

Like the interim final rule and the proposed rule, this final rule does not affect the timing of the conformity lapse which results from failure to determine conformity by the deadlines established in 40 CFR 51.400 (93.104) and 51.448(a) (93.128(a)), including deadlines to redetermine conformity with respect to submitted SIPs, following promulgation of the November 1993 rule, and following control strategy SIP approvals.

This final rule deletes paragraphs (g)(1) and (g)(2) in 51.448(g) (93.128(g)), because these provisions are no longer relevant given the other changes of this final rule.

Today's final rule will be effective August 8, 1995. Today's final rule will prevent the conformity status of certain plans and TIPs from lapsing immediately upon expiration of the interim final rule on August 8, 1995, in approximately twenty ozone nonattainment areas currently without complete 15% SIPs. This conformity lapse would be contrary to the public interest because EPA believes that halting of transportation plan, program, and project implementation in these cases is not necessary at this time for the lawful and effective implementation of Clean Air Act section 176(c). If EPA did not make this rule effective August 8, 1995, conformity lapse which is contrary to the public interest could occur in some areas during the 30-day period between publication and the effective date which is ordinarily provided under the Administrative Procedures Act (APA), 5 U.S.C. 553(d). EPA therefore finds good cause to make this final rule effective August 8, 1995. In addition, this rule relieves a restriction and therefore qualifies for an exception from the APA's 30-day advance-notice period under 5 U.S.C. 553(d)(1).

III. Response to Comments

Fourteen comments on the proposed rule were submitted, including comments from MPOs and state and local air and transportation agencies. The majority of the comments supported the proposed rule. A complete response to comments document is in the docket.

One commenter opposed the proposed rule for a number of reasons, including the concern that the proposed rule would encourage further delays in development and submission of control strategy SIPs. EPA agrees that the submission of control strategy SIPs (and thus motor vehicle emissions budgets) is of critical importance for conformity purposes. However, EPA believes that Clean Air Act section 179(b) sanctions continue to provide appropriate incentive to submit complete and approvable control strategy SIPs.

The commenter also suggested that EPA consider options such as retaining the lapsing provisions but allowing extensions in certain circumstances, or retaining the conformity lapse but allowing a longer grace period (such as 18 or 24 months) following an EPA finding of a SIP failure. In fact, because Clean Air Act highway sanctions apply 24 months following an EPA finding of a SIP failure, today's amendments aligning conformity lapse with Clean Air Act highway sanctions implement the commenter's latter suggestion. Although the commenter was also concerned that tying conformity to sanctions would make EPA more hesitant to apply sanctions, section 179(b) sanctions are mandatory within the prescribed periods following EPA's findings of State failures, under the Clean Air Act and EPA's regulations.

Other commenters suggested that EPA should align all conformity lapses due to SIP failures with Clean Air Act sanctions. Alignment for more cases than originally proposed would require another rulemaking. EPA currently intends to issue in the future a proposal to align with Clean Air Act highway sanctions the conformity lapse which results from failure to submit a 15% SIP; an incomplete 15% SIP without a protective finding; and failure to submit or incomplete CO, PM–10, or NO_2 attainment demonstrations. This change would also dramatically decrease the complexity of the regulatory language in section 51.448 (93.128) of the conformity rule, which was a concern expressed by some commenters. EPA will be considering comments advocating alignment of the lapse which follows SIP disapprovals without protective findings, but the agency has not yet decided whether to propose amending that provision.

Some commenters suggested that every conformity lapse for any reason, including failure to demonstrate conformity to a submitted SIP, should be delayed. These suggestions are beyond the scope of the proposed rule and would also require another proposed rule. Again, EPA will be considering these comments in the context of future conformity rule amendments.

Several commenters also raised concerns about aspects of the conformity rule which are not relevant to this action, including transportation control measures and non-federal projects. These comments do not affect whether EPA should proceed with today's action, but EPA will be considering them in the context of future conformity rule amendments.

IV. Administrative Requirements

A. Administrative Designation

Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the

environment, public health or safety, or State, local, or tribal governments or communities;

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

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

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements from EPA which require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

C. Regulatory Flexibility Act

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

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

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

D. Unfunded Mandates

Under Sections 202, 203 and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of $100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

Because this action will delay conformity lapses that would otherwise occur under existing regulations, EPA has determined that to the extent this rule imposes any mandate within the meaning of the Unfunded Mandates Act, this final action does not include a mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate or to the private sector. Therefore, EPA has not prepared a statement with respect to budgetary impacts.

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and Recordkeeping requirements, Volatile organic compounds.

40 CFR Part 93

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Ozone.

Dated: August 1, 1995.

Carol M. Browner,

Administrator.

40 CFR parts 51 and 93 are amended as follows:

PART 51—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

PART 93—[AMENDED]

2. The authority citation for part 93 is amended to read as follows:

Authority: 42 U.S.C. 7401–7671q.

§§ 51.448 and 93.128 [Amended]

3. The identical texts of §§ 51.448 and 93.128 are amended as follows:

a. By redesignating paragraphs (b)(2) and (c)(2) as (b)(3) and (c)(3);

b. By removing paragraphs (g)(1) and (g)(2) and redesignating paragraph (g)(3) as (g)(1) and reserving paragraph (g)(2); and

c. By revising paragraphs (a)(3), (b)(1) introductory text, and (d)(3), and adding new paragraphs (b)(2) and (c)(2).

The identical text of additions and revisions reads as follows:

§ ____.___ Transition from the interim period to the control strategy period.

(a) * * *

(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 conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act, 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 CO, PM_{10} and NO_2 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) * * *

(ii) * * *

(2) For ozone nonattainment areas where EPA has notified the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan revision required by Clean Air Act sections 182(c)(2)(A) and/or 182(c)(2)(B), failure to submit an attainment demonstration for an intrastate moderate ozone nonattainment area that chose to use the Urban Airshed Model for such demonstration, or failure to submit an attainment demonstration for a multistate moderate ozone nonattainment area, the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the Clean Air Act.

* * * * *

(c) * * *

(2) In lieu of the provisions of paragraph (c)(1) of this section, the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area under section

179(b)(1) of the Clean Air Act as a result of incompleteness, in ozone nonattainment areas where EPA notifies the State, MPO, and DOT that the following control strategy implementation plan revisions are incomplete:

(i) The implementation plan revision due November 15, 1994, as required by Clean Air Act sections 182(c)(2)(A), and/or 182(c)(2)(B);

(ii) The attainment demonstration required for moderate intrastate ozone nonattainment areas which chose to use the Urban Airshed Model for such demonstration and for multistate moderate ozone nonattainment areas; or

(iii) The VOC reasonable further progress demonstration due November 15, 1993, as required by Clean Air Act section 182(b)(1), if EPA notes in its incompleteness finding as described in paragraph (c)(1)(iii) of this section 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).

(iv) The consequences described in paragraph (c)(1) of this section shall be nullified if such provisions have been applied as a result of a failure described in paragraph (c)(2) of this section, and paragraph (c)(2) of this section shall henceforth apply with respect to any such failure.

* * * * *

(d) * * *

(3) Notwithstanding paragraph (d)(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 conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act, unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

* * * * *

[FR Doc. 95-19400 Filed 8-4-95; 8:45 am]
BILLING CODE 6560-50-P

40 CFR Part 52

[FRL-5274-3]

Determination of Attainment of Ozone Standard by Ashland, Kentucky, Northern Kentucky (Cincinnati area), Charlotte, North Carolina, and Nashville, Tennessee, and Determination Regarding Applicability of Certain Reasonable Further Progress and Attainment Demonstration Requirements: Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of final rule.

SUMMARY: On June 22, 1995, the EPA published a proposed rule (60 FR 32477) and a direct final rule (60 FR 32466) determining that the Ashland, Kentucky, Northern Kentucky (Cincinnati Area), Charlotte, North Carolina, and Nashville, Tennessee, ozone nonattainment areas were attaining the National Ambient Air Quality Standard (NAAQS) for ozone. Based on that determination, the EPA also determined that requirements of section 182(b)(1) of the Clean Air Act (Act) concerning the submission of the 15 percent plan and ozone attainment demonstration and the requirements of section 172(c)(9) of the Act concerning contingency measures are not applicable to the areas so long as the areas do not violate the ozone standard. The EPA is removing the final rule due to adverse comments regarding the Northern Kentucky (Cincinnati) area and will summarize and address all public comments received in a subsequent final rule (based upon the proposed rule cited above). Additionally, since publication of the original determination on June 22, 1995, the Ashland, Kentucky, and Charlotte, North Carolina, areas were redesignated to attainment on June 29, 1995 (60 FR 33748), and July 5, 1995 (60 FR 34859), respectively, making this finding for those areas no longer necessary. A final rule will be published regarding the Nashville area for which no adverse comments were received.

EFFECTIVE DATE: The direct final rule published at 60 FR 32466, June 22, 1995, is withdrawn effective August 7, 1995.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 4, Air Programs Branch, 345 Courtland Street, Atlanta, Georgia 30365.

FOR FURTHER INFORMATION CONTACT: Kay Prince, Regulatory Planning & Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 345 Courtland Street, Atlanta, Georgia 30365. The telephone number is (404) 347-3555, extension 4221.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 31, 1995.

R.F. McGhee,

Acting Regional Administrator.

[FR Doc. 95-19487 Filed 8-4-95; 8:45 am]
BILLING CODE 6560-50-P

40 CFR Part 70

[AD-FRL-5274-2]

Title V Clean Air Act Final Interim Approval of Operating Permits Program; District of Columbia

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Final interim approval.

SUMMARY: EPA is promulgating interim approval of the operating permits program submitted by the District of Columbia for the purpose of complying with federal requirements for an approvable program to issue operating permits to all major stationary sources, and to certain other sources.

EFFECTIVE DATE: September 6, 1995.

ADDRESSES: Copies of the District's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107.

FOR FURTHER INFORMATION CONTACT: Jennifer M. Abramson, (3AT23), Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107, (215) 597-2923.

SUPPLEMENTARY INFORMATION:

I. Background

Title V of the 1990 Clean Air Act Amendments (sections 501-507 of the Clean Air Act ("the CAA")), and

this section is to stabilize floating production facilities or semisubmersible drilling rigs which are located outside the boundaries of the fairway.

(ii) In water depths of 600 feet or less, the installation of anchors and attendant cables or chains within fairways must be temporary and shall be allowed to remain only 120 days. This period may be extended by the district engineer provided reasonable cause for such extension can be shown and the extension is otherwise justified. In water depths greater than 600 feet, time restrictions on anchors and attendant cables or chains located within a fairway, whether temporary or permanent, shall not apply.

* * * * *

Dated: August 15, 1995.

Stanley G. Genega,

Major General, U.S. Army, Director of Civil Works.

[FR Doc. 95-21112 Filed 8-28-95; 8:45 am]

BILLING CODE 3710-92-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL-5284-6]

RIN 2060-AF95

Transportation Conformity Rule Amendments: Authority for Transportation Conformity Nitrogen Oxides Waivers

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: In this document EPA amends the November 24, 1993, final transportation conformity rule to change the statutory authority for exempting certain areas from certain nitrogen oxides provisions of the transportation conformity rule. This change is necessary to implement the conformity rule in a legally correct manner and to allow EPA to approve nitrogen oxides exemptions for certain areas.

This interim final rule is effective immediately upon publication. However, EPA will also conduct full notice-and-comment rulemaking on EPA's interpretations regarding implementation of the provisions addressed in this interim final rule. A proposed rule that addresses this issue (among other things) is published in the proposed rule section of this **Federal Register**. Public comments will be addressed in a subsequent final rule.

EFFECTIVE DATE: This interim final rule is effective on August 29, 1995. Comments on this action must be received by September 28, 1995.

ADDRESSES: Interested parties may submit written comments (in duplicate, if possible) to: Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Attention: Docket No. A-95-05, 401 M Street, S.W., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kathryn Sargeant, Emission Control Strategies Branch, Emission Planning and Strategies Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105. (313) 668-4441.

SUPPLEMENTARY INFORMATION: This interim final rule changes the statutory authority for transportation conformity nitrogen oxides (NO_X) exemptions from Clean Air Act section 182(f) to section 182(b)(1), for areas subject to section 182(b)(1).

The provisions of this interim final rule shall apply immediately upon publication. However, EPA will also conduct full notice-and-comment rulemaking on EPA's interpretations regarding implementation of these provisions. A proposed rule that discusses these interpretations (among other things) is published in the proposed rule section of this **Federal Register**, and the public comment on this proposal will last until September 28, 1995. Public comments will be addressed in a subsequent final rule.

This portion of the proposal is being published as an interim final rule without benefit of a prior proposal and public comment period because EPA finds that "good cause" exists under the Administrative Procedures Act ("APA") 5 U.S.C. 553(b)(B) for deferring those procedures until after publishing the change as an interim final rule. In changing the transportation conformity rule's reference from Clean Air Act section 182(f) to section 182(b)(1) as the statutory authority for waiving the requirement to control NO_X emissions in areas subject to section 182(b)(1), EPA finds that good cause exists for at least two reasons. First, it is contrary to the public interest in light of the clear statutory reference to section 182(b)(1) to continue offering such relief under the erroneous statutory reference in the transportation conformity rule. Section 176(c)(3)(A)(iii) of the Act's transportation conformity provisions explicitly states that, for ozone nonattainment areas to conform during the period before state implementation plans are approved by EPA, such areas must demonstrate that they are achieving reductions "consistent with" the NO_X (and volatile organic compounds) reduction requirements of section 182(b)(1). That section also provides for a waiver of the NO_X requirements if EPA determines that such reductions would not contribute to attainment in a particular area. Thus, given the clear intent of the statutory language, EPA believes it is unnecessary to undertake in advance full public rulemaking procedures when it is acting to correct an obvious error and, thereby, facilitate the lawful and effective implementation of section 176(c) of the Clean Air Act.

Second, in taking this action, EPA is responding to repeated public comments the Agency received in several individual NO_X exemption rulemaking actions. These comments pointed out that the correct statutory authority for relieving interim-period transportation conformity NO_X requirements is section 182(b)(1). Formal written requests have also been submitted to EPA requesting that this portion of the transportation conformity rule be revised so as to be consistent with the clear intent and language of the Act.

This interim final rule is taking effect immediately upon publication because, as described above, EPA believes it is contrary to public interest to continue acting in contravention of section 176(c)(3)(A)(iii)'s requirement to adhere to the procedures and requirements in section 182(b)(1) when considering the conformity status of transportation-related actions during the interim period. EPA therefore finds good cause to forego the 30-day period between publication and the effective date ordinarily applied under the APA, 5 U.S.C. 553(d), and make this interim final rule effective immediately for the same reasons described above in justification of taking final action without prior proposal.

List of Subjects

40 CFR Part 51

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

40 CFR Part 93

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Ozone.

Dated: August 17, 1995.

Carol M. Browner,

Administrator.

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

PARTS 51 AND 93—[AMENDED]

1. The authority citation for parts 51 and 93 continues to read as follows:

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

2. The identical text of §§ 51.394 and 93.102 is amended by revising paragraph (b)(3)(i) to read as follows:

§ . Applicability.

* * * * *

(b) * * *

(3) * * *

(i) Volatile organic compounds and nitrogen oxides in ozone areas (unless the Administrator determines that additional reductions of NOx would not contribute to attainment);

* * * * *

[FR Doc. 95-21404 Filed 8-28-95; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 7155

[CO-935-1430-01; COC-55885]

Withdrawal of National Forest System Land for Steamboat Ski Area; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws approximately 3,462 acres of National Forest System land from mining for 50 years to protect recreational resources and facilities at the Steamboat Ski Area. This land has been and will remain open to such forms of disposition as may by law be made of National Forest System land and to mineral leasing.

EFFECTIVE DATE: August 29, 1995.

FOR FURTHER INFORMATION CONTACT: Doris E. Chelius, BLM Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215-7076, 303-239-3706.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System land is hereby withdrawn from location and entry under the United States mining laws (30 U.S.C. Ch. 2 (1988)), for protection of facilities and resources at the Steamboat Ski Area:

Routt National Forest

A tract of land located in T. 5 N., R. 83 W., T. 5 N., R. 84 W., T. 6 N., R. 83 W., and T. 6 N., R. 84 W., all of the Sixth Principal Meridian, County of Routt, State of Colorado, described as follows:

Commencing at the Northwest Corner of Section 27, T. 6 N., R. 84 W., from which the W¼ Corner of said Section 27 bears S. 1°47′53″ W., thence N. 61°57′38″ E., 6089.67 ft. to the W¼ Corner of Section 23, T. 6 N., R. 84 W., and the

TRUE POINT OF BEGINNING:

Thence N. 89°59 E., 1014.00 ft.; N. 60°45′ E., 277.00 ft.; N. 44°20′ E., 550.00 ft.; N. 49°57′ E., 159.00 ft.; N. 66°00′ E., 1290.00 ft.; N. 38°41′24″ E., 331.44 ft.; N. 24°46′28″ E., 1031.96 ft.;

Thence Northeasterly, 1973.55 ft. along the arc of a curve concave to the Southeast to a point of compound curve, said arc having a radius of 3800.00 ft., a central angle of 29°45′25″ and being subtended by a chord that bears N. 69°07′18″ E., 1951.45 ft.;

Thence Easterly, 1393.30 ft. along the arc of said compound curve to a point of reverse curve, said arc having a radius of 3100.00 ft. a central angle of 25°45′06″ and being subtended by a chord that bears S. 83°07′27″ E., 1381.60 ft.;

Thence Southeasterly, 1085.30 ft. along the arc of said reverse curve to a second point of reverse curve, said arc having a radius of 7150.00 ft., a central angle of 8°41′49″ and being subtended by a chord that bears S. 74°35′49″ E., 1084.26 ft.;

Thence Southeasterly, 662.60 ft. along the arc of said second reverse curve, said arc having a radius of 2600.00 ft., a central angle of 14°3606 and being subtended by a chord that bears S. 71°38′40″ E., 660.81 ft.;

Thence S. 43°43′ E., 1205.00 ft.; Thence S. 55°56′ E., 2630.00 ft.;

Thence S. 35°36′ E., 1365.00 ft. to a point of curve to the right;

Thence Southeasterly, 1094.33 ft. along the arc of said curve, said arc having a radius of 4000.00 ft. a central angle of 15°40′30″ and being subtended by a chord that bears S. 27°45′45″ E., 1090.92 ft.;

Thence Southeasterly, 78.88 ft. along the arc of a curve concave to the Northeast, said arc having a radius of 720.00 feet, a central angle of 6°16′38″ and being subtended by a chord that bears S. 75°16′25″ E., 78.84 ft.;

Thence S. 65°04′29″ E., 1558.99 ft.;

Thence Southwesterly, 1666.96 ft. along the arc of a curve concave to the Southeast, said arc having a radius of 7540.00 ft., a central angle of 12°40′01″ and being subtended by a chord that bears S. 13°29′32″ W.,

1663.57 ft.;

Thence S. 00°39′36″ E., 3042.39 ft.;

S. 21°07′ W., 3426.85 ft.;
S. 05°14′ W., 237.64 ft.;
S. 16°08′ W., 179.00 ft.;
S. 36°34′ W., 316.00 ft.;
S. 38°55′ W., 1431.00 ft.;
S. 43°22′ W., 897.00 ft.;
S. 47°53′ W., 892.00 ft.;
N. 48°57′ W., 1082.00 ft.;
N. 65°35′ W., 462.00 ft.;
N. 74°21′ W., 347.00 ft.;
N. 62°14′ W., 631.00 ft.;
N. 54°58′ W., 102.31 ft.;
N. 76°27′ W., 2825.00 ft.;
N. 10°18′ W., 3487.67 ft.;
N. 32°08′ W., 620.24 ft.;
N. 27°15′ W., 441.00 ft.;
N. 20°44′ W., 616.00 ft.;
N. 10°26′ W., 816.00 ft.;
N. 15°35′ W., 217.69 ft.;
N. 84°53′ W., 444.72 ft.;
N. 74°48′ W., 350.00 ft.;
N. 77°28′ W., 1055.00 ft.;
N. 68°25′ W., 380.00 ft.;
N. 86°12′ W., 485.00 ft.;
S. 81°32′ W., 1035.00 ft.;
S. 70°51′ W., 172.08 ft.;

Thence N. 01°45′ E., 52.17 ft.; along the West line of the SW¼ of said sec. 26 to the W¼ Corner of said sec. 26;

Thence N. 01°43′ E., 2694.12 ft. along the West line of the NW¼ of said sec. 26 to the Northwest Corner thereof;

Thence N. 01°24′ E., 2578.62 feet along the West line of the SW¼ of said sec. 23 to the *TRUE POINT OF BEGINNING.* The area described contains approximately 3,462 acres of National Forest System Land in Routt County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of National Forest System lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 50 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: August 17, 1995.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 95-21318 Filed 8-28-95; 8:45 am]

BILLING CODE 4310-JB-P

43 CFR Public Land Order 7156

[CO-935-1430-01; COC-52453; COC-57004]

Withdrawal of National Forest System Lands for Protection of Ski Huts/Lodges; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws approximately 24.8 acres of National

regarding 38 U.S.C. 101, paragraphs 21 (definition of active duty) and 22 (definition of active duty for training).

The Secretary certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This amendment, which constitutes an interpretive rule, will affect only individuals and will not directly affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Health care, Individuals with disabilities, Pensions, Veterans.

Approved: November 3, 1995.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.6, paragraph (a) is amended by removing "active duty, and" and adding in its place "active duty, any"; paragraphs (b)(5) and (b)(6) are redesignated as paragraphs (b)(6) and (b)(7), respectively; paragraph (c)(5) is redesignated as paragraph (c)(6); and new paragraphs (b)(5) and (c)(5) are added to read as follows:

§ 3.6 Duty periods.

* * * * *

(b) * * *

(5) Attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval Academy for enlisted active-duty members who are reassigned to a preparatory school without a release from active duty, and for other individuals who have a commitment to active duty in the Armed Forces that would be binding upon disenrollment from the preparatory school;

* * * * *

(c) * * *

(5) Attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval Academy by an individual who enters the preparatory school directly from the Reserves, National Guard or civilian life, unless the individual has a commitment to service on active duty which would be binding upon disenrollment from the preparatory school.

* * * * *

[FR Doc. 95-27995 Filed 11-13-95; 8:45 am]
BILLING CODE 8320-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL-5329-9]

RIN 2060-AF95

Transportation Conformity Rule Amendments: Miscellaneous Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action makes several changes to the current regulation requiring transportation plans, programs, and projects to conform to state air quality implementation plans.

This action allows any transportation control measure from an approved state implementation plan (SIP) to proceed during a conformity lapse; aligns the date of conformity lapses with the date of application of Clean Air Act highway sanctions for any failure to submit or submission of an incomplete control strategy SIP; extends the grace period before which areas must determine conformity to a submitted control strategy implementation plan; establishes a grace period before which transportation plan and program conformity must be determined in newly designated nonattainment areas; and corrects the nitrogen oxides provisions of the transportation conformity rule consistent with the Clean Air Act and previous commitments made by EPA.

A transportation conformity SIP revision consistent with these amendments must be submitted to EPA by 12 months from November 14, 1995.

EFFECTIVE DATE: This regulation is effective December 14, 1995, except for §§ 51.448(a)(1) and 93.128(a)(1) which will be effective November 14, 1995, and §§ 51.394(b)(3)(i), 93.102(b)(3)(i), 51.428(b)(1)(ii), and 93.118(b)(1)(ii) which will be effective February 12, 1996, for the reasons explained in **SUPPLEMENTARY INFORMATION.**

ADDRESSES: Materials relevant to this rulemaking are contained in Public Docket A-95-05. The docket is located in room M-1500 Waterside Mall (ground floor) at the Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket may be inspected from 8 a.m. to 4 p.m., Monday through Friday, including all non-government holidays.

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

SUPPLEMENTARY INFORMATION:

I. Background

This final rule amends the transportation conformity rule, "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" (58 FR 62188, November 24, 1993). Required under section 176(c) of the Clean Air Act, as amended in 1990, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration, the Federal Transit Administration, and metropolitan planning organizations (MPOs) determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state implementation plans (SIPs). Conformity ensures that transportation planning does not produce new air quality violations, worsen existing violations, or delay timely attainment of national ambient air quality standards. According to the Clean Air Act, federally supported activities must conform to the implementation plan's purpose of attaining and maintaining these standards.

This final rule is based on the August 29, 1995 proposed rule entitled, "Transportation Conformity Rule Amendments: Miscellaneous Revisions" (60 FR 44790) and comments received on that proposal. The public comment period for the proposed rule ended on September 28, 1995.

EPA also issued on August 29, 1995, an interim final rule entitled,

"Transportation Conformity Rule Amendments: Authority for Transportation Conformity Nitrogen Oxides Waivers" (60 FR 44762). The interim final rule changed the statutory authority for transportation conformity nitrogen oxides (NO_X) waivers from Clean Air Act section 182(f) to section 182(b)(1), for areas subject to section 182(b)(1). The interim final rule took effect on August 29, 1995, without prior notice and comment, and the subsequent public comment period ended on September 28, 1995. This final rule includes the provisions of the August 29 interim final rule, after completing notice-and-comment rulemaking procedures on such provisions.

This final rule is the second in a series of three anticipated amendments to the transportation conformity rule. The first set of amendments was published as an interim final rule on February 8, 1995 (60 FR 7449), and was finalized on August 7, 1995 (60 FR 40098). The first set of amendments aligned the dates of conformity lapses (i.e., halting of new federally funded highway/transit projects) due to SIP failures with the application of Clean Air Act highway sanctions for a few ozone areas and all areas with disapproved SIPs with a protective finding. The third set of amendments, which will be proposed shortly, will streamline the conformity rule and address other issues related to non-federal projects, the build/no-build test, adding projects to the transportation plan and transportation improvement program (TIP), and rural nonattainment areas.

II. Description of Final Rule

This final rule makes changes from the proposed rule, involving transportation control measures (TCMs) and grace periods for new nonattainment areas. All other provisions of the proposal are included in this final rule without modification. EPA will not restate here its rationale for the changes which are identical to the August 29 proposal. The reader is referred to the proposal notice for such discussions.

A. TCMs

The proposed rule would have allowed TCMs in an approved SIP to proceed even if the conformity status of the current transportation plan and TIP lapses, provided the TCMs were in a previously conforming transportation plan and TIP.

In the final rule, EPA is changing the provisions of the proposal in response to public comment such that any TCM in an approved SIP may proceed, regardless of whether there is a currently conforming transportation plan and TIP or whether the project was once included in a previously conforming transportation plan and TIP. However, this position does not alter or affect the title 23 (23 CFR Part 450) or Federal Transit Act requirements for the funding of TCMs. EPA acknowledges that the implementation of the Clean Air Act is done in conjunction with statewide and metropolitan planning requirements of the Intermodal Surface Transportation Efficiency Act (ISTEA). Most current and all future TCMs are subject to these provisions and are generally from a previously conforming transportation plan and TIP.

EPA received public comment that a TCM which is in an approved SIP should be allowed to proceed at any point in time, regardless of whether or not the TCM was once included in a previously conforming transportation plan and TIP. The commenter stated that since SIP requirements are legally binding, as evidenced by the fact that failure to comply subjects the violator to enforcement action, EPA cannot restrict the implementation of a TCM in the context of conformity. Furthermore, given that approved SIPs must be implemented according to the Clean Air Act and sanctions can be imposed for nonimplementation, EPA cannot adopt a rule that has the effect of preventing TCMs in an approved SIP from being implemented.

EPA agrees with the commenter. Although Clean Air Act sections 176(c)(2) (C) and (D) require that the conforming transportation plan and TIP be used to determine whether a TCM conforms to an approved SIP, a TCM contained in an approved SIP must necessarily conform to the purpose of the SIP, as required by section 176(c)(1). By definition, a TCM in an approved SIP conforms to the SIP because it is contained in the SIP. To halt the implementation of TCMs in approved SIPs during a conformity lapse of a transportation plan and TIP would be contrary to the purpose of conformity and the approved SIP. EPA is not exempting TCMs from the requirement for a conformity determination, however. Also, where applicable, hot-spot analysis would still be required. TCMs are simply not required to satisfy §§ 51.420 (93.114) and 51.422 (93.115) because to require such compliance could prevent TCM implementation.

Another commenter stated that any transportation project that is in an approved SIP and a previously conforming transportation plan and TIP should be allowed to proceed during a conformity lapse. EPA believes that this final rule's change to the proposal accommodates this comment, because all transportation projects that are in approved SIPs that require conformity determinations are TCMs. No transportation project would be approved into a SIP unless it was designed to reduce emissions from transportation activities, and these projects should be specifically identified as TCMs.

Although EPA is changing the proposed rule in response to public comment, EPA does not foresee an instance as a practical matter where a TCM would be contained in an approved SIP without first meeting the transportation planning requirements contained in 23 CFR Part 450 and 49 CFR Part 613. In order for EPA to approve a SIP, the measures contained in the SIP must have commitments from appropriate agencies and have adequate funding and resources as stipulated in section 110(a)(2)(E) of the Clean Air Act.

In the case of TCMs, EPA expects this to be demonstrated by the project's inclusion in a fiscally constrained and conforming transportation plan and TIP.

Furthermore, EPA does not intend to approve SIPs containing TCMs that have not been coordinated through the transportation planning process, because the Clean Air Act and ISTEA require that an integrated transportation/air quality planning process be used as the vehicle to identify effective TCMs and ensure their funding sources. The interagency consultation required by the conformity rule and the States' conformity SIPs is intended to ensure that the transportation planning process becomes a routine component of any analysis involving TCMs slated for inclusion in a SIP. Furthermore, as a practical matter, a project cannot receive federal highway or transit funds or Federal Highway Administration (FHWA)/Federal Transit Administration (FTA) approval unless it is contained in a fiscally constrained and conforming transportation plan and TIP that has been approved through the transportation planning process, under the requirements of 23 CFR Part 450 and 49 CFR Part 613.

Finally, projects in approved SIPs remain subject to other planning requirements, such as provisions of the National Environmental Policy Act and ISTEA, which further stipulate that these projects be reviewed through the transportation process prior to approval and implementation.

B. Grace Period for New Nonattainment Areas

Like the proposed rule, the final rule allows newly designated nonattainment areas a 12-month grace period before conformity determinations to the transportation plan and TIP are required. In response to public comment, EPA clarifies in the final rule that this grace period also applies if a nonattainment area's boundaries are newly expanded. Transportation plan and TIP conformity determinations will not be required to include transportation projects in the portion of the area that is newly added until 12 months from the date of the boundary change. Although the proposed rule did not specifically discuss applying the 12-month grace period to newly expanded areas, EPA believes that this is a logical extension of the proposed rule. EPA believes a grace period is appropriate because transportation plan and TIP conformity determinations will not have included projects in the new portion of the nonattainment area prior to the expansion. As described in the proposal, Clean Air Act section 176(c) allowed a similar grace period for 12 months after the date of enactment of the Clean Air Act Amendments of 1990. EPA believes it is consistent with Congressional intent and appropriate to include such a grace period for newly designated areas to prevent short-term adverse impacts in the implementation of transportation projects immediately following redesignation.

C. Grace Period for Determination of Conformity to Newly Submitted SIPs

Like the proposed rule, this final rule extends the grace period before which areas need to complete conformity determinations to newly submitted SIPs. Under this final rule and for reasons explained in the proposal, conformity to a newly submitted SIP must now be determined within 18 months of its submission. This grace period provision in §§ 51.448(a)(1) and 93.128(a)(1) is effective immediately.

This grace period will prevent the conformity status of certain plans and TIPs from lapsing on November 15, 1995, in several moderate and above ozone areas that have not completed conformity determinations to newly submitted SIPs. This conformity lapse would be contrary to the public interest because as explained in the proposal EPA now believes that halting of transportation plan, program, and project implementation in these cases is not necessary at this time for the lawful and effective implementation of Clean Air Act section 176(c). If EPA did not make this provision of the rule effective by November 15, 1995, conformity lapse which is contrary to the public interest could occur in some areas during the 30-day period between publication and the effective date which is ordinarily provided under the Administrative Procedures Act (APA), 5 U.S.C. 553(d). EPA therefore finds good cause to make this grace period provision contained in this final rule effective on publication. In addition, the extension of this grace period relieves a restriction and therefore qualifies for an exception from the APA's 30-day advance-notice period under 5 U.S.C. 553(d)(1).

The other provisions of this final rule will be effective on December 14, 1995, except for §§ 51.394(b)(3)(i), 93.102(b)(3)(i), 51.428(b)(1)(ii), and 93.118(b)(1)(ii) which will be effective 90 days from November 14, 1995.

D. Alignment of Certain Conformity Lapses With Sanctions

Like the proposed rule, this final rule does not impose a transportation plan/conformity lapse as a result of failure to submit or submission of an incomplete ozone, carbon monoxide (CO), particles with an aerodynamic diameter of less than or equal to a nominal 10 micrometers (PM–10), or nitrogen dioxide (NO_2) control strategy SIP. Conformity lapse as a result of these SIP failures is delayed until Clean Air Act section 179(b) highway sanctions for these failures are applied.

Like the proposed rule, this final rule does not change the timing of conformity lapse for disapproval of any control strategy SIP without a protective finding. This issue will be addressed in a forthcoming proposal.

E. NO_x Budgets

Like the proposed rule, this final rule requires consistency with NO_x motor vehicle emissions budgets in control strategy SIPs, regardless of whether a NO_x waiver has previously been granted. However, the NO_x build/no-build test and less-than-1990 tests would not apply to ozone nonattainment areas receiving a NO_x waiver. Furthermore, as described in the *Response to Comment* section of today's action, some flexibility is possible for areas that have been issued a NO_x waiver based upon air quality modeling data. Please refer to that section for further discussion on this issue.

The NO_x budget provisions will be effective 90 days from November 14, 1995. In response to public comment, EPA has delayed this effective date to prevent difficulties in identifying appropriate NO_x budgets from disrupting conformity determinations that are currently underway.

EPA believes that *Sierra Club* v. *EPA*, 719 F.2d 436 (DC Cir. 1983), gives EPA the authority to delay the effective date of the NO_x budget provisions in today's action. EPA believes that *Sierra Club* provides a legal basis to allow grandfathering when there is an abrupt departure from requirements that affected parties have previously relied upon. Although EPA had previously announced that the NO_x budget changes to the transportation conformity rule would be contained in this action, comments on the proposal indicate that certain areas are not prepared for these provisions to be effective within the usual 30-day timeframe following publication of the final rule. Therefore, EPA finds good cause to make these provisions effective 90 days from November 14, 1995.

F. NO_x Waiver Authority

Like the interim final rule, the final rule changes the statutory authority for transportation conformity NO_x waivers from Clean Air Act section 182(f) to section 182(b)(1), for areas subject to section 182(b)(1). In general, NO_x waivers are findings by the EPA Administrator under Clean Air Act section 182(f) or 182(b) that additional reductions of NO_x would not contribute to attainment of the ozone national ambient air quality standards by the statutory deadline. The interim final rule will remain in effect until December 14, 1995, at which time the final rule will be effective and supersede the interim final rule. As a result, the requirements for NO_x waivers granted after August 29, 1995, remain the same and are not altered by today's action.

G. Conformity SIP Revision

A conformity SIP revision consistent with these amendments is required to be submitted to EPA 12 months from November 14, 1995. Section 176(c)(4)(C) of the Clean Air Act as amended in 1990 allowed States 12 months from the promulgation of the original transportation conformity rule to submit conformity SIP revisions. EPA believes that it is consistent with the statute to provide states a similar time period to revise their conformity SIPs in response to these rule revisions.

III. Response to Comments

Twenty comments on the proposed rule and interim final rule were submitted, including comments from MPOs, state and local air and transportation agencies, neighborhood associations, and environmental groups.

The majority of the comments supported the proposed rule and the interim final rule. A complete response to comments document is in the docket. Major comments and EPA responses are summarized here.

A. TCMs

Some comments suggested that TCMs from a submitted (and not yet approved) SIP should be allowed to proceed at any time, without regard to the conformity status of the transportation plan and TIP. However, Clean Air Act section 176(c) requires conformity to the "applicable implementation plan." Clean Air Act section 302(q) defines an applicable implementation plan as a portion (or portions) of the current implementation plan which has (have) been approved or promulgated by EPA. Projects from a submitted SIP that has not yet been approved do not necessarily conform to the "applicable" (approved) SIP. In order for such projects, including TCMs, to conform, there must be a conforming transportation plan and TIP, as required by Clean Air Act sections 176(c)(2) (C) and (D). For these reasons, only TCMs which are included in an approved SIP are affected by today's rule change allowing implementation of TCMs in an approved SIP to proceed during a transportation plan and TIP conformity lapse.

Similar comments suggesting ways in which to increase the scope and impact of this final rule changes regarding TCMs are not possible due to the reasons already outlined above. For example, one commenter suggested that any new project with a demonstrated emission reduction benefit, regardless of whether it is in an approved SIP, should be allowed to proceed even if it was not in a previously conforming transportation plan and TIP. EPA could not make this change because the agency has no evidence that such projects conform to the approved SIP.

B. Grace Period for New Nonattainment Areas

One commenter opposed the 12-month grace period for newly designated nonattainment areas and stated that this grace period is not consistent with Clean Air Act section 176(c). As stated in the proposed rule, section 176(c)(3)(B)(i) allowed a similar grace period for 12 months after the date of enactment of the Clean Air Act Amendments of 1990. EPA continues to believe it is appropriate to implement section 176(c) so as to allow this same grace period for newly designated areas. The existence of the grace period in section 176(c) indicates that Congress clearly did not wish to immediately halt transportation activities upon application of section 176(c) to an area.

The commenter suggested that there is sufficient time during the redesignation process in which areas could plan ahead and prepare to meet conformity requirements upon being designated to a nonattainment area. However, as stated in the preamble of the proposed rule, conformity determinations take time and the 12-month grace period provides local and state transportation agencies with the temporary relief that is necessary for these agencies to complete future conformity requirements. Further, such agencies do not control the timing of redesignation requests by state air quality agencies.

The commenter also disagreed that *Sierra Club* v. *EPA*, 719 F.2d 436 (DC Cir. 1983), gave EPA the authority to grant such a grace period to newly designated nonattainment areas. EPA believes that *Sierra Club* provides a legal basis to allow grandfathering when there is an abrupt departure from requirements that affected parties have previously relied upon. Although the case did involve retroactivity, the legal analysis applies equally to grandfathering from new requirements, and EPA has historically relied on the case in this context. See, e.g., 54 FR 2214, 2219 (Jan. 19, 1989); 59 FR 13044, 13057 (March 18, 1994). Although the Court of Appeals did not uphold all of the grandfathering provisions in *Sierra Club*, the Court did uphold grandfathering when supported by reliance. Attainment areas have traditionally relied upon not being required to fulfill conformity requirements that are mandated for nonattainment areas. Immediate application of such requirements to newly designated areas without an appropriate transition period clearly represents a significant departure from past practice. The commenter points to Supreme Court case law indicating that if any reliance on prior law were enough to shield everyone from all changed requirements, all laws would be frozen forever. However, this case law does not prohibit limited grandfathering from new complex requirements for a short time period to allow areas time to complete activities necessary to comply with such requirements, where such areas had relied on past law that did not impose such requirements. Based on the Court's interpretations of reliance in *Sierra Club*, EPA believes that this case supports its authority to grant a 12-month grace period to newly designated nonattainment areas prior to subjecting such areas to transportation conformity requirements.

C. Grace Period for Determination of Conformity to Newly Submitted SIPs

Several commenters were concerned that the 18-month grace period before which a conformity determination is required for a newly submitted SIP was not extended to those areas that have already submitted a SIP revision. Specifically, the comments raised concerns surrounding the equity of the proposed grace period.

The proposed rule states that the grace period would begin upon the date of a new SIP's submission. This also applies to SIPs submitted prior to today's rule change. Therefore, although areas that have already submitted a SIP prior to this final action will not benefit from the grace period extension as much as areas that have not yet submitted a SIP, they will still get the full 18-month period from SIP submission to make a conformity determination. EPA believes that this final action makes the conformity rule more equitable because every area has the same time period in which to determine conformity to newly submitted SIPs. Prior to this final action, time periods for completing conformity determinations were calculated starting from SIP submittal deadlines.

One commenter stated that EPA did not provide adequate rationale in the preamble of the proposed rule regarding the selection of the length of this grace period. The commenter further suggested that 12 months would be a more appropriate grace period length and would be consistent with prior EPA policy regarding this issue. Based on experience with the transportation conformity rule to date, EPA continues to believe that 18 months reflects the most realistic timeframe required for nonattainment areas to determine conformity to newly submitted SIPs. Conformity determinations are typically completed by local transportation planners on an annual basis. If the grace period was 12 months instead of 18 months, a newly submitted SIP could be introduced into a local conformity cycle at a time in that cycle that is disruptive to the local transportation planning process. Such a disruption could necessitate that additional time be required to complete the conformity determination, which may then delay the implementation of local transportation projects. EPA's experience with the existing 12-month grace period has convinced the agency that 12 months is an unrealistic grace period in this context.

D. Alignment of Certain Conformity Lapses With Sanctions

All commenters that commented on this issue supported the alignment of conformity lapses due to SIP failures with Clean Air Act sanctions. In addition, some commenters advocated aligning lapses and sanction deadlines even in the case of SIP disapprovals without a protective finding. As utilized under transportation conformity regulations, a protective finding is a mechanism that would allow a submitted SIP's motor vehicle emissions budget to be used for conformity purposes even though the SIP does not fulfill all requirements in enforceable form, as stipulated by Clean Air Act section 110(a)(2)(A). This conclusion is based on a determination by EPA that a SIP would have been approvable with respect to requirements for emissions reductions if all of the section 110(a)(2)(A) requirements had been met. Thus, a protective finding allows an area to proceed with transportation planning and project implementation while the area revises the SIP. In contrast, a SIP that is disapproved without a protective finding does not contain an emissions budget that could be used for transportation conformity purposes. A protective finding only allows the SIP's motor vehicle emissions budget to be used for conformity purposes; it does not guarantee that the SIP will eventually be approved.

EPA has been aware of stakeholder concerns regarding conformity lapse following SIP disapprovals without protective findings, and as EPA has previously stated, this issue will be raised for comment in the preamble of the upcoming proposal of the third set of conformity amendments. EPA could not take final action on this issue today because it had never proposed to do so.

E. NO_X Budgets

Several commenters stated that consistency with a NO_X budget should not be required for areas that have received a NO_X waiver from EPA based on air quality modeling. NO_X waivers are findings by the EPA Administrator under Clean Air Act section 182(b) or 182(f) that additional reductions of NO_X would not contribute to attainment of the ozone national ambient air quality standards by the statutory deadline. NO_X waivers may be granted on the basis of modeling demonstrations or monitoring data.

For the reasons described in the preamble to the August 29, 1995, proposal, EPA continues to believe that the Clean Air Act requires consistency with NO_X motor vehicle emissions budgets in control strategy SIPs, regardless of whether a NO_X waiver has previously been granted. The demonstration typically utilized to justify a NO_X waiver does not necessarily address the level of NO_X emissions necessary for an area to attain and maintain the ozone standard. That is, a NO_X waiver's demonstration that additional NO_X reductions would not contribute to attainment does not necessarily mean that NO_X increases would not affect an area's ability to attain and maintain the ozone standard. The purpose of conformity to a NO_X budget is to prevent NO_X emissions from reaching levels that would threaten attainment or maintenance of the ozone standard.

The commenters opposing a NO_X budget test in areas with modeling-based NO_X waivers state that the attainment demonstrations in such areas do not include NO_X inventories or NO_X projections with sufficient accuracy to warrant their use in determining conformity. Although the attainment demonstration contains NO_X projections that EPA could treat as an "implicit budget," areas may not have performed the modeling necessary to determine how high NO_X emissions could be while remaining consistent with attainment and maintenance of the ozone standard. The projections that could act as an implicit budget could thus be unnecessarily constraining, and exceeding those projections may not have real air quality consequences. Furthermore, commenters argue that if the modeling that would determine a maximum NO_X motor vehicle emissions budget is not a necessary part of the attainment demonstration, it should not be required solely for conformity purposes.

Although EPA is retaining in the final rule the requirement for consistency with NO_X emissions budgets for all ozone areas with control strategy SIPs, including areas that received NO_X waivers, EPA agrees that in some circumstances it is appropriate to interpret the control strategy SIP as not establishing a NO_X motor vehicle emissions budget. EPA may conclude in such circumstances that modeling-based sensitivity analyses included in the attainment or maintenance demonstration are sufficient to indicate that motor vehicle NO_X emissions could grow without limit over the transportation planning horizon because the area would still attain the ozone standard without jeopardizing attainment in other areas. In such a case, EPA would agree that the control strategy SIP does not establish a NO_X motor vehicle emissions budget, and the NO_X budget test would not have to be satisfied for transportation conformity purposes.

For example, EPA expects that it would be able to interpret the attainment demonstration as not establishing a NO_X motor vehicle emissions budget if it included modeling demonstrating that additional reductions of NO_X would increase peak ozone concentrations. In contrast, modeling that did not examine the effect of NO_X reductions would not be sufficient to show that the attainment demonstration did not establish a NO_X motor vehicle emissions budget. Also, areas with a SIP requirement to control NO_X emissions in order for downwind nonattainment areas to attain the ozone standard would have an established NO_X budget, because of the need to indicate the level of NO_X reductions required.

In addition, it is important to note that areas that are in nonattainment or maintenance for both PM_{10} and ozone may have a NO_X motor vehicle emissions budget established in the PM_{10} SIP, regardless of whether the area has a NO_X waiver for ozone purposes or the area's ozone attainment or maintenance SIP establishes a NO_X motor vehicle emissions budget.

EPA continues to believe that, in general, control strategy SIPs by their nature establish motor vehicle emissions budgets, whether or not these budgets are explicitly stated. Motor vehicle emissions budgets are implicitly a feature of control strategy SIPs, and a statement in the SIP that no motor vehicle emissions budget is established does not necessarily relieve the requirement to demonstrate consistency with the SIP's implicit budget. However, as described above, EPA believes that there are special circumstances under which EPA would agree that the attainment or maintenance SIP demonstrates that no motor vehicle emissions budget is necessary, and the budget test is not required for transportation conformity purposes.

EPA encourages areas that are developing SIPs to explicitly state the motor vehicle emissions budget(s) for each relevant pollutant or pollutant precursor. For SIPs that have already been submitted, agencies should work through the interagency consultation process to identify the motor vehicle emissions budget(s) that is (are) not explicitly stated. EPA will not consider a submitted SIP adequate for transportation conformity purposes unless it either includes explicit motor vehicle emissions budgets or adequate information to establish budgets, or EPA

has agreed that the SIP sufficiently demonstrates that a NO_X motor vehicle emissions budget is not necessary.

F. Additional Comments Not Addressed in the Proposal

Several commenters also raised concerns about aspects of the transportation conformity rule which are not relevant to this action, including the build/no-build test, non-federal projects, and adding projects to the transportation plan and TIP. These comments do not affect whether EPA should proceed with this final action, but EPA will be considering these and other issues, such as issues related to rural nonattainment areas, in the context of the third set of conformity rule amendments.

EPA did not address in this final rule the issues contained in the Environmental Defense Fund et al.'s Petition for Reconsideration relating to the November 24, 1993, transportation conformity rule that may still be outstanding. Many of the issues contained in this petition were beyond the scope of this rulemaking. The third set of conformity amendments will address several of these issues, and EPA intends to formally respond to others at a later date.

IV. Administrative Requirements

A. Administrative Designation

Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more, or otherwise adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

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

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

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

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866. Therefore, this notice was not subject to OMB review under the Executive Order 12866.

B. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements from EPA which require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

C. Regulatory Flexibility Act

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

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

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

D. Unfunded Mandates

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a federal mandate that may result in estimated costs of $100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

EPA has determined that to the extent this rule imposes any mandate within the meaning of the Unfunded Mandates Act, this final action does not include a mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate or to the private sector. Therefore, EPA has not prepared a statement with respect to budgetary impacts.

List of Subjects

40 CFR Part 51

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

40 CFR Part 93

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Ozone.

Dated: November 6, 1995.

Carol M. Browner,

Administrator.

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

PARTS 51 AND 93 —[AMENDED]

1. The authority citation for parts 51 and 93 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. The identical text of §§ 51.392 and 93.101 is amended by adding a definition in alphabetical order to read as follows:

§ . Definitions.

* * * * *

Protective finding means a determination by EPA that the control strategy contained in a submitted control strategy implementation plan revision would have been considered approvable with respect to requirements for emissions reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A).

* * * * *

3. The identical text of §§ 51.394 and 93.102 is amended by revising paragraph (b)(3)(i) and adding paragraph (d) to read as follows:

§ . Applicability.

* * * * *

(b) * * *

(3) * * *

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

* * * * *

(d) *Grace period for new nonattainment areas.* For areas or portions of areas which have been in attainment for either ozone, CO, PM–10, or NO_2 since 1990 and are subsequently redesignated to nonattainment for any of these pollutants, the provisions of this subpart shall not apply for such pollutant for 12 months following the date of final designation to nonattainment.

4. Section 51.396(a) is amended by adding a sentence after the second sentence to read as follows:

§ 51.396 Implementation plan revision.

(a) * * * Further revisions to the implementation plan required by amendments to this subpart must be submitted within 12 months of the date of publication of such final amendments to this subpart. * * *

* * * * *

5. Section 51.420 is revised to read as follows:

§ 51.420 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.

(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements of § 51.400.

(b) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the applicable implementation plan, provided that all other relevant criteria of this subpart are satisfied.

6. Section 93.114 is revised to read as follows:

§ 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.

(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements of § 93.104.

(b) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the applicable implementation plan, provided that all other relevant criteria of this subpart are satisfied.

7. The identical text of §§ 51.422 and 93.115 are amended by adding a sentence to the end of paragraph (a) and by adding paragraph (d) as follows:

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

(a) * * * Special provisions for TCMs in an applicable implementation plan are provided in paragraph (d) of this section.

* * * * *

(d) *TCMs.* This criterion is not required to be satisfied for TCMs specifically included in an applicable implementation plan.

8. The identical text of §§ 51.428 and 93.118 is amended by revising paragraph (b)(1)(ii) to read as follows:

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

* * * * *

(b) * * *

(1) * * *

(ii) NO_X as an ozone precursor;

* * * * *

9. Section 51.448 is amended by removing paragraph (g), redesignating paragraphs (h) and (i) as (g) and (h), and revising paragraphs (a) through (d) and the newly designated paragraph (g) to read as follows:

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

(a) *Control strategy implementation plan submissions.* (1) The transportation plan and TIP must be demonstrated to conform by 18 months from the date of the State's initial submission to EPA of each control strategy implementation plan establishing a motor vehicle emissions budget. If conformity is not determined by 18 months from the date of submission of such control strategy implementation plan, the conformity status of the transportation plan and TIP will lapse, and no new project-level conformity determinations may be made, until the transportation plan and TIP have been demonstrated to conform.

(2) For areas not yet in the control strategy period for a given pollutant, conformity shall be demonstrated using the motor vehicle emissions budget(s) in a submitted control strategy implementation plan revision for that pollutant beginning 90 days after submission, unless EPA declares such budget(s) inadequate for transportation conformity purposes. The motor vehicle emissions budget(s) may be used to determine conformity during the first 90 days after its submission if EPA agrees that the budget(s) are adequate for conformity purposes.

(b) *Disapprovals.* (1) 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 section 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 fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined.

(2) Notwithstanding paragraph (b)(1) of this section, if EPA disapproves the submitted control strategy implementation plan revision but makes a protective finding, the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined.

(c) *Failure to submit and incompleteness.* For areas where EPA notifies the State, MPO, and DOT of the State's failure to submit or submission of an incomplete control strategy implementation plan revision, which initiates the sanction process under Clean Air Act section 179 or 110(m), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the Clean Air Act, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(d) *Federal implementation plans.* When EPA promulgates a federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

* * * * *

(g) *Nonattainment areas which are not required to demonstrate reasonable further progress and attainment.* If an area listed in § 51.464 submits a control strategy implementation plan revision, the requirements of paragraphs (a) and

(e) of this section apply. Because the areas listed in § 51.464 are not required to demonstrate reasonable further progress and attainment the provisions of paragraphs (b) and (c) of this section do not apply to these areas.

* * * * *

10. Section 93.128 is amended by removing paragraph (g), redesignating paragraphs (h) and (i) as (g) and (h), and revising paragraphs (a) through (d) and the newly designated paragraph (g) to read as follows:

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

(a) *Control strategy implementation plan submissions.* (1) The transportation plan and TIP must be demonstrated to conform by 18 months from the date of the State's initial submission to EPA of each control strategy implementation plan establishing a motor vehicle emissions budget. If conformity is not determined by 18 months from the date of submission of such control strategy implementation plan, the conformity status of the transportation plan and TIP will lapse, and no new project-level conformity determinations may be made, until the transportation plan and TIP have been demonstrated to conform.

(2) For areas not yet in the control strategy period for a given pollutant, conformity shall be demonstrated using the motor vehicle emissions budget(s) in a submitted control strategy implementation plan revision for that pollutant beginning 90 days after submission, unless EPA declares such budget(s) inadequate for transportation conformity purposes. The motor vehicle emissions budget(s) may be used to determine conformity during the first 90 days after its submission if EPA agrees that the budget(s) are adequate for conformity purposes.

(b) *Disapprovals.* (1) 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 section 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 fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined.

(2) Notwithstanding paragraph (b)(1) of this section, if EPA disapproves the submitted control strategy implementation plan revision but makes a protective finding, the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined.

(c) *Failure to submit and incompleteness.* For areas where EPA notifies the State, MPO, and DOT of the State's failure to submit or submission of an incomplete control strategy implementation plan revision, 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 on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the Clean Air Act, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(d) *Federal implementation plans.* When EPA promulgates a federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

* * * * *

(g) *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 the provisions of paragraphs (b) and (c) of this section do not apply to these areas.

* * * * *

§§ 51.452 and 93.130 [Amended]

11. The identical text of §§ 51.452 and 93.130 is amended by redesignating paragraph (b)(5) as paragraph (a)(6); and in paragraph (c)(1) by revising the references, "paragraph (a)" to read "paragraph (b)" in two places.

[FR Doc. 95-27949 Filed 11-13-95; 8:45 am]

BILLING CODE 6560-50-P

40 CFR Part 70

[KY-95-01; FRL-5330-2]

Clean Air Act Final Interim Approval of Operating Permits Program; Kentucky

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interim approval.

SUMMARY: The EPA is promulgating source category-limited (SCL) interim approval of the Operating Permits Program submitted by the Kentucky Natural Resources and Environmental Protection Cabinet for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

EFFECTIVE DATE: December 14, 1995.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 4, 345 Courtland Street NE, Atlanta, Georgia 30365, on the 3rd floor of the Tower Building. Interested persons wanting to examine these documents, contained in EPA docket number KY-95-01, should make an appointment at least 24 hours before the visiting day.

FOR FURTHER INFORMATION CONTACT: Yolanda Adams, Title V Program Development Team, Air Programs Branch, Air, Pesticides & Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 345 Courtland Street, NE., Atlanta, Georgia 30365, (404) 347-3555, Ext. 4149.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

Title V of the 1990 Clean Air Act Amendments (sections 501-507 of the Clean Air Act ("the Act")), and implementing regulations at 40 Code of Federal Regulations (CFR) part 70 require that states develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within one year after receiving the submittal. EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a

federal register

Friday
August 15, 1997

Part II

Environmental Protection Agency

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

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL–5871–4]

RIN 2060–AG16

Transportation Conformity Rule Amendments: Flexibility and Streamlining

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

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

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

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

EFFECTIVE DATE: September 15, 1997.

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

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

SUPPLEMENTARY INFORMATION:

Regulated Entities

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

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

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

Electronic Availability

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

Internet Web Sites

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

Or

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

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

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

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

I. Background on Transportation Conformity

Today's action amends the transportation conformity rule, "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act" (58 FR 62188, November 24, 1993). Required under section 176(c) of the Clean Air Act as amended in 1990, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and metropolitan planning organizations (MPOs) determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state air quality implementation plans (SIPs). Conformity ensures that transportation plans, programs, and projects do not produce new air quality violations, worsen existing violations, or delay timely attainment of national ambient air quality standards (NAAQS). According to the Clean Air Act, federally supported activities must conform to the implementation plan's

purpose of attaining and maintaining these standards.

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

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

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

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

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

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

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

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

A. Description of Final Rule

Today's action finalizes the proposal to eliminate the build/no-build test and other emission reduction tests once a control strategy SIP or maintenance plan has been submitted to EPA and EPA has had 45 days to review the SIP submission and the adequacy of its motor vehicle emissions budget(s) for conformity purposes. This final rule also includes regulatory text from the proposal's preamble which establishes the minimum criteria that must be satisfied in order for EPA to find a submitted motor vehicle emissions budget adequate for transportation conformity purposes. EPA clarifies today that submitted SIPs must already meet these minimum criteria in order to be approved; EPA is not imposing any new requirements for submitted SIPs.

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

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

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

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

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

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

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

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

Areas that submit SIPs after the effective date of this final rule will be able to use their SIP budget(s) within 45 days of submission or sooner if EPA finds them adequate. Areas that submit SIPs prior to the effective date of this final rule can use those SIPs according to the requirements of § 51.448(a)(2)/ § 93.128(a)(2) as amended on November 14, 1995 (60 FR 57179). According to these sections, areas can use submitted SIP budgets beginning 90 days after submission unless EPA finds them inadequate; areas can use them earlier if EPA declares them adequate.

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

B. Rationale and Response to Comments

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

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

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

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

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

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

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

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

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

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

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

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

III. Other Comments on Conformity Tests

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

Some commenters stated that EPA should allow submitted SIP budgets to override those in approved SIPs for years directly addressed by the approved SIP. These commenters believed that newly submitted SIPs often provide a more realistic picture of the future than approved SIPs. Some believed that, unlike approved SIPs, newly submitted SIPs are more accurate because they are based on an area's latest planning assumptions.

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

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

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

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

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

B. VMT Comparison as Substitute for Budget Test

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

In order to meet the "VMT test," commenters said that areas would have to demonstrate that: a) vehicle trips, VMT, and number of vehicles projected in the proposed plan/TIP have not exceeded these projections in the SIP; and, b) the transportation system in the proposed plan and TIP, and vehicle speed distributions on that system, are found through the consultation process to be in reasonable agreement with the system and speed distributions assumed in the SIP. Commenters argued that this idea is supported by Clean Air Act section 176(c)(2)(A) which says that "emissions expected from the implementation of plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan * * *" If an MPO's "most recent population, employment, travel and congestion estimates" (section 176(c)(1)) do not exceed estimates of these parameters in the SIP, the commenters believe that the transportation community has fulfilled its Clean Air Act requirements.

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

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

A. Description of Final Rule

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

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

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

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

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

B. Discussion of Comments and Rationale

1. Default Budgets for Clean Data Areas

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

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

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

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

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

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

2. Maintenance Areas

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

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

3. Emission Reduction Test Flexibility in PM–10 and NO_2 Nonattainment Areas

One commenter requested that EPA remove the build/no-build test as an option for demonstrating conformity in PM–10 (particles with an aerodynamic diameter of less than or equal to a nominal 10 micrometers) and NO_2 (nitrogen dioxide) nonattainment areas that have not submitted control strategy SIPs or maintenance plans. Section 93.119(c) of the proposal, like the November 1993 final transportation conformity rule, offered PM–10 and NO_2 nonattainment areas the option to use either the build/no-build test or no-greater-than-1990 test to determine conformity, provided they have not submitted a control strategy SIP or maintenance plan. The commenter believed that the build/no-build test will not ensure that the frequency and severity of existing violations will not be increased, as required by Clean Air Act section 176(c)(1). Furthermore, commenters did not believe that the same logic that was used in the November 1993 final rule could be used to provide the build/no-build test option in ozone and CO nonattainment areas that are not required to submit control strategy SIPs.

Since the flexibility for PM–10 and NO_2 nonattainment areas was finalized in the November 24, 1993 conformity rule, the deadline for commenting on this provision has passed, and EPA is not obligated to respond to this comment. Nevertheless, EPA does believe that it is appropriate to continue to offer the build/no-build test as an option in PM–10 and NO_2 nonattainment areas. By ensuring that motor vehicle emissions are less than they would be if no new transportation investments were made, the build/no-build test does ensure that the frequency and severity of violations are not increased as a result of new transportation investments. EPA believes that this same rationale can be used to justify the build/no-build test option in ozone and CO areas that are not required to submit control strategy SIPs. In summary, EPA continues to believe that where no SIP has been submitted, the build/no-build test is sufficient for areas to meet the requirements of section 176(c)(1).

V. Rural Nonattainment and Maintenance Areas

A. Description of the Final Rule

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

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

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

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

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

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

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

B. Rationale and Response to Comments

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

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

In general, EPA believes that a SIP budget, even if it is not yet approved by EPA, is a better measure of conformity than the build/no-build test. For this reason, EPA requires most areas to continue demonstrating conformity to the SIP emissions budgets even after the timeframe of the SIP (see section VI., "Mismatch in SIP/Transportation Plan Timeframe," for more explanation). However, EPA believes it does have the flexibility to allow conformity to be demonstrated using some test other than the SIP budget for years not addressed by the SIP, if that test is more appropriate.

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

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

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

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

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

VI. Mismatch in SIP/Transportation Plan Timeframe

A. Description of Final Rule

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

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

EPA will require areas to demonstrate that motor vehicle emissions budgets for years outside the timeframe of the maintenance plan are consistent with maintenance of air quality standards. EPA will not permit areas to simply use the motor vehicle emissions in the year of redesignation as a budget without considering growth in non-mobile source emissions, which was a possibility discussed in the proposal under option 3. However, EPA believes it has the flexibility to approve budgets for years outside the usual maintenance plan timeframe for conformity purposes based on less rigorous demonstrations than are required for the Clean Air Act-mandated ten-year maintenance plan. Whereas normally control measures must be fully adopted in order for EPA to approve the SIP, EPA would be willing to approve conformity budgets that were based in part on enforceable commitments to adopt specific control measures in the future. Because these commitments would be included in the approved SIP, they would be enforceable by all parties, including the public. In addition, EPA would consider allowing the motor vehicle emissions budgets in the last year of the ten-year maintenance plan to be increased for future years provided offsetting emissions reductions are adopted or committed to in the SIP.

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

B. Rationale and Discussion of Comments

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

Many commenters supported option 1 because they believe that maintaining the SIP's emission targets for the timeframe of the transportation plan is a central purpose of conformity and perhaps its most important requirement. Commenters stated that because the obligation to meet air quality standards persists indefinitely, the obligation to meet the motor vehicle emissions budget should not terminate after the attainment date or the last year of the maintenance plan. According to some commenters, it is appropriate to analyze the effects of transportation investments over a 20-year timeframe, because it may in fact take decades for these effects to be fully realized. They stated that it is better to use a long timeframe and make the right choices at the outset than to pursue a path for several years and then try to quickly overcome the adverse consequences of that path. One commenter pointed out that demonstrating conformity to the SIP's budget over the 20 years of the transportation plan is the best way to prepare for the fact that the benefits of fleet turnover do decline over time.

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

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

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

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

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

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

C. Response to Specific Comments

Several commenters stated that EPA should allow areas to use any of the three proposed options. A commenter suggested that the choice of options would be decided by each area through its own interagency consultation process. As explained above, EPA believes that the option being finalized is the most appropriate. One commenter supported option 1 provided areas have more flexibility to account for future programs that will affect emissions. Currently, areas cannot assume future programs unless they are adopted or included in the SIP. EPA believes that the approach being finalized today will allow the flexibility the commenter is seeking, because it allows budgets established for conformity purposes to be based on enforceable commitments in the SIP rather than requiring fully adopted control measures, as needed for approval as part of a control strategy SIP.

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

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

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

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

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

VII. Non-Federal Projects

A. Description of Final Rule

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

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

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

B. Rationale for Clarification and Response to Comments

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

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

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

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

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

C. Governor Approval

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

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

D. Responses to Other Comments on Non-Federal Projects

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

1. Comments Opposing Statutory Interpretation

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

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

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

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

2. Changes in Implementation Date

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

3. Comments on Original Conformity Rule

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

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

VIII. Deadline for Use of Network Models and Affected Areas

A. Description of Final Rule

Today's action finalizes the proposal to require serious CO and serious, severe, and extreme ozone areas to use network models for conformity determinations by January 1, 1997. In addition, as proposed, these network modeling requirements are revised so that they only apply to metropolitan planning areas with an urbanized area population over 200,000. EPA continues to believe that network modeling requirements are most important for large urbanized areas, and therefore believes that it is appropriate for the conformity rule to focus its specific modeling requirements on them. See section IX.A. for a description of the final rule's requirements for network models.

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

B. Rationale and Discussion of Comments

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

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

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

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

change the rule in response to this comment.

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

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

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

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

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

A. Description of Final Rule

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

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

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

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

A capacity-restrained traffic assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak volumes and speeds, and which uses speeds based on final assigned volumes. Zone-to-zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits. Finally, network-based models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

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

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

B. Rationale and Discussion of Comments: Selected Option

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

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

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

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

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

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

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

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

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

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

An area that has not yet implemented the currently required model improvements supported option 1 because the area believed option 1 would provide flexibility and make a conformity lapse for this area less likely. EPA believes that it would be inappropriate to eliminate all of the modeling criteria just because a few areas are having temporary difficulty achieving them. This stakeholder concern was also raised in the context of extending the deadline for implementing network modeling requirements. EPA considered the merits of this comment, and as outlined above, decided that a reproposal to extend the deadline could not be completed in time to provide relief to the few affected areas. As previously mentioned, EPA and DOT are assisting the two areas without adequate network models to achieve the minimum standards in this rule.

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

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

C. Future Modeling Guidance and Response to Comments

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

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

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

D. Rationale and Discussion of Comments: Specific Criteria

As discussed above, this final rule specifies six requirements for network models for serious and above ozone and CO areas. These replace the 11 that were required by the November 1993 conformity rule. This final rule includes the five requirements that were proposed as option 3, as well as a requirement from the November 1993 conformity rule that was not originally proposed as part of option 3 (but was included in proposed option 2, which included all requirements of the 1993 rule). Several minor changes were made to the wording proposed in option 3 in order to respond to comments, reduce ambiguity, and streamline the text.

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

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

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

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

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

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

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

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

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

The final rule's fifth network modeling requirement is based on § 51.452(b)(1)(iv)/§ 93.130(b)(1)(iv) of the November 1993 conformity rule, which requires feedback of travel times resulting from traffic assignment to travel times used in trip distribution. Although this requirement was not proposed as part of option 3, EPA received comments based on proposed option 2 that this requirement of the original rule should be retained. Commenters pointed out that this type of consistency in the evaluation of travel time is almost universally recognized to be scientifically valid. A commenter stated that not requiring feedback would allow analyses to be manipulated to produce desired results. Another commenter stated that most MPOs have already implemented full feedback, and it is easy to perform and more accurate than partial feedback. Commenters submitted technical reports and papers to the docket in order to document their claims that full feedback is recognized to be a necessary and sound modeling improvement.

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

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

The final rule's sixth and final network modeling requirement is for network-based models to be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices. EPA's proposed option 3 would have required models to be reasonably sensitive to trip-making changes due to changes in the cost, travel time, capacity, and quality of all travel choices, if the necessary information is available. EPA has eliminated the reference to "trip-making changes" because EPA received comments indicating that this implies a requirement for trip generation to be dependent on accessibility. This is not what EPA intended. The November 1993 conformity rule strongly encouraged a dependence of trip generation on the accessibility of destinations, but it was not specifically required. EPA continues to believe that such a trip generation requirement is not widely available, minimum practice. In addition to deleting "trip-making changes," EPA made other modifications to the proposed requirement in order to streamline the language. By making the language more general, EPA believes that the qualification "if the necessary information is available" is no longer necessary. EPA has therefore eliminated this language.

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

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

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

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

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

A. Description of Final Rule

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

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

B. Rationale

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

EPA agrees with a commenter who pointed out that regulatory requirements that govern how satisfaction of a conformity test is demonstrated cannot be removed and replaced with unspecified guidance that is not subject to notice and comment. EPA believes that the commenter is correct in asserting that guidelines for how the alternate emissions analysis would have to be performed would have to be included in regulatory language, if the flexibility were to be finalized. Such additional regulatory language would require reproposal because it is a significant departure from what was originally proposed; EPA did not propose any specific guidelines or limitations for this flexibility in either the preamble or regulatory language of the July 9, 1996, proposal.

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

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

The few methodologies proposed by stakeholders were not sufficient to form the basis of nationally applicable, minimum guidelines for alternate emissions analysis. When EPA proposed the flexibility, it was seeking a procedure that would yield similar results as a full-scale regional analysis but with less effort. However, the methodologies suggested by commenters were sketch planning techniques, which are ancillary to but not substitutes for network modeling. While sketch planning techniques may be appropriate for certain projects in certain circumstances, the commenters did not suggest guidelines that would delineate when sketch planning techniques may be an adequate approximation or how these techniques could be replicated nationally.

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

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

C. Pilot Program

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

XI. Consequences of SIP Disapproval

A. Description of the Rule

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

1. Disapproval With a Protective Finding

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

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

2. Disapproval Without a Protective Finding

In the cases where EPA disapproves a SIP and does not give it a protective finding, an area has a 120-day grace period, after which the only transportation projects that could be found to conform would be those included in the first three years of the currently conforming transportation plan and TIP. No new plans, TIPs, or plan/TIP amendments could be found to conform after the grace period. Further, no additional projects not already in the first three years of the currently conforming plan and TIP could be found to conform. Since exempt projects and non-federal projects do not require conformity determinations, they could proceed as long as they meet other applicable requirements of the conformity rule (for example, a regionally significant non-federal project must have been included in the regional emissions analysis supporting the most recent plan and TIP conformity determination).

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

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

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

As in the previous conformity rule, adverse consequences would occur following any EPA final disapproval action on a control strategy SIP without a protective finding, even if the disapproval is limited or partial. The motor vehicle emissions budget is sufficient for conformity determinations only if the SIP as a whole satisfies the Clean Air Act requirements for RFP or attainment. If one part of a SIP is disapproved without a protective finding, even if that part does not address mobile sources, then there is no overall strategy for RFP or attainment, and it is not possible to determine whether consistency with the motor vehicle emissions budget will result in a level of emissions consistent with RFP or attainment.

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

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

B. Rationale

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

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

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

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

C. Discussion of Specific Comments

Some objections to the legality of the primary option were raised. One commenter objected to any project approvals based on plans and TIPs that have lapsed, since even projects in the first three years cannot satisfy the statutory test for coming from a conforming plan and TIP if the conformity of the plan and TIP has lapsed. EPA agrees that projects cannot be approved if the plan and TIP have lapsed. However, in this situation, the conformity status of existing plans and TIPs is not lapsing. The plan and TIP is frozen such that no new projects can be added, but projects in the first three years can proceed to project-level approval. EPA is grandfathering plans and TIPs that have already been found to conform. EPA agrees that new plans and TIPs or plan/TIP amendments cannot be found to conform after the 120-day grace period.

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

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

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

Finally, a commenter believed that prohibiting any project funding except for grandfathered projects after the imposition of highway sanctions (i.e., a conformity lapse) is not consistent with the policy adopted by Congress for the imposition of sanctions. The commenter stated that the conformity rule should be revised to explicitly adopt the policy of prohibiting funding only for highway capacity expansion while providing funding for all those projects that will improve air quality identified in Clean Air Act section 179(b)(1)(B). Section 179(b)(1)(B) lists the types of projects that can proceed under sanctions.

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

XII. Traffic Signal Synchronization

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

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

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

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

XIII. Conformity SIPs

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

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

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

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

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

XIV. Hot-Spot Tests

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

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

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

XV. TCM Flexibility

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

XVI. Conformity and the Proposed NAAQS Revisions

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

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

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

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

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

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

Today's final conformity rule does not include any changes specifically intended to address the NAAQS revisions. No changes are necessary in the short term because the existing conformity process will continue for several years. The Federal Advisory Committee Act (FACA) Subcommittee for Ozone, PM and Regional Haze Implementation Programs is discussing the longer-term conformity issues, and EPA's decisions will be published in future policy notices. In addition, EPA will be promulgating a conformity rule addressing transitional ozone areas under the new standard by December 1998.

XVII. Minor Changes to the Rule

A. Definitions

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

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

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

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

B. Consultation

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

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

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

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

list of items that consultation procedures must address.

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

C. Changes to § 93.109

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

XVIII. Administrative Requirements

A. Administrative Designation

Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more, or otherwise adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

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

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

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

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

B. Paperwork Reduction Act

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

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

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

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

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

C. Regulatory Flexibility Analysis

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

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

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

D. Submission to Congress and the Comptroller General

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

E. Unfunded Mandates

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

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

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

List of Subjects

40 CFR Part 51

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

40 CFR Part 93

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

Dated: July 31, 1997.

Carol M. Browner,

Administrator.

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

PART 51—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

2. Subpart T is revised to read as follows:

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

§ 51.390 Implementation plan revision.

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

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

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

(d) In order for EPA to approve the implementation plan revision submitted to EPA and DOT under this subpart, the plan must address all requirements of part 93, subpart A, of this chapter in a manner which gives them full legal effect. In particular, the revision shall incorporate the provisions of the following sections of part 93, subpart A, of this chapter in verbatim form, except insofar as needed to clarify or to give effect to a stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in the following sections of this chapter: §§ 93.101, 93.102, 93.103, 93.104, 93.106, 93.109, 93.110, 93.111, 93.112, 93.113, 93.114, 93.115, 93.116, 93.117, 93.118, 93.119, 93.120, 93.121, 93.126, and 93.127.

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

4. Subpart A is revised to read as follows:

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

Sec.

93.100 Purpose.
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93.115 Criteria and procedures: Projects from a plan and TIP.
93.116 Criteria and procedures: Localized CO and PM_{10} violations (hot spots).
93.117 Criteria and procedures: Compliance with PM_{10} control measures.
93.118 Criteria and procedures: Motor vehicle emissions budget.
93.119 Criteria and procedures: Emission reductions in areas without motor vehicle emissions budgets.
93.120 Consequences of control strategy implementation plan failures.
93.121 Requirements for adoption or approval of projects by other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws.
93.122 Procedures for determining regional transportation-related emissions.
93.123 Procedures for determining localized CO and PM_{10} concentrations (hot-spot analysis).

93.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).
93.125 Enforceability of design concept and scope and project-level mitigation and control measures.
93.126 Exempt projects.
93.127 Projects exempt from regional emissions analyses.
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Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

§ 93.100 Purpose.

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

§ 93.101 Definitions.

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

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

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

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

(1) To cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard during the future period in question, if the project were not implemented; or

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

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

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

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

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

DOT means the United States Department of Transportation.

EPA means the Environmental Protection Agency.

FHWA means the Federal Highway Administration of DOT.

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

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

FTA means the Federal Transit Administration of DOT.

Highway project is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:

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

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

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

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

Hot-spot analysis is an estimation of likely future localized CO and PM_{10} pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

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

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

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

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

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

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

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

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

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

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

NEPA process completion, for the purposes of this subpart, with respect to FHWA or FTA, means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.

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

Project means a highway project or transit project.

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

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

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

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

Standard means a national ambient air quality standard.

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

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

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

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

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

Transportation control measure (TCM) is any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in section 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the first sentence of this definition, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this subpart.

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

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

Transportation project is a highway project or a transit project.

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

§ 93.102 Applicability.

(a) *Action applicability.*

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

(i) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT;

(ii) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT; and

(iii) The approval, funding, or implementation of FHWA/FTA projects.

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

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

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

(NO_2), and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}).

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

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

(ii) NO_x in NO_2 areas; and

(iii) VOC, NO_x, and PM_{10} in PM_{10} areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related precursor emissions within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes a budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

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

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

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

(d) *Grace period for new nonattainment areas.* For areas or portions of areas which have been designated attainment for either ozone, CO, PM_{10} or NO_2 since 1990 and are subsequently redesignated to nonattainment for any of these pollutants, the provisions of this subpart shall not apply for 12 months following the date of final designation to nonattainment for such pollutant.

§ 93.103 Priority.

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

§ 93.104 Frequency of conformity determinations.

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

(b) *Frequency of conformity determinations for transportation plans.* (1) Each new transportation plan must be demonstrated to conform before the transportation plan is approved by the MPO or accepted by DOT.

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

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

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

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

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

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

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

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

(1) November 24, 1993;

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

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

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

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

§ 93.105 Consultation.

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

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

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

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

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

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

(ii) The organizational level of regular consultation;

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

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

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

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

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

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

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

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

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

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

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

(vi) Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in § 93.126 or § 93.127; and

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

(2) A process involving the MPO and State and local air quality planning agencies and transportation agencies for the following:

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

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

(3) Where the metropolitan planning area does not include the entire nonattainment or maintenance area, a process involving the MPO and the State department of transportation for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area.

(4) A process to ensure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered), including those by recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws, are disclosed to the MPO on a regular basis, and to ensure that any changes to those plans are immediately disclosed.

(5) A process involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws for assuming the location and design concept and scope of projects which are disclosed to the MPO as required by paragraph (c)(4) of this section but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of § 93.122.

(6) A process for consulting on the design, schedule, and funding of research and data collection efforts and regional transportation model development by the MPO (e.g., household/ travel transportation surveys).

(7) A process for providing final documents (including applicable implementation plans and implementation plan revisions) and supporting information to each agency after approval or adoption. This process is applicable to all agencies described in paragraph (a)(1) of this section, including Federal agencies.

(d) *Resolving conflicts.* Conflicts among State agencies or between State agencies and an MPO shall be escalated to the Governor if they cannot be resolved by the heads of the involved agencies. The State air 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 § 51.390 of this chapter shall define the procedures for starting the 14-day clock. If the State air agency appeals to the Governor, the final conformity determination must have the concurrence of the Governor. If the State air agency does not appeal to the Governor within 14 days, the MPO or State department of transportation may proceed with the final conformity determination. The Governor may delegate his or her role in this process, but not to the head or staff of the State or local air agency, State department of transportation, State transportation commission or board, or an MPO.

(e) *Public consultation procedures.* Affected agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a conformity determination for all transportation plans and TIPs, consistent with these requirements and those of 23 CFR 450.316(b). Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.95. In addition, these agencies must specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. These agencies shall also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

§ 93.106 Content of transportation plans.

(a) *Transportation plans adopted after January 1, 1997 in serious, severe, or extreme ozone nonattainment areas and in serious CO nonattainment areas.* If the metropolitan planning area contains an urbanized area population greater than 200,000, the transportation plan must specifically describe the transportation system envisioned for certain future years which shall be called horizon years.

(1) The agency or organization developing the transportation plan may choose any years to be horizon years, subject to the following restrictions:

(i) Horizon years may be no more than 10 years apart;

(ii) The first horizon year may be no more than 10 years from the base year used to validate the transportation demand planning model;

(iii) If the attainment year is in the time span of the transportation plan, the attainment year must be a horizon year; and

(iv) The last horizon year must be the last year of the transportation plan's forecast period.

(2) For these horizon years:

(i) The transportation plan shall quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts, in accordance with implementation plan provisions and the consultation requirements specified by § 93.105;

(ii) The highway and transit system shall be described in terms of the regionally significant additions or modifications to the existing transportation network which the transportation plan envisions to be operational in the horizon years. Additions and modifications to the highway network shall be sufficiently identified to indicate intersections with existing regionally significant facilities, and to determine their effect on route options between transportation analysis zones. Each added or modified highway segment shall also be sufficiently identified in terms of its design concept and design scope to allow modeling of travel times under various traffic volumes, consistent with the modeling methods for area-wide transportation analysis in use by the MPO. Transit facilities, equipment, and services envisioned for the future shall be identified in terms of design concept, design scope, and operating policies that are sufficient for modeling of their transit ridership. Additions and modifications to the transportation network shall be described sufficiently to show that there is a reasonable relationship between expected land use and the envisioned transportation system; and

(iii) Other future transportation policies, requirements, services, and activities, including intermodal activities, shall be described.

(b) *Moderate areas reclassified to serious.* Ozone or CO nonattainment areas which are reclassified from moderate to serious and have an urbanized population greater than 200,000 must meet the requirements of paragraph (a) of this section within two years from the date of reclassification.

(c) *Transportation plans for other areas.* Transportation plans for other areas must meet the requirements of paragraph (a) of this section at least to the extent it has been the previous practice of the MPO to prepare plans which meet those requirements. Otherwise, the transportation system envisioned for the future must be sufficiently described within the transportation plans so that a conformity determination can be made according to the criteria and procedures of §§ 93.109 through 93.119.

(d) *Savings.* The requirements of this section supplement other requirements of applicable law or regulation governing the format or content of transportation plans.

§ 93.107 Relationship of transportation plan and TIP conformity with the NEPA process.

The degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA process or other project development studies. Should the NEPA process result in a project with design concept and scope significantly different from that in the transportation plan or TIP, the project must meet the criteria in §§ 93.109 through 93.119 for projects not from a TIP before NEPA process completion.

§ 93.108 Fiscal constraints for transportation plans and TIPs.

Transportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity.

§ 93.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.

(a) In order for each transportation plan, program, and FHWA/FTA project to be found to conform, the MPO and DOT must demonstrate that the applicable criteria and procedures in this subpart are satisfied, and the MPO and DOT must comply with all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity. The criteria for making conformity determinations differ based on the action under review (transportation plans, TIPs, and FHWA/FTA projects), the relevant pollutant(s), and the status of the implementation plan.

(b) Table 1 in this paragraph indicates the criteria and procedures in §§ 93.110 through 93.119 which apply for transportation plans, TIPs, and FHWA/

FTA projects. Paragraphs (c) through (f) of this section explain when the budget, emission reduction, and hot spot tests are required for each pollutant. Paragraph (g) of this section addresses isolated rural nonattainment and maintenance areas. Table 1 follows:

TABLE 1.—CONFORMITY CRITERIA

All Actions at all times:	
§ 93.110	Latest planning assumptions.
§ 93.111	Latest emissions model.
§ 93.112	Consultation.
Transportation Plan:	
§ 93.113(b)	TCMs.
§ 93.118 or § 93.119	Emissions budget or Emission reduction.
TIP:	
§ 93.113(c)	TCMs.
§ 93.118 or § 93.119	Emissions budget or Emission reduction.
Project (From a Conforming Plan and TIP):	
§ 93.114	Currently conforming plan and TIP.
§ 93.115	Project from a conforming plan and TIP.
§ 93.116	CO and PM_{10} hot spots.
§ 93.117	PM_{10} control measures.
Project (Not From a Conforming Plan and TIP):	
§ 93.113(d)	TCMs.
§ 93.114	Currently conforming plan and TIP.
§ 93.116	CO and PM_{10} hot spots.
§ 93.117	PM_{10} control measures.
§ 93.118 or § 93.119	Emissions budget or Emission reduction.

(c) *Ozone nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(1) In ozone nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In ozone nonattainment areas that are required to submit a control strategy implementation plan revision (usually moderate and above areas), the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(3) An ozone nonattainment area must satisfy the emission reduction test for NO_X, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO_X. The implementation plan will be considered to establish a motor vehicle emissions budget for NO_X if the implementation plan or plan submission contains an explicit NO_X motor vehicle emissions budget that is intended to act as a ceiling on future NO_X emissions, and the NO_X motor vehicle emissions budget is a net reduction from NO_X emissions levels in 1990.

(4) Ozone nonattainment areas that have not submitted a maintenance plan and that are not required to submit a control strategy implementation plan revision (usually marginal and below areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by § 93.119; or

(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by § 93.118 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (c)(1) of this section).

(5) Notwithstanding paragraphs (c)(1) and (c)(2) of this section, moderate and above ozone nonattainment areas with three years of clean data that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements must satisfy one of the following requirements:

(i) The emission reduction tests as required by § 93.119;

(ii) The budget test as required by § 93.118, using the motor vehicle emissions budgets in the submitted control strategy implementation plan (subject to the timing requirements of paragraph (c)(1) of this section); or

(iii) The budget test as required by § 93.118, using the motor vehicle emissions of ozone precursors in the most recent year of clean data as motor vehicle emissions budgets, if such budgets are established by the EPA rulemaking that determines that the area has clean data.

(d) *CO nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in CO nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following:

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot spot test required by § 93.116(a) at all times. Until a CO attainment demonstration or maintenance plan is approved by EPA, FHWA/FTA projects must also satisfy the hot spot test required by § 93.116(b).

(2) In CO nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) Except as provided in paragraph (d)(4) of this section, in CO nonattainment areas the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions

budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(4) CO nonattainment areas that have not submitted a maintenance plan and that are not required to submit an attainment demonstration (e.g., moderate CO areas with a design value of 12.7 ppm or less or not classified CO areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by § 93.119; or

(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by § 93.118 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (d)(2) of this section).

(e) *PM_{10} nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in PM_{10} nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following:

(1) FHWA/FTA projects in PM_{10} nonattainment or maintenance areas must satisfy the hot spot test required by § 93.116(a).

(2) In PM_{10} nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) In PM_{10} nonattainment areas the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes;

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan; or

(iii) If the submitted implementation plan revision is a demonstration of impracticability under CAA section 189(a)(1)(B)(ii) and does not demonstrate attainment.

(f) *NO_2 nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in NO_2 nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(1) In NO_2 nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In NO_2 nonattainment areas the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(g) *Isolated rural nonattainment and maintenance areas.* This paragraph applies to any nonattainment or maintenance area (or portion thereof) which does not have a metropolitan transportation plan or TIP and whose projects are not part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. This paragraph does not apply to "donut" areas which are outside the metropolitan planning boundary and inside the nonattainment/maintenance area boundary.

(1) FHWA/FTA projects in all isolated rural nonattainment and maintenance areas must satisfy the requirements of §§ 93.110, 93.111, 93.112, 93.113(d), 93.116, and 93.117. Until EPA approves the control strategy implementation plan or maintenance plan for a rural CO nonattainment or maintenance area, FHWA/FTA projects must also satisfy the requirements of § 93.116(b) ("Localized CO and PM_{10} violations (hot spots)").

(2) Isolated rural nonattainment and maintenance areas are subject to the budget and/or emission reduction tests as described in paragraphs (c) through (f) of this section, with the following modifications:

(i) When the requirements of §§ 93.118 and 93.119 apply to isolated rural nonattainment and maintenance areas, references to "transportation plan" or "TIP" should be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the rural nonattainment or maintenance area.

(ii) In isolated rural nonattainment and maintenance areas that are subject to § 93.118, FHWA/FTA projects must be consistent with motor vehicle emissions budget(s) for the years in the timeframe of the attainment demonstration or maintenance plan. For years after the attainment year (if a maintenance plan has not been submitted) or after the last year of the maintenance plan, FHWA/FTA projects must satisfy one of the following requirements:

(A) § 93.118;

(B) § 93.119 (including regional emissions analysis for NO_X in all ozone nonattainment and maintenance areas, notwithstanding § 93.119(d)(2)); or

(C) As demonstrated by the air quality dispersion model or other air quality modeling technique used in the attainment demonstration or maintenance plan, the FHWA/FTA project, in combination with all other

regionally significant projects expected in the area in the timeframe of the statewide transportation plan, must not cause or contribute to any new violation of any standard in any areas; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area. Control measures assumed in the analysis must be enforceable.

(iii) The choice of requirements in paragraph (g)(2)(ii) of this section and the methodology used to meet the requirements of paragraph (g)(2)(ii)(C) of this section must be determined through the interagency consultation process required in § 93.105(c)(1)(vii) through which the relevant recipients of title 23 U.S.C. or Federal Transit Laws funds, the local air quality agency, the State air quality agency, and the State department of transportation should reach consensus about the option and methodology selected. EPA and DOT must be consulted through this process as well. In the event of unresolved disputes, conflicts may be escalated to the Governor consistent with the procedure in § 93.105(d), which applies for any State air agency comments on a conformity determination.

§ 93.110 Criteria and procedures: Latest planning assumptions.

(a) The conformity determination, with respect to all other applicable criteria in §§ 93.111 through 93.119, must be based upon the most recent planning assumptions in force at the time of the conformity determination. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section.

(b) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations.

(c) The conformity determination for each transportation plan and TIP must discuss how transit operating policies (including fares and service levels) and assumed transit ridership have changed since the previous conformity determination.

(d) The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(e) The conformity determination must use the latest existing information regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(f) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public consultation required by § 93.105.

§ 93.111 Criteria and procedures: Latest emissions model.

(a) The conformity determination must be based on the latest emission estimation model available. This criterion is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. Where EMFAC is the motor vehicle emissions model used in preparing or revising the applicable implementation plan, new versions must be approved by EPA before they are used in the conformity analysis.

(b) EPA will consult with DOT to establish a grace period following the specification of any new model.

(1) The grace period will be no less than three months and no more than 24 months after notice of availability is published in the **Federal Register**.

(2) The length of the grace period will depend on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the **Federal Register**.

(c) Transportation plan and TIP conformity analyses for which the emissions analysis was begun during the grace period or before the **Federal Register** notice of availability of the latest emission model may continue to use the previous version of the model. Conformity determinations for projects may also be based on the previous model if the analysis was begun during the grace period or before the **Federal Register** notice of availability, and if the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document.

§ 93.112 Criteria and procedures: Consultation.

Conformity must be determined according to the consultation procedures in this subpart and in the applicable implementation plan, and according to the public involvement procedures established in compliance with 23 CFR part 450. Until the implementation plan revision required by § 51.390 of this chapter is fully approved by EPA, the conformity determination must be made according to § 93.105 (a)(2) and (e) and the requirements of 23 CFR part 450.

§ 93.113 Criteria and procedures: Timely implementation of TCMs.

(a) The transportation plan, TIP, or any FHWA/FTA project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.

(b) For transportation plans, this criterion is satisfied if the following two conditions are met:

(1) The transportation plan, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the applicable implementation plan which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws, consistent with schedules included in the applicable implementation plan.

(2) Nothing in the transportation plan interferes with the implementation of any TCM in the applicable implementation plan.

(c) For TIPs, this criterion is satisfied if the following conditions are met:

(1) An examination of the specific steps and funding source(s) needed to fully implement each TCM indicates that TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws are on or ahead of the schedule established in the applicable implementation plan, or, if such TCMs are behind the schedule established in the applicable implementation plan, the MPO and DOT have determined that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control, including projects in locations outside the nonattainment or maintenance area.

(2) If TCMs in the applicable implementation plan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs, or if there are no other TCMs in the TIP, if the funds are reallocated to projects in the TIP other than projects which are eligible for Federal funding intended for air quality

improvement projects, e.g., the Congestion Mitigation and Air Quality Improvement Program.

(3) Nothing in the TIP may interfere with the implementation of any TCM in the applicable implementation plan.

(d) For FHWA/FTA projects which are not from a conforming transportation plan and TIP, this criterion is satisfied if the project does not interfere with the implementation of any TCM in the applicable implementation plan.

§ 93.114 Criteria and procedures: Currently conforming transportation plan and TIP.

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

(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements specified in § 93.104.

(b) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the applicable implementation plan, provided that all other relevant criteria of this subpart are satisfied.

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

(a) The project must come from a conforming plan and program. If this criterion is not satisfied, the project must satisfy all criteria in Table 1 of § 93.109(b) for a project not from a conforming transportation plan and TIP. A project is considered to be from a conforming transportation plan if it meets the requirements of paragraph (b) of this section and from a conforming program if it meets the requirements of paragraph (c) of this section. Special provisions for TCMs in an applicable implementation plan are provided in paragraph (d) of this section.

(b) A project is considered to be from a conforming transportation plan if one of the following conditions applies:

(1) For projects which are required to be identified in the transportation plan in order to satisfy § 93.106 ("Content of transportation plans"), the project is specifically included in the conforming transportation plan and the project's design concept and scope have not changed significantly from those which were described in the transportation plan, or in a manner which would significantly impact use of the facility; or

(2) For projects which are not required to be specifically identified in the transportation plan, the project is identified in the conforming transportation plan, or is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.

(c) A project is considered to be from a conforming program if the following conditions are met:

(1) The project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and the project design concept and scope have not changed significantly from those which were described in the TIP; and

(2) If the TIP describes a project design concept and scope which includes project-level emissions mitigation or control measures, written commitments to implement such measures must be obtained from the project sponsor and/or operator as required by § 93.125(a) in order for the project to be considered from a conforming program. Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the design concept and scope of the project.

(d) *TCMs.* This criterion is not required to be satisfied for TCMs specifically included in an applicable implementation plan.

§ 93.116 Criteria and procedures: Localized CO and PM_{10} violations (hot spots).

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO or PM_{10} violations or increase the frequency or severity of any existing CO or PM_{10} violations in CO and PM_{10} nonattainment and maintenance areas. This criterion is satisfied if it is demonstrated that no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

(b) This paragraph applies for CO nonattainment areas as described in § 93.109(d)(1). Each FHWA/FTA project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (in CO nonattainment areas). This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that existing localized CO violations will be eliminated or reduced in severity and number as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

§ 93.117 Criteria and procedures: Compliance with PM_{10} control measures.

The FHWA/FTA project must comply with PM_{10} control measures in the applicable implementation plan. This criterion is satisfied if the project-level conformity determination contains a written commitment from the project sponsor to include in the final plans, specifications, and estimates for the project those control measures (for the purpose of limiting PM_{10} emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.

§ 93.118 Criteria and procedures: Motor vehicle emissions budget.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies as described in § 93.109(c) through (g). This criterion is satisfied if it is demonstrated that emissions of the pollutants or pollutant precursors described in paragraph (c) of this section are less than or equal to the motor vehicle emissions budget(s) established in the applicable implementation plan or implementation plan submission.

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes motor vehicle emissions budget(s), for the last year of the transportation plan's forecast period, and for any intermediate years as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

(1) Until a maintenance plan is submitted:

(i) Emissions in each year (such as milestone years and the attainment year) for which the control strategy implementation plan revision establishes motor vehicle emissions budget(s) must be less than or equal to that year's motor vehicle emissions budget(s); and

(ii) Emissions in years for which no motor vehicle emissions budget(s) are specifically established must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year. For example, emissions in years after the attainment year for which the implementation plan does not establish a budget must be less than or equal to the motor vehicle emissions budget(s) for the attainment year.

(2) When a maintenance plan has been submitted:

(i) Emissions must be less than or equal to the motor vehicle emissions budget(s) established for the last year of the maintenance plan, and for any other years for which the maintenance plan establishes motor vehicle emissions budgets. If the maintenance plan does not establish motor vehicle emissions budgets for any years other than the last year of the maintenance plan, the demonstration of consistency with the motor vehicle emissions budget(s) must be accompanied by a qualitative finding that there are no factors which would cause or contribute to a new violation or exacerbate an existing violation in the years before the last year of the maintenance plan. The interagency consultation process required by § 93.105 shall determine what must be considered in order to make such a finding;

(ii) For years after the last year of the maintenance plan, emissions must be less than or equal to the maintenance plan's motor vehicle emissions budget(s) for the last year of the maintenance plan; and

(iii) If an approved control strategy implementation plan has established motor vehicle emissions budgets for years in the timeframe of the transportation plan, emissions in these years must be less than or equal to the control strategy implementation plan's motor vehicle emissions budget(s) for these years.

(c) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each pollutant or pollutant precursor in § 93.102(b) for which the area is in nonattainment or maintenance and for which the applicable implementation plan (or implementation plan submission) establishes a motor vehicle emissions budget.

(d) Consistency with the motor vehicle emissions budget(s) must be demonstrated by including emissions from the entire transportation system, including all regionally significant projects contained in the transportation plan and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan.

(1) Consistency with the motor vehicle emissions budget(s) must be demonstrated with a regional emissions analysis that meets the requirements of §§ 93.122 and 93.105(c)(1)(i).

(2) The regional emissions analysis may be performed for any years in the timeframe of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the transportation plan) and the last year of the plan's forecast period. Emissions in years for which consistency with motor vehicle emissions budgets must be demonstrated, as required in paragraph (b) of this section, may be determined by interpolating between the years for which the regional emissions analysis is performed.

(e) *Motor vehicle emissions budgets in submitted control strategy implementation plan revisions and submitted maintenance plans.* (1) Consistency with the motor vehicle emissions budgets in submitted control strategy implementation plan revisions or maintenance plans must be demonstrated if EPA has declared the motor vehicle emissions budget(s) adequate for transportation conformity purposes, or beginning 45 days after the control strategy implementation plan revision or maintenance plan has been submitted (unless EPA has declared the motor vehicle emissions budget(s) inadequate for transportation conformity purposes). However, submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the period of years addressed by the approved implementation plan.

(2) If EPA has declared an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes, the inadequate budget(s) shall not be used to satisfy the requirements of this section. Consistency with the previously established motor vehicle emissions budget(s) must be demonstrated. If there are no previous approved implementation plans or implementation plan submissions with motor vehicle emissions budgets, the emission reduction tests required by § 93.119 must be satisfied.

(3) If EPA declares an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes more than 45 days after its submission to EPA, and conformity of a transportation plan or TIP has already been determined by DOT using the budget(s), the conformity determination will remain valid. Projects included in that transportation plan or TIP could still satisfy §§ 93.114 and 93.115, which require a currently conforming transportation plan and TIP to be in place at the time of a project's conformity determination and that projects come from a conforming transportation plan and TIP.

(4) EPA will not find a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan to be adequate for transportation conformity purposes unless the following minimum criteria are satisfied:

(i) The submitted control strategy implementation plan revision or maintenance plan was endorsed by the Governor (or his or her designee) and was subject to a State public hearing;

(ii) Before the control strategy implementation plan or maintenance plan was submitted to EPA, consultation among federal, State, and local agencies occurred; full implementation plan documentation was provided to EPA; and EPA's stated concerns, if any, were addressed;

(iii) The motor vehicle emissions budget(s) is clearly identified and precisely quantified;

(iv) The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins (see § 93.101 for definition); and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

(5) Before determining the adequacy of a submitted motor vehicle emissions budget, EPA will review the State's compilation of public comments and response to comments that are required to be submitted with any implementation plan. EPA will document its consideration of such

comments and responses in a letter to the State indicating the adequacy of the submitted motor vehicle emissions budget.

(6) When the motor vehicle emissions budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by EPA, the MPO and DOT's conformity determinations will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; increase the frequency or severity of any existing violation of any standard; or delay timely attainment of any standard or any required interim emission reductions or other milestones.

§ 93.119 Criteria and procedures: Emission reductions in areas without motor vehicle emissions budgets.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must contribute to emissions reductions. This criterion applies as described in § 93.109(c) through (g). It applies to the net effect of the action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) on motor vehicle emissions from the entire transportation system.

(b) This criterion may be met in moderate and above ozone nonattainment areas that are subject to the reasonable further progress requirements of CAA section 182(b)(1) and in moderate with design value greater than 12.7 ppm and serious CO nonattainment areas if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(2) The emissions predicted in the "Action" scenario are lower than 1990 emissions by any nonzero amount.

(c) This criterion may be met in PM_{10} and NO_2 nonattainment areas; marginal and below ozone nonattainment areas and other ozone nonattainment areas that are not subject to the reasonable further progress requirements of CAA section 182(b)(1); and moderate with design value less than 12.7 ppm and below CO nonattainment areas if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(2) The emissions predicted in the "Action" scenario are not greater than baseline emissions. Baseline emissions are those estimated to have occurred during calendar year 1990, unless the conformity implementation plan revision required by § 51.390 of this chapter defines the baseline emissions for a 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.

(d) *Pollutants.* The regional emissions analysis must be performed for the following pollutants:

(1) VOC in ozone areas;

(2) NO_X in ozone areas, unless the EPA Administrator determines that additional reductions of NO_X would not contribute to attainment;

(3) CO in CO areas;

(4) PM_{10} in PM_{10} areas;

(5) Transportation-related precursors of PM_{10} in PM_{10} nonattainment and maintenance areas if the EPA Regional Administrator or the director of the State air agency has made a finding that such precursor emissions from within the area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT; and

(6) NO_X in NO_2 areas.

(e) *Analysis years.* The regional emissions analysis must be performed for analysis years that are no more than ten years apart. The first analysis year must be no more than five years beyond the year in which the conformity determination is being made. The last year of transportation plan's forecast period must also be an analysis year.

(f) *"Baseline" scenario.* The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Baseline" scenario in each analysis year. The "Baseline" scenario must be defined for each of the analysis years. The "Baseline" scenario is the future transportation system that will result from current programs, including the following (except that exempt projects listed in § 93.126 and projects exempt from regional emissions analysis as listed in § 93.127 need not be explicitly considered):

(1) All in-place regionally significant highway and transit facilities, services and activities;

(2) All ongoing travel demand management or transportation system management activities; and

(3) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for hardship acquisition and protective buying); come from the first year of the previously conforming transportation plan and/or TIP; or have completed the NEPA process.

(g) *"Action" scenario.* The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Action" scenario in each analysis year. The "Action" scenario must be defined for each of the analysis years. The "Action" scenario is the transportation system that would result from the implementation of the proposed action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) and all other expected regionally significant projects in the nonattainment area. The "Action" scenario must include the following (except that exempt projects listed in § 93.126 and projects exempt from regional emissions analysis as listed in § 93.127 need not be explicitly considered):

(1) All facilities, services, and activities in the "Baseline" scenario;

(2) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) specifically identified in the proposed transportation plan which will be operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;

(3) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination;

(4) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any

Federal funding or approval, which were adopted and/or funded prior to the date of the last conformity determination, but which have been modified since then to be more stringent or effective;

(5) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and

(6) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(h) *Projects not from a conforming transportation plan and TIP.* For the regional emissions analysis required by paragraphs (b) and (c) of this section, if the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the plan or TIP, the 'Baseline' scenario must include the project with its original design concept and scope, and the 'Action' scenario must include the project with its new design concept and scope.

§ 93.120 Consequences of control strategy implementation plan failures.

(a) *Disapprovals.* (1) If EPA disapproves any submitted control strategy implementation plan revision (with or without a protective finding), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the CAA. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined.

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, then beginning 120 days after such disapproval, only projects in the first three years of the currently conforming transportation plan and TIP may be found to conform. This means that beginning 120 days after disapproval without a protective finding, no transportation plan, TIP, or project not in the first three years of the currently conforming plan and TIP may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined. During the first 120 days following EPA's disapproval without a protective finding, transportation plan, TIP, and project conformity determinations shall be made using the motor vehicle emissions budget(s) in the disapproved control strategy implementation plan, unless another control strategy implementation plan revision has been submitted and its motor vehicle emissions budget(s) applies for transportation conformity purposes, pursuant to § 93.109.

(3) In disapproving a control strategy implementation plan revision, EPA would give a protective finding where a submitted plan contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

(b) *Failure to submit and incompleteness.* In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan or submission of an incomplete control strategy implementation plan revision (either of which initiates the sanction process under CAA sections 179 or 110(m)), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the CAA, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(c) *Federal implementation plans.* If EPA promulgates a Federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

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

(a) Except as provided in paragraph (b) of this section, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(1) The project was included in the first three years of the most recently conforming transportation plan and TIP (or the conformity determination's regional emissions analyses), even if conformity status is currently lapsed; and the project's design concept and scope has not changed significantly from those analyses; or

(2) There is a currently conforming transportation plan and TIP, and a new regional emissions analysis including the project and the currently conforming transportation plan and TIP demonstrates that the transportation plan and TIP would still conform if the project were implemented (consistent with the requirements of §§ 93.118 and/or 93.119 for a project not from a conforming transportation plan and TIP).

(b) In isolated rural nonattainment and maintenance areas subject to § 93.109(g), no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(1) The project was included in the regional emissions analysis supporting the most recent conformity determination for the portion of the statewide transportation plan and TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly; or

(2) A new regional emissions analysis including the project and all other regionally significant projects expected in the nonattainment or maintenance area demonstrates that those projects in the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area would still conform if the project were implemented (consistent with the requirements of §§ 93.118 and/or 93.119 for projects not from a conforming transportation plan and TIP).

§ 93.122 Procedures for determining regional transportation-related emissions.

(a) *General requirements.* (1) The regional emissions analysis required by §§ 93.118 and 93.119 for the transportation plan, TIP, or project not from a conforming plan and TIP must include all regionally significant projects expected in the nonattainment or maintenance area. The analysis shall include FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO as required by § 93.105. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMs and similar projects that are not regionally

significant may also be estimated in accordance with reasonable professional practice.

(2) The emissions analysis may not include for emissions reduction credit any TCMs or other measures in the applicable implementation plan which have been delayed beyond the scheduled date(s) until such time as their implementation has been assured. If the measure has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.

(3) Emissions reduction credit from projects, programs, or activities which require a regulatory action in order to be implemented may not be included in the emissions analysis unless:

(i) The regulatory action is already adopted by the enforcing jurisdiction;

(ii) The project, program, or activity is included in the applicable implementation plan;

(iii) The control strategy implementation plan submission or maintenance plan submission that establishes the motor vehicle emissions budget(s) for the purposes of § 93.118 contains a written commitment to the project, program, or activity by the agency with authority to implement it; or

(iv) EPA has approved an opt-in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe standards), or the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(4) Emissions reduction credit from control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.

(i) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

(ii) The conformity implementation plan revision required in § 51.390 of this chapter must provide that written commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(5) A regional emissions analysis for the purpose of satisfying the requirements of § 93.119 must make the same assumptions in both the "Baseline" and "Action" scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(6) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to establish the emissions budget in the applicable implementation plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the applicable implementation plan, unless modified after interagency consultation according to § 93.105(c)(1)(i) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

(7) Reasonable methods shall be used to estimate nonattainment or maintenance area VMT on off-network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

(b) Regional emissions analysis in serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas must meet the requirements of paragraphs (b)(1) through (3) of this section if their metropolitan planning area contains an urbanized area population over 200,000.

(1) By January 1, 1997, estimates of regional transportation-related emissions used to support conformity determinations must be made at a minimum using network-based travel models according to procedures and methods that are available and in practice and supported by current and available documentation. These procedures, methods, and practices are available from DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency consultation process, as required by § 93.105(c)(1)(i). Network-based travel models must at a minimum satisfy the following requirements:

(i) Network-based travel models must be validated against observed counts (peak and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented;

(ii) Land use, population, employment, and other network-based travel model assumptions must be documented and based on the best available information;

(iii) Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable;

(iv) A capacity-sensitive assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak link volumes and speeds and uses speeds based on final assigned volumes;

(v) Zone-to-zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits; and

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

(2) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network-based travel model.

(3) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network-based travel models, a factor (or factors) may be developed to reconcile and calibrate the network-based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future VMT. In this factoring process, consideration will be given to differences between HPMS and network-based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count-

based programs and other departures from these procedures are permitted subject to the interagency consultation procedures of § 93.105(c)(1)(i).

(c) In all areas not otherwise subject to paragraph (b) of this section, regional emissions analyses must use those procedures described in paragraph (b) of this section if the use of those procedures has been the previous practice of the MPO. Otherwise, areas not subject to paragraph (b) of this section may estimate regional emissions using any appropriate methods that account for VMT growth by, for example, extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for VMT per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.

(d) *PM_{10} from construction-related fugitive dust.* (1) For areas in which the implementation plan does not identify construction-related fugitive PM_{10} as a contributor to the nonattainment problem, the fugitive PM_{10} emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

(2) In PM_{10} nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM_{10} as a contributor to the nonattainment problem, the regional PM_{10} emissions analysis shall consider construction-related fugitive PM_{10} and shall account for the level of construction activity, the fugitive PM_{10} control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

(e) *Reliance on previous regional emissions analysis.* (1) The TIP may be demonstrated to satisfy the requirements of §§ 93.118 ("Motor vehicle emissions budget") or 93.119 ("Emission reductions in areas without motor vehicle emissions budgets") without new regional emissions analysis if the regional emissions analysis already performed for the plan also applies to the TIP. This requires a demonstration that:

(i) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the transportation plan;

(ii) All TIP projects which are regionally significant are included in the transportation plan with design concept and scope adequate to determine their contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination; and

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

(2) A project which is not from a conforming transportation plan and a conforming TIP may be demonstrated to satisfy the requirements of § 93.118 or § 93.119 without additional regional emissions analysis if allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the transportation plan, and if the project is either:

(i) Not regionally significant; or

(ii) Included in the conforming transportation plan (even if it is not specifically included in the latest conforming TIP) with design concept and scope adequate to determine its contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination, and the design concept and scope of the project is not significantly different from that described in the transportation plan.

§ 93.123 Procedures for determining localized CO and PM_{10} concentrations (hot-spot analysis).

(a) *CO hot-spot analysis.* (1) The demonstrations required by § 93.116 ("Localized CO and PM_{10} violations") must be based on quantitative analysis using the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51, Appendix W (Guideline on Air Quality Models). These procedures shall be used in the following cases, unless different procedures developed through the interagency consultation process required in § 93.105 and approved by the EPA Regional Administrator are used:

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

(ii) For projects affecting intersections that are at Level-of-Service D, E, or F, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes related to the project;

(iii) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with highest traffic volumes, as identified in the applicable implementation plan; and

(iv) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with the worst level of service, as identified in the applicable implementation plan.

(2) In cases other than those described in paragraph (a)(1) of this section, the demonstrations required by § 93.116 may be based on either:

(i) Quantitative methods that represent reasonable and common professional practice; or

(ii) A qualitative consideration of local factors, if this can provide a clear demonstration that the requirements of § 93.116 are met.

(b) *PM_{10} hot-spot analysis.* (1) The hot-spot demonstration required by § 93.116 must be based on quantitative analysis methods for the following types of projects:

(i) Projects which are located at sites at which violations have been verified by monitoring;

(ii) Projects which are located at sites which have vehicle and roadway emission and dispersion characteristics that are essentially identical to those of sites with verified violations (including sites near one at which a violation has been monitored); and

(iii) New or expanded bus and rail terminals and transfer points which increase the number of diesel vehicles congregating at a single location.

(2) Where quantitative analysis methods are not required, the demonstration required by § 93.116 may be based on a qualitative consideration of local factors.

(3) The identification of the sites described in paragraph (b)(1)(i) and (ii) of this section, and other cases where quantitative methods are appropriate, shall be determined through the interagency consultation process required in § 93.105. DOT may choose to make a categorical conformity determination on bus and rail terminals or transfer points based on appropriate modeling of various terminal sizes, configurations, and activity levels.

(4) The requirements for quantitative analysis contained in this paragraph (b) will not take effect until EPA releases modeling guidance on this subject and announces in the **Federal Register** that these requirements are in effect.

(c) *General requirements.* (1) Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the

area substantially affected by the project.

(2) Hot-spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. The future background concentration should be estimated by multiplying current background by the ratio of future to current traffic and the ratio of future to current emission factors.

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

(4) PM_{10} or CO mitigation or control measures shall be assumed in the hot-spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by § 93.125(a).

(5) CO and PM_{10} hot-spot analyses are not required to consider construction-related activities which cause temporary increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established "Guideline" methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.

§ 93.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).

(a) In interpreting an applicable implementation plan (or implementation plan submission) with respect to its motor vehicle emissions budget(s), the MPO and DOT may not infer additions to the budget(s) that are not explicitly intended by the implementation plan (or submission). Unless the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the milestone, attainment, or maintenance requirement and explicitly states an intent that some or all of this additional amount should be available to the MPO and DOT in the emissions budget for conformity purposes, the MPO may not interpret the budget to be higher than the implementation plan's estimate of future emissions. This applies in particular to applicable implementation plans (or submissions) which demonstrate that after implementation of control measures in the implementation plan:

(1) Emissions from all sources will be less than the total emissions that would be consistent with a required demonstration of an emissions reduction milestone;

(2) Emissions from all sources will result in achieving attainment prior to the attainment deadline and/or ambient concentrations in the attainment deadline year will be lower than needed to demonstrate attainment; or

(3) Emissions will be lower than needed to provide for continued maintenance.

(b) If an applicable implementation plan submitted before November 24, 1993, demonstrates that emissions from all sources will be less than the total emissions that would be consistent with attainment and quantifies that "safety margin," the State may submit an implementation plan revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such an implementation plan revision, once it is endorsed by the Governor and has been subject to a public hearing, may be used for the purposes of transportation conformity before it is approved by EPA.

(c) A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the implementation plan establishes appropriate mechanisms for such trades.

(d) If the applicable implementation plan (or implementation plan submission) estimates future emissions by geographic subarea of the nonattainment area, the MPO and DOT are not required to consider this to establish subarea budgets, unless the applicable implementation plan (or implementation plan submission) explicitly indicates an intent to create such subarea budgets for the purposes of conformity.

(e) If a nonattainment area includes more than one MPO, the implementation plan may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

§ 93.125 Enforceability of design concept and scope and project-level mitigation and control measures.

(a) Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws, FHWA, or FTA must obtain from the project sponsor and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local PM_{10} or CO impacts. Before a conformity determination is made, written commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and are included in the project design concept and scope which is used in the regional emissions analysis required by §§ 93.118 ("Motor vehicle emissions budget") and 93.119 ("Emission reductions in areas without motor vehicle emissions budgets") or used in the project-level hot-spot analysis required by § 93.116.

(b) Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(c) The implementation plan revision required in § 51.390 of this chapter shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(d) If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of § 93.116, emission budget requirements of § 93.118, and emission reduction requirements of § 93.119 are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under § 93.105. The MPO and DOT must find that the transportation plan and TIP still satisfy the applicable requirements of §§ 93.118 and/or 93.119 and that the project still satisfies the requirements of § 93.116, and therefore that the conformity determinations for the transportation plan, TIP, and project are still valid. This finding is subject to the applicable public consultation requirements in § 93.105(e) for conformity determinations for projects.

§ 93.126 Exempt projects.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 2 of this section are exempt from the requirement to determine

conformity. Such projects may proceed toward implementation even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 2 of this section is not exempt if the MPO in consultation with other agencies (see § 93.105(c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation. Table 2 follows:

TABLE 2.—EXEMPT PROJECTS

Safety

Railroad/highway crossing.
Hazard elimination program.
Safer non-Federal-aid system roads.
Shoulder improvements.
Increasing sight distance.
Safety improvement program.
Traffic control devices and operating assistance other than signalization projects.
Railroad/highway crossing warning devices.
Guardrails, median barriers, crash cushions.
Pavement resurfacing and/or rehabilitation.
Pavement marking demonstration.
Emergency relief (23 U.S.C. 125).
Fencing.
Skid treatments.
Safety roadside rest areas.
Adding medians.
Truck climbing lanes outside the urbanized area.
Lighting improvements.
Widening narrow pavements or reconstructing bridges (no additional travel lanes).
Emergency truck pullovers.

Mass Transit

Operating assistance to transit agencies.
Purchase of support vehicles.
Rehabilitation of transit 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, stations, terminals, and ancillary structures).
Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way.
Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet [1].
Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR part 771.

Air Quality

Continuation of ride-sharing and van-pooling promotion activities at current levels.
Bicycle and pedestrian facilities.

Other

Specific activities which do not involve or lead directly to construction, such as:
- Planning and technical studies.
- Grants for training and research programs.
- Planning activities conducted pursuant to titles 23 and 49 U.S.C.
- Federal-aid systems revisions.

Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.
Noise attenuation.
Emergency or hardship advance land acquisitions (23 CFR 712.204(d)).
Acquisition of scenic easements.
Plantings, landscaping, etc.
Sign removal.
Directional and informational signs.
Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).
Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.

Note: [1] In PM_{10} nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

§ 93.127 Projects exempt from regional emissions analyses.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 3 of this section are exempt from regional emissions analysis requirements. The local effects of these projects with respect to CO or PM_{10} concentrations must be considered to determine if a hot-spot analysis is required prior to making a project-level conformity determination. These projects may then proceed to the project development process even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 3 of this section is not exempt from regional emissions analysis if the MPO in consultation with other agencies (see § 93.105(c)(1)(iii)), the EPA, and the FHWA (in the

case of a highway project) or the FTA (in the case of a transit project) concur that it has potential regional impacts for any reason. Table 3 follows:

TABLE 3.—PROJECTS EXEMPT FROM REGIONAL EMISSIONS ANALYSES

Intersection channelization projects.
Intersection signalization projects at individual intersections.
Interchange reconfiguration projects.
Changes in vertical and horizontal alignment.
Truck size and weight inspection stations.
Bus terminals and transfer points.

§ 93.128 Traffic signal synchronization projects.

Traffic signal synchronization projects may be approved, funded, and implemented without satisfying the requirements of this subpart. However, all subsequent regional emissions analyses required by §§ 93.118 and 93.119 for transportation plans, TIPs, or projects not from a conforming plan and TIP must include such regionally significant traffic signal synchronization projects.

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Thursday
March 18, 1999

Part II

Environmental Protection Agency

40 CFR Part 93
Transportation Conformity Rule Amendment for the Transportation Conformity Pilot Program; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 93

[FRL–6309–6]

RIN 2060–AG79

Transportation Conformity Rule Amendment for the Transportation Conformity Pilot Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing the amendment to the transportation conformity rule which allows EPA to create and implement a conformity pilot program. The conformity rule requires that transportation activities conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do. Conformity to an air quality plan means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of national ambient air quality standards.

EPA and DOT will select up to six areas to participate in the pilot program. Each selected pilot area must submit its pilot procedures to EPA as a conformity SIP revision; if approved, these alternative procedures will be enforceable and replace the sections of the federal conformity rule that are addressed by each pilot program. Each pilot area will implement its pilot procedures for the three-year duration of the program. Today's action also describes the final application and selection process.

The conformity pilot program allows state and local transportation and air quality agencies the additional flexibility to seek out and test the conformity procedures that work best in their area. Participating areas' experiences will be evaluated and it is possible that successful pilot programs may ultimately lead to further changes in the conformity rule.

Along with recent amendments to the conformity rule, the pilot program is part of an EPA and DOT strategy to provide states and localities greater flexibility in meeting federal transportation conformity requirements while reinforcing Clean Air Act transportation and air quality commitments.

DATES: This rule is effective on April 19, 1999. EPA has been accepting applications since July 9, 1996, and the deadline for submitting applications and expressions of interest is open-ended.

ADDRESSES: Materials relevant to this rulemaking are contained in Docket No. A–95–55. The docket is located in room M–1500 Waterside Mall (ground floor) at the Environmental Protection Agency, 401 M Street S.W., Washington, DC 20460. The docket may be inspected from 8 a.m. to 5:30 p.m., Monday through Friday, including all non-government holidays. See **SUPPLEMENTARY INFORMATION** for obtaining an electronic version of the final rule.

FOR FURTHER INFORMATION CONTACT: Meg Patulski, Transportation and Market Incentives Group, Regional and State Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, (734) 214–4842.

SUPPLEMENTARY INFORMATION:

Electronic Version of Final Rule

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

Internet Web Sites

http://www.epa.gov/docs/fedrgstr/EPA–AIR/ (either select desired date or use Search feature) OR http://www.epa.gov/oms/traq (look in What's New or under the Conformity file area)

The electronic version of this final rule should be available today on any of the above-listed sites. For informational purposes, areas which submit expressions of interest and applications will be listed on the Conformity file area at the above web address. Please note that due to differences between the software used to develop the final rule and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

Regulated Entities

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

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

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

The contents of today's preamble are listed in the following outline:

I. Background on Transportation Conformity
II. Discussion of Major Changes From the Proposal: Conformity SIPs
  A. Description of Final Rule
  B. Rationale and Response to Comments
  C. Implications for Applicants and Participants
  D. Responses to Other Comments
III. Conformity SIP Revisions for Selected Pilot Areas
  A. Content of Conformity SIPs in Pilot Areas
  B. Existing Requirements for Conformity SIP Revisions
IV. Application and Selection Process: General Overview
  A. Application Process
  B. Selection Criteria
  C. Selection Process
V. Administrative Requirements
  A. Executive Order 12866
  B. Paperwork Reduction Act
  C. Regulatory Flexibility Act
  D. Submission to Congress and the Comptroller General
  E. Unfunded Mandates
  F. Petitions for Judicial Review
  G. Children's Health Protection
  H. National Technology Transfer and Advancement Act

I. Executive Order 12875: Enhancing Intergovernmental Partnerships
J. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

I. Background on Transportation Conformity

Today's action creates a transportation conformity pilot program by amending the transportation conformity rule, as most recently amended on August 15, 1997 (62 FR 43780). Required under section 176(c) of the Clean Air Act, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and local metropolitan planning organizations (MPOs) determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state air quality implementation plans (SIPs). Conformity ensures that transportation plans, programs, and projects do not produce new air quality violations, worsen existing violations, or delay timely attainment of national ambient air quality standards (NAAQS). According to the Clean Air Act, federally supported transportation activities must conform to the SIP's purpose of attaining and maintaining these standards.

Since publication of the original transportation conformity rule in November 1993, EPA, the Department of Transportation (DOT), and state and local air and transportation officials have had considerable experience implementing the criteria and procedures in the rule. This experience has led EPA and DOT to streamline the conformity process through today's action and several past amendments to the conformity rule. EPA finalized minor amendments to the rule on August 7, 1995 (60 FR 40098), and November 14, 1995 (60 FR 57179). EPA also finalized a more significant third set of conformity amendments on August 15, 1997 (62 FR 43780). The amendments and the conformity pilot program were created through a stakeholder process which has included both federal agencies, state and local air and transportation planning agencies, and environmental and transportation interest groups.

The Notice of Proposed Rulemaking (NPRM) for today's rule was published in the **Federal Register** on July 9, 1996 (61 FR 35994). EPA worked with conformity stakeholders in developing the proposal, with input from the National Governors' Association (NGA), state DOTs, state and local environmental agencies, MPOs, environmentalists, other local officials, and DOT. In December of 1995, EPA circulated a draft of the proposal to stakeholders for comment, and a conference call was held to discuss the draft proposal.

The NPRM described an application and selection process and proposed regulatory text to create the pilot program. The proposal also opened the pilot program's application period and requested that interested areas submit a non-binding expression of interest letter for the pilot program.

The proposal's comment period ended August 8, 1996. EPA received three comments on the proposal. EPA has received expressions of interest in the pilot program from the following five agencies: the Southern California Association of Governments (SCAG); the Washington State Department of Ecology; the Birmingham Regional Planning Commission in Alabama; the Idaho Division of Environmental Quality; and the Las Vegas Regional Transportation Commission. In addition to these letters, SCAG submitted a brief draft paper outlining its potential ideas for a pilot program. As of today's final rule, EPA has not received any formal applications to the pilot program. Copies of all present and future comments, expression of interest letters, applications, and other submitted documents for the pilot program in their entirety can be obtained from the EPA docket for the final rule (see ADDRESSES). The docket also includes a complete Response to Comments document for this rulemaking.

As described in the proposal, the pilot program allows areas to submit applications that propose specific flexibility for three aspects of the conformity rule: modeling, consultation, and coordination of the Intermodal Surface Transportation Efficiency Act (ISTEA) schedules and procedures with conformity deadlines and schedules. EPA and DOT will also consider applications proposing to extend flexibility to other aspects of the conformity rule. EPA and DOT will award $25,000 to each selected pilot program to facilitate in the implementation of a pilot area's proposed flexibility.

During the third year of the pilot program, EPA and DOT will conduct a national evaluation to see if transportation policy, project selection and investment choices changed as a result of a more flexible approach to meeting the Clean Air Act's conformity provisions; if interagency consultation and public participation improved as a result of new procedures; and if Clean Air Act compliance costs were reduced and efficiencies implemented while still ensuring that Clean Air Act goals and requirements were met. Selected pilot areas will also propose methods for self-evaluation of their conformity pilot program and cooperate with the national evaluation.

II. Discussion of Major Changes From the Proposal: Conformity SIPs

A. Description of Final Rule

As proposed, today's final rule allows no more than six areas to participate in the transportation conformity pilot program for no more than three years. The final rule enables selected pilot areas to substitute their alternative conformity procedures for the relevant requirements of the federal conformity rule for the three-year duration of the pilot program.

The final rule changes the proposal by requiring that each selected pilot area submit a conformity SIP revision containing the area's alternative conformity procedures, and requiring that EPA approve the conformity SIP revision before a pilot area can implement these new procedures. The proposed application requirements, selection criteria, and the majority of the selection process has not changed in the final rule.

EPA proposed that selected pilot areas submit their alternative procedures as project agreements, which would have undergone a 30-day public comment period but would not have been processed through notice-and-comment rulemaking as formal conformity SIP revisions. Under the proposal, EPA and DOT would have finalized project agreements after the completion of the public comment period (assuming that no adverse comments were received and that the agreements met the established criteria). These agreements would then have been fully enforceable under the Clean Air Act.

In response to comments, EPA has revised how pilot programs will be finalized. Under the final rule, each selected pilot area must submit its alternative pilot procedures to EPA as a formal conformity SIP revision. If such SIPs are approved, these procedures will replace the sections of the federal conformity rule or previously approved conformity SIP that the area has chosen to address in its pilot program as the federally enforceable conformity requirements for the area. The alternative conformity procedures must achieve results equivalent to or better than the requirements of 176(c) of the Clean Air Act. Only selected pilot areas will be required to submit conformity

SIP revisions pursuant to the pilot program. EPA and DOT are not requiring that interested areas submit their initial pilot applications as conformity SIP revisions. EPA and DOT will jointly select up to six pilot programs. If fewer than six participants are selected in the first iteration of the selection process, EPA and DOT will continue to process applications on a rolling basis.

After EPA's approval of a pilot area's conformity SIP, an area will implement its pilot procedures for three years. After the pilot program has expired, pilot areas will again be subject to all of the requirements of the existing federal transportation conformity rule (40 CFR Parts 51 and 93) and/or previously approved conformity SIPs. EPA may revise 40 CFR Parts 51 and 93 to incorporate elements of effective pilot programs based on results from evaluating the first two years of program implementation.

Selected pilot areas must also submit a conformity SIP revision in a timely manner according to § 51.390 of the conformity rule, which requires all nonattainment and maintenance areas to submit a SIP revision incorporating all of the federal conformity requirements in the August 15, 1997 rule amendments. Conformity SIP revisions for pilot programs will fulfill the SIP submission requirement of § 51.390 for the duration of the pilot program for only those sections/paragraphs that are addressed by the area's alternative pilot procedures.

Since 1993, the transportation conformity rule has been included in 40 CFR part 51 and largely duplicated in 40 CFR part 93. At the time of the pilot program proposal, EPA proposed to amend both parts 51 and 93 because of this duplication in the CFR. However, the August 15, 1997 conformity rule amendments streamlined the CFR and eliminated all but § 51.390 from part 51. Therefore, today's action only amends 40 CFR part 93. The pilot program proposal had not proposed any changes to § 51.390.

B. Rationale and Response to Comments

EPA has changed the proposal and required selected pilot areas to submit their alternative conformity procedures as conformity SIP revisions for several reasons. First, EPA agrees with commenters that Congress clearly intended that conformity SIPs be used to establish state and local conformity procedures in all areas subject to conformity requirements, pursuant to Clean Air Act section 176(c)(4)(C).

Because EPA will approve conformity procedures for selected pilot areas through the SIP process, the final rule addresses commenters' concerns that pilot area conformity procedures must be subject to the Administrative Procedures Act's (APA) notice-and-comment requirements. One commenter stated that adequate public comment would not be available under the proposal because selected pilot areas would only have been required to hold a 30-day local public comment period on final pilot project agreements, instead of the national comment period provided for EPA conformity SIP approvals. Since selected pilot areas would use alternative procedures as a substitute for the existing federal conformity rule, some commenters believed that pilot procedures should be subject to the same APA process as the existing rule. The final rule addresses these concerns because conformity SIP revisions must be subject to APA notice-and-comment requirements before they can be approved. Requiring conformity SIP revisions for selected pilot areas also ensures that the rights and responsibilities of state and local agencies and the public are made clear. For example, a conformity SIP specifies what agencies make conformity determinations as well as who distributes information to the public prior to a conformity determination.

The final rule also addresses a commenter's suggestion that a selected pilot program's alternative conformity procedures must be approved as a SIP revision in order to be fully enforceable under the Clean Air Act. EPA believes that the pilot area's final conformity procedures would not necessarily have to be contained in a SIP revision to be enforceable. EPA believes that Clean Air Act section 113(a)(3) would have allowed pilot conformity procedures in a project agreement to be enforceable by EPA under the federal conformity rule until they were included in a SIP, as was proposed. Nevertheless, EPA believes that the final rule's requirement for conformity SIPs addresses the original comment by removing the potential ambiguity about enforceability and clarifying that pilot procedures will be enforceable both by EPA under section 113 and by citizen suit under section 304, as applicable.

Requiring conformity SIP revisions for selected pilot areas will also address the procedural inequities that would have occurred under the proposal. The proposal would have allowed selected pilot areas that had not yet submitted any conformity SIP to immediately participate in the pilot program, whereas selected areas with approved conformity SIPs would have had to amend their existing conformity SIPs prior to participating in the pilot program. Under the final rule, the procedures for gaining EPA and DOT approval are now the same regardless of whether an area has a previously approved conformity SIP; all areas participating in the pilot program will need to submit a conformity SIP revision and have it approved by EPA before they can participate in the pilot program.

Today's final rule also addresses concerns that the proposal violated specific Clean Air Act requirements for conformity SIPs. One commenter believed that EPA could not propose to exempt selected pilot areas from submitting the conformity SIP revisions (required by § 51.390 of the conformity rule) during the three years of the pilot program. According to this commenter, EPA also has an obligation to take final action on previously submitted conformity SIPs within 12 months of submission (Clean Air Act section 110(k)(2)), and pilot areas cannot withdraw these required conformity SIPs in order to participate in the pilot program, as was proposed. Furthermore, the commenter believed that the 18-month SIP failure sanctions clock should be started if a state withdraws a previously submitted conformity SIP in order to participate in the pilot program. In light of the comments submitted, EPA agrees that Clean Air Act section 176(c)(4)(C) cannot be waived or modified, and EPA is addressing all of these comments in the final rule by requiring conformity SIP revisions for both alternate pilot procedures and the August 15, 1997 rule amendments.

By eliminating all of the above concerns through provisions for notice-and-comment approval of each alternative pilot procedure, EPA believes that future legal challenges to either individual pilot sites or the overall pilot program will be minimized. In addition, because the SIP process is an established process that requires interagency consultation and public participation, using the SIP process to approve pilot procedures will minimize potential confusion. State and local agencies and the general public are already familiar with their roles in the SIP process, whereas the proposal would have created an ad hoc process for the pilot program that could have introduced confusion regarding the roles and responsibilities of state and local agencies and the general public. At the same time, EPA also believes that the final rule imposes minimal additional administrative burdens on selected pilot areas, as described in more detail below.

C. Implications for Applicants and Participants

As a practical matter, the final rule does not impose significant additional burden on selected pilot areas when compared to the proposal. The proposal's application and selection processes have not changed; only the project finalization stage of the pilot program has changed in the final rule. Thus, changes from the proposal will only affect the areas that EPA and DOT actually select for the conformity pilot program.

In the project finalization stage, EPA, DOT, and each selected pilot area will still negotiate the details of the pilot area's alternative conformity procedures, as was proposed. However, the final alternative conformity procedures must be submitted to EPA as a conformity SIP revision prior to implementation, for the reasons described above. EPA had originally proposed that pilot areas submit project agreements, not conformity SIPs. Under the final rule, EPA, DOT, and each pilot area will agree about the content of each conformity SIP prior to its submission, including what the alternative conformity procedures will be and what aspects of the federal conformity rule will be addressed by these alternative procedures.

As with any SIP submission, selected pilot areas will need to comply with the SIP completeness criteria contained in 40 CFR part 51, Appendix V. In addition to other documentation, pilot areas must include with their conformity SIP submission: a formal letter of submittal from the Governor or his/her designee and evidence that a state public hearing was held and sufficient public notice for the hearing occurred. EPA believes that the public input requirements are still similar under the proposal and today's final rule. The pilot proposal would have required a 30-day local comment period on final project agreements, whereas the final rule requires that a public hearing be held, as is always required in the SIP process. Since EPA approval through notice-and-comment rulemaking is now required for all selected pilot areas, the time period before areas will be able to implement their pilot programs may be lengthened. However, EPA believes that this will only have a short-term impact on the implementation schedule of each pilot program. In general, EPA intends to use a SIP processing technique known as parallel processing to approve conformity SIP revisions in order to reduce the length of time necessary before EPA SIP approval, as described more fully below. Finally, EPA notes that the final rule change does not impact all potential pilot areas since formal notice-and-comment rulemaking would have been required under the proposal in any case for pilot areas that already have approved conformity SIP revisions.

EPA is committed to expediting the review and approval of conformity SIP revisions for the pilot program. To accomplish this, EPA intends to parallel process conformity SIPs for the pilot program where possible. Under parallel processing, states would submit their proposed conformity SIP to EPA, and the state and EPA would then request public comment on the proposed conformity SIP at the same time. If no adverse comments are received at either the state or federal levels, EPA would then finalize approval as soon as possible after formal state adoption and submittal occurs, as long as no substantive changes have occurred and the conformity SIP is still approvable. If there are adverse comments or changes in the state procedures, EPA may reconsider the proposed approval or issue a supplemental proposal at the federal level based on response to comment or revised state requirements prior to approving the conformity SIP. States need to request parallel processing when submitting to EPA the proposed conformity SIP revision for each pilot program. They must also include a schedule for the state's final adoption or issuance of the SIP.

D. Responses to Other Comments

1. Endorsement of Pilot Applications

One commenter stated that EPA should maintain the proposal's requirement that pilot applications be endorsed by all affected state and local air and transportation agencies. EPA agrees and is retaining this requirement.

2. Purpose of the Pilot Program

One commenter believed that the current conformity rule already provides for flexibility in modeling, consultation, and coordination of ISTEA and conformity schedules, and EPA did not adequately justify in the proposal why additional conformity flexibility is necessary under a pilot program. Others commented that the pilot program would be a significant step in EPA providing states and cities greater flexibility in meeting conformity requirements.

Although the August 15, 1997 conformity rule amendments streamline and simplify the conformity process, EPA believes that there may be additional opportunities that are unique to local processes. During EPA and DOT's original stakeholder process, many conformity stakeholders expressed their desire for further flexibility in implementing the conformity rule.

3. Selection Criteria

A commenter suggested that any state that has not yet submitted a conformity SIP should automatically be excluded from consideration for participation in the pilot program. This commenter believed that his/her viewpoint was supported by one of the proposal's selection criteria that stated that EPA must consider "whether the area has adequately demonstrated its intent to comply with Clean Air Act objectives" (61 FR 35997). The commenter believed that even with the delay in the promulgation of the original conformity rule, conformity SIPs should have been submitted by November, 1994, and therefore, EPA should not select any area that has not yet complied with this requirement.

EPA does not believe that compliance with the intent of the Clean Air Act should be solely measured by whether an area has submitted a conformity SIP. There are many ways that an area can comply with the intent of the Clean Air Act, including whether an area has submitted the appropriate control strategy SIPs. Furthermore, EPA believes that the degree to which an area is complying with the federal transportation conformity rule (e.g., modeling or consultation requirements) is more relevant than whether it has submitted a conformity SIP. In addition, EPA is aware that many areas delayed submitting conformity SIPs to save local resources because EPA was in the process of revising the federal conformity rule, which would necessitate revisions to any adopted state conformity requirements. Therefore, EPA will not automatically eliminate an applicant from possible participation in the pilot program if an area has not submitted past conformity SIPs.

4. National Consistency of Pilot Procedures

A commenter stated that the pilot program contradicts Congress' desire for uniform procedures between federal agencies and among MPOs and states when making conformity determinations; Congress did not authorize major exemptions from EPA regulations such as those proposed under the pilot program. EPA does not believe that Congress intended complete national uniformity for all conformity requirements because it specifically required local conformity SIPs, which

allow areas to tailor aspects of their conformity processes. EPA believes that this final rule does not inhibit national consistency because the final rule requires all pilot procedures to fulfill the requirements of section 176(c) of the Clean Air Act, as all areas subject to the federal conformity rule are required to do.

III. Conformity SIP Revisions for Selected Pilot Areas

A. Content of Conformity SIPs in Pilot Areas

The conformity SIP revisions for selected pilot areas must contain substitute regulatory language for those sections and/or paragraphs of the current transportation conformity rule that would be replaced by the pilot area's alternative conformity procedures. In order for EPA to review the conformity SIP revision, the sections of the current rule that are being proposed to be replaced as well as the new pilot sections must be clearly identified.

EPA will accept conformity SIP revisions in any fully enforceable form, including state laws or memorandums of understanding (MOUs), provided the state can demonstrate to EPA's satisfaction that, as a matter of state law, the state has adequate authority to compel compliance with the requirements of the state pilot conformity procedures.

Selected pilot areas must also include language incorporating § 93.129 in their conformity SIPs, in addition to those sections/paragraphs of the federal rule that will be addressed by each pilot area's alternative conformity procedures. EPA cannot exempt pilot areas from the otherwise applicable federal conformity requirements without pilot areas including this section in their conformity SIPs, since § 93.129 grants EPA the authority to implement individual pilot programs. Only selected pilot areas will be required to incorporate § 93.129 in their conformity SIPs.

B. Existing Requirements for Conformity SIP Revisions

Section 176(c)(4)(C) of the Clean Air Act requires that all states with areas subject to conformity must submit a SIP revision that establishes state conformity procedures. Conformity SIP revisions address how DOT, MPOs, and other state and local agencies will assess the conformity of transportation plans, programs, and projects to the SIP; conformity SIPs also define the conformity requirements for recipients of federal funds. Section 51.390 of the conformity rule outlines what needs to be addressed in the conformity SIP, including how interagency consultation and public participation will occur. In addition, § 51.390 requires that SIP revisions incorporating amendments to the conformity rule be submitted within one year of the publication of those actions. Aside from conformity SIP revisions for selected pilot areas, the federal conformity rule presently only requires that states submit SIP revisions within one year of the publication of the August 15, 1997 rule amendments, because these amendments supersede all past conformity rulemakings.

As part of the pilot program, selected pilot areas that currently have an EPA-approved conformity SIP revision will only need to revise those sections/paragraphs of the approved conformity SIP that are being addressed in the area's pilot procedures. Separately, the federal conformity rule will still require pilot areas with currently approved conformity SIPs to revise the other sections of their approved conformity SIP according to the August 15, 1997 conformity rule amendments.

If a selected pilot area has previously submitted a conformity SIP for the original 1993 rule or subsequent rule amendments and EPA has yet to approve it, then the pilot area would need to indicate in its new pilot SIP revision which sections/paragraphs of the previously submitted conformity SIP are being modified. EPA continue to require that the pilot area update its conformity SIP submission according to the August 15, 1997 rule amendments (62 FR 43780) within one year of the publication of the amendments, for the conformity rule sections not addressed by the pilot program. Selected pilot areas that have previously submitted a conformity SIP revision which EPA has not yet approved would not need to withdraw such a revision in order to participate in the pilot program. This would have been required under the proposal. Instead, they may merely update it through SIP submissions to meet the pilot program and the amended federal rule.

EPA believes that it is appropriate to approve conformity SIPs for the pilot program that address only a portion of the federal conformity requirements, even if an area doesn't yet have an approved conformity SIP revision for the recent rule amendments. The remaining sections/paragraphs that are not addressed by an area's alternative pilot procedures must ultimately be addressed by another conformity SIP in a timely fashion. While an area prepares this additional conformity SIP revision, the federal conformity rule will continue to apply for the provisions not covered by the pilot area's conformity SIP, thus providing continuity in conformity implementation.

Since the alternative procedures will only apply in pilot areas for up to three years, EPA will insert a three-year sunset date provision in its approval of each pilot area's conformity SIP at the time of EPA SIP approval. After this three-year sunset date is reached, those sections/paragraphs of the approved conformity SIP that are alternatives to the federal conformity rule would no longer be federally approved. The federal conformity rule or other relevant previously approved conformity SIP provisions would instead apply for those sections/paragraphs until another conformity SIP revision for the area consistent with the federal rule is approved.

IV. Application and Selection Process: General Overview

A. Application Process

Under the final rule, the application process for the pilot program will be the same as in the proposal. Applications will not need to be submitted as conformity SIP revisions; a SIP submission will only be necessary if an area is selected by EPA and DOT to participate in the pilot program. All areas subject to the requirements of the transportation conformity regulation are eligible to apply to the pilot program.

As stated in the proposal and this final rule, either an MPO, a local air quality agency, a state air quality agency, or a state department of transportation may submit an application, acting as the lead contact for purposes of the pilot program. When submitting its application, the lead agency must demonstrate that its proposal is endorsed by all state and local air and transportation agencies that are eligible to participate in the area's conformity consultation process. In certain cases (for example, an MPO that covers more than one nonattainment area or a nonattainment area that covers more than one state), EPA and DOT may subsequently request further endorsement from additional agencies affected by the pilot proposal.

As generally stated in the proposal, the following information will enable EPA and DOT to adequately consider an application: (1) a description of the alternative conformity methods and/or procedures to be used in meeting conformity requirements; (2) the rationale for change, including: (i) the particular problems in the existing requirements that the proposal intends to address, and (ii) the benefits that the

alternative proposal would create (e.g., air quality benefits, resource savings); (3) a description of how alternative conformity methods and/or procedures will fulfill the conformity requirements of and achieve results equivalent to or better than section 176(c) of the Clean Air Act; (4) the proposed schedule for making conformity determinations during the pilot program (for a period of up to three years); (5) evidence that sufficient resources to conduct the pilot program will be available (e.g., some of the pilot program activities may be eligible for title 23 State Planning and Research Funds (SPR) or Planning (PL) funds); (6) discussion of any potential implementation issues that must be overcome for the pilot program to be successful; (7) suggestions for self-evaluation of the pilot program; (8) evidence that the proposal is endorsed by all the state and local air and transportation agencies; and (9) evidence that key stakeholders (e.g., public, community groups) have been or will be consulted. In today's action, EPA has clarified the first and third application elements so that interested areas understand what should be addressed in pilot applications. This final rule does not create any new application elements for pilot applicants.

Applications should be in narrative form and should be concise while still containing sufficient information to fully describe the proposal. It is EPA and DOT's intent to use the application to conduct preliminary reviews. If EPA and DOT selected an area for the pilot program, further details of each pilot proposal would be expanded during the consultation stage of the selection process and would be refined in the conformity SIP revision. The application length and the extent to which the application addresses the information requested will depend upon the proposal's complexity.

Areas can submit pilot applications at any time. Before an application is developed, EPA and DOT encourage any interested areas to send a non-binding expression of interest letter to EPA highlighting the area's initial interest, and if possible, describing the area's basic idea for a pilot application. However, an expression of interest letter is not necessarily required before an area submits a pilot application. Please send expressions of interest letters and/or applications to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of today's action.

EPA will maintain a list of areas which have expressed interest or applied to the pilot program on the EPA conformity web site. All complete letters and applications will be placed in the EPA docket for this rulemaking. For more information on how to access the conformity web site or docket, please see the **ADDRESSES** section of this final rule.

B. Selection Criteria

The final rule does not change the proposal's selection criteria by which EPA and DOT will judge pilot applications. Applications will be assessed according to the following criteria: (1) whether the proposed flexibilities fulfill all of the statutory requirements for transportation conformity; (2) the degree to which the application fulfills the pilot program's goals of testing innovative methods and streamlining the conformity process, including, but not limited to, improved modeling and interagency/public consultation and better coordination of ISTEA and Clean Air Act requirements; (3) the degree of key stakeholder and public support in the geographic area affected by the proposal; (4) whether the applicant has the resources necessary to effectively implement and evaluate the proposed conformity pilot program; (5) whether the area has adequately demonstrated its intent to comply with Clean Air Act objectives; and (6) the degree to which data and analysis will be provided to help assess air quality, resource savings, public participation, and other program benefits.

EPA and DOT will attempt to select a group of participants that is diverse in terms of geographic distribution, pollutants, nonattainment or maintenance classifications/designations, and rural and urban development, since both federal agencies believe that the pilot program should provide an opportunity to test innovative conformity approaches in a broad range of circumstances.

C. Selection Process

The proposal described a three-stage selection process which would involve application review, applicant consultation, and project finalization. Under this final rule, the application review and applicant consultation stages of the selection process in the proposal remain the same; only the proposed project agreement finalization stage is changed from the proposal, as described in section II.

1. Application Stage

Under this final rule, when an application is submitted, EPA and DOT will review the application and decide whether it should proceed to the consultation stage. EPA and DOT will notify agencies whether or not they have been selected to proceed.

2. Consultation Stage

In the consultation stage, EPA and DOT will schedule a conference call with each applicant to clarify any questions about the applicant's proposal. EPA and DOT will then arrange for a subset of these applicants to present their proposals in a review session with federal agency staff. Representatives of the lead agency submitting the pilot program application and other public agencies involved in the applicant's geographic area would participate in the presentation. Based upon the information presented in the application and consultation stages, EPA and DOT could select up to six applicants to participate in the pilot program and proceed to the finalization stage.

3. Project Finalization Stage

As described in section II., an area selected to advance to the project finalization stage will submit its alternative conformity procedures as a conformity SIP revision, and this revision must be formally approved before a pilot area can implement its conformity pilot program.

V. Administrative Requirements

A. Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more, or otherwise adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

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

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

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is not a "significant regulatory action" because this action does not have any of the impacts described above or raise novel legal or

policy issues arising out of legal mandates, the President's priorities, and the principles set forth in the Executive Order. Therefore, this action was not subject to OMB review under the Executive Order.

B. Paperwork Reduction Act

This final rule does not impose any new information collection requirements from EPA which require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq*. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

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

C. Regulatory Flexibility Act

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

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

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

D. Submission to Congress and the Comptroller General

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

E. Unfunded Mandates

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a federal mandate that may result in estimated costs of $100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

EPA has determined that to the extent this rule imposes any mandate within the meaning of the Unfunded Mandates Act, this final action does not include a mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate or to the private sector. Therefore, EPA has not prepared a statement with respect to budgetary impacts.

F. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 17, 1999.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the Administrative Procedures Act).

G. Children's Health Protection

This final rule is not subject to E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Executive Order 12875: Enhancing Intergovernmental Partnerships

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local, or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 does not apply to this rule.

J. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the

Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. The final rule offers an opportunity for areas to voluntarily apply into the conformity pilot program; it is not a mandatory program. In addition, EPA and DOT are offering seed money for each area that is selected to be in the pilot program. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

List of Subjects in 40 CFR Part 93

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen Dioxide, Ozone, Particulate matter, Transportation, Volatile Organic Compounds.

Dated: March 10, 1999.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, 40 CFR part 93 is amended as follows.

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

2. Subpart A is amended by adding § 93.129 to read as follows:

§ 93.129 Special exemptions from conformity requirements for pilot program areas.

EPA and DOT may exempt no more than six areas for no more than three years from certain requirements of this subpart if these areas are selected to participate in a conformity pilot program and have developed alternative requirements that have been approved by EPA as an implementation plan revision in accordance with § 51.390 of this chapter. For the duration of the pilot program, areas selected to participate in the pilot program must comply with the conformity requirements of the pilot area's implementation plan revision for § 51.390 of this chapter and all other requirements in 40 CFR parts 51 and 93 that are not covered by the pilot area's implementation plan revision for § 51.390 of this chapter. The alternative conformity requirements in conjunction with any applicable state and/or federal conformity requirements must be proposed to fulfill all of the requirements of and achieve results equivalent to or better than section 176(c) of the Clean Air Act. After the three-year duration of the pilot program has expired, areas will again be subject to all of the requirements of this subpart and 40 CFR part 51, subpart T, and/or to the requirements of any implementation plan revision that was previously approved by EPA in accordance with § 51.390 of this chapter.

[FR Doc. 99–6654 Filed 3–17–99; 8:45 am]

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Waste Incinerators. The Alabama State Plan satisfies the requirements for an approvable section 111(d) plan under subparts B and Ce of 40 CFR part 60. For these reasons, we are approving the Alabama HMIWI State Plan.

VII. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 9, 2000. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Hospital/medical/infectious waste incineration, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: March 16, 2000.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

Subpart B—Alabama

2. Section 62.100 is amended by adding paragraphs (b)(5) and (c)(5) to read as follows:

§ 62.100 Identification of plan.

* * * * *

(b) * * *

(5) Alabama Department of Environmental Management Plan for the Control of Hospital/Medical/Infectious Waste Incinerators, submitted on April 20, 1999, by the Alabama Department of Environmental Management.

(c) * * *

(5) Existing hospital/medical/infectious waste incinerators.

3. Subpart B is amended by adding a new § 62.104 and a new undesignated center heading to read as follows:

Air Emissions From Hospital/Medical/Infectious Waste Incinerators

§ 62.104 Identification of sources.

The plan applies to existing hospital/medical/infectious waste incinerators for which construction, reconstruction, or modification was commenced before June 20, 1996, as described in 40 CFR part 60, subpart Ce.

[FR Doc. 00–8142 Filed 4–7–00; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 93

[FRL–6574–7]

RIN 2060–AI76

Transportation Conformity Amendment: Deletion of Grace Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this final rule we (EPA) are eliminating a provision of the transportation conformity rule that was overturned by the U.S. Court of Appeals for the District of Columbia Circuit (*Sierra Club* v. *EPA, et al.*, 129 F.3d 137 (D.C. Cir. 1997)). In compliance with the court's ruling, today's final rule formally deletes the 1995 amendment that allowed new nonattainment areas a one-year grace period before transportation conformity began applying.

In addition, we discuss in the preamble four issues that were raised in

a Petition for Reconsideration of the original transportation conformity rule that was finalized November 24, 1993. Although we are not taking any regulatory action in response to these issues at this time, the preamble clarifies our policies on the issues raised in the Petition.

Transportation conformity is a Clean Air Act requirement for transportation plans, programs, and projects to conform to state air quality plans. Conformity to a state air quality plan means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national air quality standards.

Our transportation conformity rule establishes the criteria and procedures for determining whether or not transportation activities conform to the state air quality plan.

EFFECTIVE DATE: May 10, 2000.

ADDRESSES: Docket No. A–99–35 contains materials relevant to today's action and is located at the U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460 in Room M–1500, Waterside Mall (ground floor). The docket is open and supporting materials are available for review between 8:00 a.m. and 5:30 p.m. on all federal government workdays . You may have to pay a reasonable fee for copying docket materials.

FOR FURTHER INFORMATION CONTACT:
Denise Kearns, Transportation and Market Incentives Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, kearns.denise@epa.gov. (734–214–4240).

SUPPLEMENTARY INFORMATION: The text of this rulemaking and certain supporting documents used to develop the rule also can be accessed and downloaded from the Internet at http://www.epa.gov/docs/fedrgstr/EPA-AIR/ (either select desired date or use Search feature) OR http://www.epa.gov/OMSWWW/ (look in What's New or under the Conformity file area). Please note that there may be format changes in the documents on the web due to differences in software.

Regulated Entities

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

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

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

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

I. Background
II. How Soon Does Conformity Apply to a New Nonattainment Area?
III. What Are the Effects of Deleting the Grace Period and EPA's Response to Comments?
IV. What Are the Issues From the Petition for Reconsideration and EPA's Response to Comments?
A. Fiscal Constraint
B. Horizon Years for Hot-Spot Analyses
C. Assumptions Regarding Regional Distribution of Emissions
D. Credit for Delayed TCMs
V. How Would This Action Affect Conformity SIPs?
VI. Administrative Requirements and EPA's Response to Comments on Small Business and Environmental Justice Impacts of Rule
A. Executive Order 12866
B. Paperwork Reduction Act
C. Regulatory Flexibility Analysis and EPA's Response to Comments on Impact of Grace Period Deletion on Small Entities
D. Unfunded Mandates
E. National Technology Transfer and Advancement Act of 1995
F. Executive Order 13045
G. Executive Order 13084
H. Executive Orders on Federalism
I. Executive Order 12898 and EPA's Response to Comments on Environmental Justice Impacts of Grace Period Deletion
J. Submission to Congress and the Comptroller General
K. Petitions for Judicial Review

I. Background

The original conformity rule was finalized on November 24, 1993 (58 FR 62188). That rule has been subsequently amended on August 7, 1995 (60 FR 40098), November 14, 1995 (60 FR 57179), and August 15, 1997 (62 FR 43780).

In 1998, we entered into a settlement with Environmental Defense (ED) in response to litigation. In that settlement, we agreed to repeal the grace period which had been established by the November 14, 1995 amendments and was permitted under 40 CFR 93.102(d) of the conformity rule. This grace period was overturned by the United States Court of Appeals in 1997.

We also agreed to respond to four issues raised in a Petition for Reconsideration that was submitted by the ED, Natural Resources Defense Council, and Sierra Club. That petition was filed with us on May 26, 1994 and addressed various provisions of the original conformity rule (58 FR 62188).

The Notice of Proposed Rulemaking for today's rule was published on November 30, 1999 (64 FR 66832). The comment period for the proposal ended December 30, 1999.

We received four comments on our proposal. Most commenters addressed issues relating to the rule's effect in areas subject to conformity. However, one commenter focused exclusively on our discussion of the four issues raised in the 1994 petition. Copies of the comments in their entirety can be obtained from the docket for this rule (see **ADDRESSES**).

This docket also includes a complete Response to Comments document for this rule. We summarize our response to comments below in parts III, IV and V of this preamble.

II. How Soon Does Conformity Apply to a New Nonattainment Area?

Conformity applies as soon as we formally designate an area nonattainment. In this final rule we are deleting § 93.102(d), which had provided a one-year grace period following nonattainment designation. On November 4, 1997, the U.S. Court of Appeals for the District of Columbia Circuit overturned § 93.102(d) of the conformity rule, and ruled that the

Clean Air Act requires conformity to apply upon designation. Because the court overturned § 93.102(d), we must delete this provision from our rules.

Therefore, as soon as a nonattainment designation is effective for your area, you must have a conforming transportation plan and transportation improvement plan (TIP) in order to approve transportation projects. This plan and TIP must conform with respect to all pollutants for which the area is designated nonattainment. You may have to delay approving projects until this is done.

III. What Are the Effects of Deleting the Grace Period and EPA's Response to Comments?

Under today's rule, new nonattainment areas must have a conforming plan and TIP in place as soon as their designations become effective. As a practical matter, this requirement has been in effect since November 14, 1997, when the court ruled to delete the one-hour grace period.

Two commenters expressed concern that transportation planning agencies will not have enough time to respond to a new nonattainment designation and ensure that their plans and TIPs conform. These commenters were concerned that without a grace period, virtually all transportation projects in new nonattainment areas could be stopped upon the effective date of a designation.

We believe that new nonattainment areas will have ample time to develop a conforming plan and TIP before nonattainment designations are final and effective. There are generally several opportunities for transportation agencies to become aware that we are preparing to designate an area nonattainment, and as a consequence to prepare for conformity as needed.

For example, on October 25, 1999, we published a proposal to reinstate the one-hour ozone standard in areas that had previously been designated nonattainment. In that proposal, we stated that designations would not become effective until 90 days after we publish the final rule reinstating our one-hour ozone standard. In these areas, state and local transportation agencies will have been notified more than six months in advance of our decision to reinstate the nonattainment designations.

In addition, we point out that we do pursue a public process before we formally designate an area as nonattainment for the first time. We seek recommendations from the state regarding nonattainment designations and boundaries. If we modify the state's recommendations, we notify the state at least 120 days before finalizing the designation.

State and local transportation agencies and air quality agencies also are working to coordinate their planning processes and avoid situations that would result in a conformity lapse. We and the U.S. Department of Transportation (DOT) will work with areas to process their conformity determinations expeditiously. Although we acknowledge the timing issues and other concerns expressed by commenters regarding the deletion of the grace period, we believe that all partners involved in the conformity process can share information and effectively find ways to avoid significant delays in transportation projects resulting from the court's interpretation of the Clean Air Act.

We also note some transportation projects can proceed in the absence of a conforming plan and TIP, including exempt projects (§§ 93.126 and 93.127) and transportation control measures in an approved state implementation plan. These projects would not be affected by a new nonattainment designation.

IV. What Are the Issues From the Petition for Reconsideration and EPA's Response to Comments?

On May 26, 1994, Environmental Defense (ED), Natural Resources Defense Council, and Sierra Club Legal Defense Fund submitted to us a Petition for Reconsideration of the November 1993 conformity rule. We have responded to all issues raised in this petition through previous conformity amendments, with the exception of four issues addressed in this preamble. In a 1998 court settlement, EPA and ED agreed to address these four issues through today's rulemaking. A copy of the 1998 settlement and the full Petition for Reconsideration are included in the docket for this rulemaking see (ADDRESSES). As proposed, we are not taking any regulatory action in today's rule in response to the four issues raised in the 1994 Petition. However, in the discussion below we do clarify certain existing EPA policies, where we feel such clarification is necessary to address concerns raised by commenters on our proposed response to the Petition for Reconsideration.

A. Fiscal Constraint

1. What Is the Issue?

As discussed in the November proposal, in issue 6 of the Petition for Reconsideration, the petitioners requested that we adopt our own regulatory language requiring transportation plans and TIPs to be fiscally constrained, rather than referencing the Department of Transportation's (DOT's) metropolitan planning regulations. The existing conformity rule requires plans and TIPs to be fiscally constrained as required by DOT's metropolitan planning rule at 23 CFR part 450. These DOT regulations require that proposed projects in plans and TIPs be consistent with already available or projected sources of revenue.

2. What Comments Did EPA Receive on Fiscal Constraint, and What Is EPA's Response?

In response to our proposal, one of the petitioners reiterates their position that by referencing DOT's planning regulations, we have unlawfully delegated our rulemaking authority to DOT. Another commenter on the issue concurs with our belief that it is not necessary for us to establish our own language regarding fiscal constraint.

As we discussed in the proposal, we believe it is appropriate to refer to DOT's regulations on fiscal constraint for several reasons. First, we believe DOT's definition of fiscal constraint substantively meets the goals of our conformity rule. We also maintain that by referencing DOT's definition, we have met our procedural obligation to provide criteria and procedures for determining conformity, as required under section 176(c)(4)(A) of the Clean Air Act. We disagree with the commenter's contention that the Clean Air Act directs us to issue regulations specifically regarding fiscal constraint.

Again, we note that we rely on many other DOT definitions and rules, including some that are even more fundamental to the implementation of conformity (*e.g.*, DOT definitions and requirements for plans and TIPs). We also note that the petitioner's comments agree with us that DOT's existing fiscal constraint definition is acceptable for the purposes of conformity.

The commenter's real concern seems to be that future changes to the definition may be unacceptable, and that the conformity rule will automatically incorporate any future changes without EPA action. To remedy this situation, the commenter suggests that we adopt by reference DOT's existing definition of fiscal constraint and specifically exclude any changes that may be made in future DOT rules.

Although we agree that we do not have a concurrence role on DOT's metropolitan planning rule, we point out that there are effective, non-

statutory mechanisms in place to ensure federal coordination. We are fully utilizing these mechanisms and actively working with DOT on their new metropolitan planning regulations, including those provisions that address the definition of fiscal constraint. DOT is proposing to amend these regulations under the Transportation Equity Act for the 21st Century. Petitioners will have an opportunity to comment directly on any changes DOT may propose to their regulation on fiscal constraint through DOT's regulatory process.

As described in the proposal, we also believe that it is appropriate and efficient to rely on DOT's definition of fiscal constraint. It would be impractical to require plans and TIPs to satisfy two different definitions of fiscal constraint. If we refer only to the current definition of fiscal constraint, to ensure consistency we would have to amend the conformity rule whenever DOT's regulations change.

In summary, we believe that by referencing DOT's fiscal constraint definition we are meeting our statutory duty under the Clean Air Act. We also believe that it is reasonable to rely on the framework for federal coordination to ensure that DOT's regulations are appropriate in the conformity context. Lastly, we also believe that wherever it makes sense, we have a responsibility to provide state and local agencies involved in transportation conformity with clear and consistent rules. By referencing DOT's regulations in this case, and coordinating with DOT on any changes they may be contemplating, we believe the goals of conformity and the needs of the public will be effectively met.

B. Horizon Years for Hot-Spot Analyses

1. What Is the Issue?

As discussed in the proposal, issue 9B of the Petition for Reconsideration requested that we require hot-spot analyses to examine the 20-year timeframe of the transportation plan. The existing transportation conformity rule does not clearly specify the horizon for hot-spot analyses.

2. What Comments Did We Receive on the Hot-Spot Analysis Issue?

One of the petitioners explained that their intention was to request that EPA require hot-spot reviews of transportation projects to be consistent with plan and TIP time horizons, and with the time horizons for emissions analyses required by our general conformity rule. To ensure that projects do not cause or worsen hot-spots during the timeframe of the transportation plan, the petitioner suggests that we require an analysis to be conducted for the year during which peak emissions from the action are expected.

3. What Is Our Policy on the Horizon for Hot-Spot Analysis?

As discussed in the proposal to this rule, the conformity rule allows flexibility for areas to decide through the interagency consultation process how to demonstrate that hot-spots are not caused or worsened in any area. Although most areas conduct hot-spot analyses for the year of project completion, many areas also examine other analysis years in the future. For example, some areas do analyze the last year of a currently conforming transportation plan, or another year within the timeframe of that plan, whichever year emissions are highest.

In response to comments on the proposal, we acknowledge the need to clarify that the hot-spot analysis must demonstrate that no hot-spots will be caused or worsened during the timeframe of the transportation plan. Nonetheless, we continue to believe that the specific year examined in the hot-spot analysis to make this demonstration should be decided through interagency consultation, as appropriate to the individual area, on a case-by-case basis. This is allowed by our conformity rule. We also reiterate that it is not necessary in all cases to model the last year of the transportation plan in a hot-spot analysis. Rather, the hot-spot analysis should examine the year in which peak emissions are expected, which may not necessarily be the last year of the conforming plan.

We believe that it would be useful for § 93.116 of the conformity rule to specify that a demonstration that local violations will not be caused or worsened should cover the timeframe of the transportation plan. We agree that without this clarification, it is difficult for implementers to decide which years to examine in order to demonstrate that the conformity requirement is satisfied. For example, some could read the existing requirement to mean that the demonstration regarding local violations must consider only the year of project completion, or in contrast that it consider all future years.

Because we need to propose a regulatory clarification before finalizing it, we are not making any changes to § 93.116 or § 93.123 in this rule. However, we will propose clarifying regulatory text on this issue in an upcoming proposal to amend the conformity rule in response to the March 2, 1999 court decision (*Environmental Defense Fund* v. *EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). That proposal would codify existing EPA guidance, issued in a May 14, 1999 memorandum from Gay MacGregor, Director of the Regional and State Programs Division in the Office of Transportation and Air Quality, to Regional Air Division Directors, "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision." Based on the court's decision that guidance outlines our approach for notifying and providing the public an opportunity to participate in the conformity process. It also provides criteria for transportation projects that may proceed during a conformity lapse.

In the interim, until this proposal is advanced, we believe our interpretation of § 93.116 and § 93.123 is consistent with our existing conformity rule, and that selection of the year of peak emissions should continue to be decided through the consultation process. We and DOT will implement the hot-spot requirements of the conformity rule as described in this preamble in all future conformity determinations.

C. Assumptions Regarding the Regional Distribution of Emissions

1. What Is the Issue?

In issue 12 of the Petition for Reconsideration, petitioners requested that we require metropolitan planning organizations (MPOs) to demonstrate that regional land use policies and proposed transportation plans achieve the same spatial distribution of motor vehicle emissions as was used in the state implementation plan (SIP) for demonstrating attainment. As discussed in the proposed rule, we had interpreted issue 12 of the Petition for Reconsideration to mean that the petitioners were in effect requesting that we should always require SIPs to establish subarea budgets that MPOs would have to conform to.

2. What Are the Conformity Rule's Requirements on the Use of Subarea Budgets?

Our existing conformity rule does not require states to establish subarea budgets in their SIPs. However, the conformity rule does support the development and use subarea budgets where states choose to do so, and it requires conformity to such budgets if they are established.

3. What Comments Did We Receive?

One commenter supported our current requirement that subarea budgets be established only at the state's

discretion. One of the petitioners commented that we had misconstrued this issue as presented in the Petition for Reconsideration.

The petitioner states that they did not mean to request that subarea budgets be established in all cases. Rather, the petitioner intended to request that we require MPOs to determine whether the emissions it projects for an area are going to be spatially distributed in the same way their distribution has been assumed in a SIP, whether or not there are subarea budgets. The petitioner also suggests that we develop screening criteria to help MPOs identify what is a significant magnitude of variance. In cases where the variance is significant, the petitioner believes we should require MPOs to perform an updated air quality analysis.

4. What Is Our Response to These Comments?

We do not believe that the Clean Air Act directs us to require analyses of spatial distribution or regional air quality analyses as a means for ensuring that transportation activities will not cause or contribute to new or increased violations, or delay timely attainment. The Clean Air Act simply requires a comparison with the SIP's estimates of emissions. We do not believe that the Clean Air Act ever intended MPOs to routinely perform regional air quality analyses, such as photochemical grid modeling, as part of a conformity determination.[1]

As a practical matter, we also note the SIP's assumptions about spatial distribution of emissions would not necessarily be clear to an MPO unless subarea budgets had been established. This is because not all SIPs are required to specifically document their assumptions about spatial distribution, and these assumptions are not always developed or presented in a form that is useful for other agencies, such as MPOs. Spatial distributions of emissions in SIPs are generally developed strictly to serve as an input to the SIP's dispersion modeling, and these emissions distributions are not designed or required to be used for any other purpose.

Again, neither the Clean Air Act nor the conformity rule requires states to develop subarea budgets. We have always interpreted the Clean Air Act to allow for a single budget for a nonattainment area for a given criteria pollutant or precursor, although states have the option to disaggregate and establish subarea budgets at their discretion (see our General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 at 57 FR 13448, April 16, 1992).

To conclude, we do not believe that the Clean Air Act directs us to require the analysis suggested in the petitioner's comments as a means to ensuring that conformity is properly implemented. We also believe that the analysis suggested by petitioners would in effect require states to establish subarea budgets. Although EPA recognizes that there may be some areas that would benefit by conducting emissions analyses that rely on subarea budgets, we believe these areas will be identified through the interagency consultation process and that it is not necessary for us to issue regulations imposing these kinds of requirements.

D. Credit for Delayed TCMs

1. What Is the Issue?

As described in issue 15 of the Petition for Reconsideration, the petitioners believe that where a transportation control measure (TCM) has been delayed beyond the scheduled implementation date(s) in the SIP, an area's conformity determination should not be allowed to take emissions reduction credit for the TCM until after the TCM has actually been brought into service.

2. What Are the Conformity Rule's Requirements on the Timely Implementation of TCMs?

Under the current conformity rule, emission reduction credit may be taken at "such time as implementation has been assured" (see § 93.122(a)(2)). Once implementation has been assured, emissions analyses can take credit for the TCM in the analysis years during which the TCM would actually be in service (under the revised schedule). In the preamble discussion of the November 30, 1999 proposed rule, we clarified that an assurance of implementation would require at least the following: (a) Past obstacles to implementation of the TCM have been overcome; (b) state and local agencies are giving maximum priority to approval or funding of TCMs over other projects within their control; (c) funding for the TCM is identified and reasonably expected to be available; and (d) the legal or regulatory authority necessary to implement the TCM has been secured or appropriate commitments are in place.

3. What Comments Did EPA Receive on the Timely Implementation of TCMs, and What Is EPA's Response?

In response to our discussion on requirements for assuring the timely implementation of TCMs in the proposal, commenters seemed satisfied that EPA's existing requirements were appropriate. However, a petitioner suggested that we include the criteria listed in the November 1999 proposal as a regulatory definition for assurance of implementation.

EPA does not believe that it is necessary to amend the conformity rule to include such a regulatory definition. We believe that § 93.113 of the conformity rule as written is clear, and that this preamble is an appropriate place to elaborate on the rule. We note that a previous preamble discussion on the timely implementation of TCMs (58 FR 62197, November 24, 1993) has provided additional guidance on our implementation of the conformity rule to date. EPA and DOT have effectively used this 1993 preamble discussion to implement conformity, and we will continue to do so with the language in today's preamble.

V. How Would This Action Affect Conformity SIPs?

Clean Air Act section 176(c)(4)(C) requires states to submit revisions to their SIPs in order to include the criteria and procedures for determining conformity.

If we approved your area's conformity SIP and it includes a provision for a one-year grace period (§ 93.102(d)), that provision cannot be implemented. This has been the case ever since the November 4, 1997, court decision, which found such provisions to be inconsistent with the Clean Air Act. Future conformity SIP submissions may not include § 93.102(d).

If your area has submitted a conformity SIP to us that contains this provision (and we have not yet approved the conformity SIP), we will not approve such a provision as part of the SIP.

VI. Administrative Requirements and EPA's Response to Comments on Small Business and Environmental Justice Impacts of Rule

A. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines significant

[1] One state has opted to require dispersion modeling for conformity for its own purposes.

"regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or otherwise adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

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

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

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

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This rule does not impose any new information collection requirements from EPA which require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

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

C. Regulatory Flexibility Analysis and EPA's Response to Comments on Impact of Grace Period Deletion on Small Entities

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires the agency to conduct a regulatory flexibility analysis of any significant impact a rule will have on a substantial number of small entities. Small entities include small businesses, small not-for-profit organizations and small government jurisdictions. EPA has determined that today's regulations will not have a significant impact on a substantial number of small entities.

One commenter questioned our determination that the proposal to delete the grace period will not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA). We found no such impact because the conformity rules only apply directly to Federal agencies and metropolitan planning organizations (MPOs), which by definition are designated only for metropolitan areas with population of at least 50,000 and thus do not meet the definition of small entities under the RFA. The commenter alleged that both the RFA, the courts, and our own implementing guidance require us to consider the indirect impacts of a proposed rule as well.

We do not agree with the commenter that the agency must consider the indirect impacts of a regulation under the RFA. EPA has consistently interpreted the RFA as requiring the agency only to assess the impacts of proposed rules on the small entities directly regulated by the proposed rule, and this position has been upheld by the courts. See *Mid-Tex Electric Cooperative, Inc.* v. *FERC*, 773 F.2d 327 (D.C. Cir. 1985) (agency's certification need only consider the rule's impact on entities subject to the requirements of the rule); *American Trucking Associations, Inc., et al.*, v. *EPA, et al.*, 175 F.3d 1027 (D.C. Cir. 1999) (court has consistently interpreted RFA to impose no obligation on agency to assess impacts on entities it does not regulate).

In addition, the commenter misreads EPA's guidance concerning consideration of indirect impacts. The sentence the commenter quotes from EPA's guidance directs agency staff to consider indirect impacts as part of any broader economic analysis conducted for the rule, such as a Regulatory Impact Analysis if one is conducted. However, the immediately preceding sentence of the guidance clarifies that if a rule is applicable only to large entities but indirectly impacts small entities, the agency can still certify no significant impact on small entities under the RFA. See Revised Interim Guidance for EPA Rulewriters: Regulatory Flexibility Act, March 29, 1999, p. 17. In any event, the document to which the commenter refers is only guidance; it does not establish any legally binding requirements.

It is also clear that the conformity rule applies directly only to federal agencies and MPOs and does not directly regulate small entities, such as the road builders represented by the commenter. These entities will only be adversely effected by the deletion of the grace period if DOT and the MPOs fail to develop a conforming transportation plan and program by the effective date of a nonattainment designation. In light of the advance warning areas will have of pending designations during the notice and comment period, and the delayed effective date EPA intends to provide for such designations, EPA believes that DOT and MPOs will be able to develop conforming plans and programs in a timely fashion.

Finally, the commenter's allegation is incorrect that the court which ordered EPA to delete the grace period determined that such a change would adversely effect small entities. The court in *Sierra Club* did find that the fact that an intervening governmental agency could alleviate any potential impact on private individuals was not sufficient to deprive such individuals of standing to challenge the grace period in court. However, the standard for showing harm sufficient to support legal standing to sue has no bearing on the impact necessary to mandate a finding of significant impacts under the RFA. The RFA only requires an agency to assess the impacts of a proposed rule on entities directly subject to the proposed rule. The analysis under the RFA need not cover any entities not directly subject to the proposed rule notwithstanding any indirect impacts that may result to other entities, regardless of whether any such impacts could support legal standing to challenge the rule.

EPA therefore concludes that it correctly interpreted the RFA and correctly found that the proposal to delete the grace period would not have a significant impact on a substantial number of small entities. Therefore, as required under section 605 of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules

with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Furthermore, this rule simply formalizes what the court has already decided as a legal matter, and which is already being implemented in practice.

This rule affects only those areas that are newly designated as nonattainment, and it simply applies conformity one year earlier than our previous rule had required. Therefore, this rule could require a limited number of areas to perform perhaps one additional transportation plan/TIP conformity determination each.

A 1992 DOT survey of metropolitan planning organizations (MPOs) found that most MPOs spend less than $50,000 per transportation plan/TIP conformity determination. The largest MPOs (serving a population over one million) spent up to $250,000. Thus, even if EPA were to designate 200 areas as nonattainment in one year and each one incurred the maximum costs, the expenditures would not exceed $100 million.

Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it is not economically significant within the meaning of Executive Order 12866.

G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

The Clean Air Act requires conformity to apply in nonattainment and maintenance areas, and the U.S. Court of Appeals for the District of Columbia Circuit has determined that the Clean Air Act requires conformity to apply immediately upon nonattainment designation. As a result, this regulatory change is required by statute. Furthermore, today's rule would not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

H. Executive Orders on Federalism

Executive Order 13132, Federalism (64 FR 43255, August 10, 1999), revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency

consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's Prior consultation with State and local officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the Agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This final rule, which is required by statute, will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in nonattainment and maintenance areas, and the U.S. Court of Appeals for the District of Columbia Circuit has determined that the Clean Air Act requires conformity to apply immediately upon nonattainment designation. As a result, this rule is codifying in regulation the statutory interpretation by the court that is currently in effect. Consequently, this rule is required by statute, and by itself will not have substantial impact on States. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

I. Executive Order 12898 and EPA's Response to Comments on Environmental Justice Impacts of Grace Period Deletion

One commenter indicated that we failed to consider the disproportionate impact the deletion of the grace period would have on minority and low income groups as required by Executive Order 12898 on environmental justice. The commenter argued that we recently found that minorities and low income populations were disproportionately represented in nonattainment areas, and that we are required by the Executive Order to consider the economic impact on such populations of job loss resulting from deletion of the grace period.

We do not agree that Executive Order 12898 requires us to consider the economic impact of the grace period deletion on minorities and low income populations in this case. The Executive Order only requires agencies to assess adverse impacts on minorities and low income populations where the action the agency is taking will cause disproportionate human health or environmental impacts on such populations. In this case the regulatory action we are taking to delete the grace period from our conformity regulations will not have such impacts, since we are only formally correcting our regulations to reflect the action taken by the United States Court of Appeals in 1997. Any potential adverse impacts on minority and low income populations resulting from deletion of the grace period were caused by the court when it found the grace period to be illegal and overturned it. Since the court decision in 1997, the grace period has effectively been nullified and any areas newly redesignated to nonattainment have been subject to conformity requirements immediately upon the effective date of any redesignation. In addition, since this deletion is mandated by the court's ruling, we could not effectively address any potential adverse impacts from EPA action even if an environmental justice analysis disclosed any.

J. Submission to Congress and the Comptroller General

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

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 9, 2000. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceeding to enforce its requirements. (See section 307(b)(2) of the Administrative Procedures Act.)

List of Subjects in 40 CFR Part 93

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

Dated: March 31, 2000.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, 40 CFR part 93 is amended as follows:

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

§ 93.102 [Amended]

2. In § 93.102, paragraph (d) is removed.

[FR Doc. 00–8712 Filed 4–7–00; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW–FRL–6570–2]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Exclusion

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is granting a petition submitted by Rhodia, Inc. (Rhodia), to exclude from hazardous waste control (or delist) a certain solid waste. This action responds to the petition originally submitted by Rhodia to delist the Filter Cake Sludge on a "generator specific" basis from the lists of hazardous waste.

After careful analysis, the EPA has concluded that the petitioned waste is not hazardous waste when disposed of in subtitle D landfills/surface impoundments. This exclusion applies to Filter Cake Sludge generated at Rhodia's Houston, Texas facility. Accordingly, this final rule excludes the petitioned waste from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) when disposed of in subtitle D landfills/surface impoundments but imposes testing conditions to ensure that the future-generated wastes remain qualified for delisting.

* * * * *

[FR Doc. 02-19798 Filed 8-5-02; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 93

[FRL-7256-3]

RIN 2060-AJ70

Transportation Conformity Rule Amendments: Minor Revision of 18-Month Requirement for Initial SIP Submissions and Addition of Grace Period for Newly Designated Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating two minor revisions to the transportation conformity rule. Transportation conformity is required by the Clean Air Act to ensure that federally supported highway and transit project activities are consistent with ("conform to") the purpose of a state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the state air quality plan.

First, today's final rule will implement a Clean Air Act amendment that provides a one-year grace period before conformity is required in areas that are designated nonattainment for a given air quality standard for the first time. This Clean Air Act amendment was enacted on October 27, 2000. Although the grace period is already available to newly designated nonattainment areas as a matter of law, EPA is today incorporating the one-year conformity grace period into the conformity rule.

Second, today's final rule will change the point by which a conformity determination must be made following a State's submission of a control strategy implementation plan or maintenance plan for the first time (an "initial" SIP submission). Today's rule requires conformity to be determined within 18 months of EPA's affirmative finding that the SIP's motor vehicle emissions budgets are adequate. Prior to today's action, the conformity rule required a new conformity determination within 18 months of the submission of an initial SIP.

This change to the conformity rule better aligns when the 18-month requirement for conformity to initial SIP submissions is implemented, so that state and local agencies have sufficient time to redetermine conformity when initial SIPs are submitted and after EPA finds the SIP budgets adequate.

EFFECTIVE DATE: This final rule is effective on September 5, 2002.

ADDRESSES: Materials relevant to this rulemaking are in Public Docket A-2001-12 located at the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 in Room M-1500, Waterside Mall (ground floor). Ph: 202-260-7548. The docket is open and supporting materials are available for review between 8 a.m. and 5:30 p.m. on all federal government workdays. You may have to pay a reasonable fee for copying docket materials.

This final rule is available electronically from EPA's Web site. *See* **SUPPLEMENTARY INFORMATION** for information on accessing and downloading files.

FOR FURTHER INFORMATION CONTACT: Angela Spickard, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, *spickard.angela@epa.gov*, (734) 214-4283.

SUPPLEMENTARY INFORMATION: You can access and download today's final rule on your computer by going to the following address on EPA's Internet Web site: *http://www.epa.gov/otaq/traq* (Once at the site, click on "conformity.").

Regulated Entities

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

Category	Examples of regulated entities
Local government	Local transportation and air quality agencies, including metropolitan planning organizations.
State government	State transportation and air quality agencies.
Federal government	Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)) and EPA.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this rule. This table lists the types of entities of which EPA is aware that could potentially be regulated by the conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in 40 CFR 93.102 of the transportation conformity rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

I. Background
II. One-year Conformity Grace Period for Newly Designated Nonattainment Areas
III. Conformity Determinations for Initial SIP Submissions
IV. What Comments That Addressed Topics Other Than Those Covered in This Rulemaking Did We Receive?
V. How Does Today's Final Rule Affect Conformity SIPs?
VI. Administrative Requirements

I. Background

Transportation conformity is required under section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with ("conform to") the purpose of a state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the state air quality plan.

EPA first published the transportation conformity rule on November 24, 1993 (58 FR 62188), and made subsequent minor revisions to the rule in 1995 (60

FR 40098, August 7, 1995, and 60 FR 57179, November 14, 1995). On August 15, 1997, however, EPA published a comprehensive set of amendments that clarified and streamlined language from the 1993 transportation conformity rule and 1995 amendments (62 FR 43780). Since the publication of the 1997 rule, we made one additional minor revision to the conformity rule in 2000 (65 FR 18911, April 10, 2000).

As described in the October 5, 2001, proposal to this final rule (66 FR 50954), EPA's 1995 conformity rule provided a one-year conformity grace period to areas that were designated nonattainment for a given air quality standard for the first time (§ 93.102(d) of the November 14, 1995, final rule; 60 FR 57179). However, this provision was challenged by the Sierra Club under the Clean Air Act as amended in 1990, and the U.S. Court of Appeals for the District of Columbia Circuit overturned the grace period on statutory grounds on November 4, 1997 (*Sierra Club* v. *EPA, et al.*, 129 F. 3d 137, D.C. Cir. 1997). As a result of the court's decision, the one-year conformity grace period was no longer available to areas and EPA removed it from the conformity rule in 2000 (65 FR 18911). Subsequently, Congress amended the Clean Air Act on October 27, 2000, to reinstate the grace period as a matter of law. Today's final rule amends the conformity regulation by reinstating the grace period provision to be consistent with the October 2000 Clean Air Act amendment, and therefore will provide newly designated nonattainment areas with a one-year grace period before the conformity regulation applies.

Today's action also amends the conformity rule to respond, in part, to the impact of a decision made on March 2, 1999, by the U.S. Court of Appeals for the District of Columbia Circuit that affected several provisions of the 1997 rulemaking (*Environmental Defense Fund* v. *EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). Specifically, today's final rule addresses the indirect impact of this court decision on one provision of the conformity rule (§ 93.104(e)), the provision that requires conformity to be redetermined within 18 months of an initial SIP submission. In addition to today's minor rule revision, we are currently preparing a future rulemaking to respond to the remaining issues addressed by the March 1999 court decision that will be separately proposed in the **Federal Register**.

In the interim, areas where conformity applies are currently operating under administrative guidance that EPA and the U.S. Department of Transportation (DOT) issued to address the provisions directly affected by the court decision. See EPA's web site listed in the **SUPPLEMENTARY INFORMATION** section to download an electronic version of EPA's May 14, 1999, and DOT's January 2, 2002, memoranda implementing the March 1999 court decision.

Today's final rule is based on the October 5, 2001, proposed rule entitled, "Transportation Conformity Rule Amendments: Minor Revision of 18-month Requirement for Initial SIP Submissions and Addition of Grace Period for Newly Designated Nonattainment Areas" (66 FR 50954) and comments received on that proposal. The public comment period for the proposed rule ended on November 5, 2001. EPA received twelve public comments on the proposed rule from metropolitan planning organizations, state transportation and air quality agencies, and an environmental group.

This final rule makes two minor changes to the October 5, 2001, proposed rule that further clarify the applicability of the one-year conformity grace period to newly designated nonattainment areas. No other modifications to the proposed rule, however, have been made in today's final rule. EPA will not restate here its rationale for the changes to the conformity rule that are identical to the October 5 proposal. The reader is referred to the proposal notice for such discussions.

II. One-year Conformity Grace Period for Newly Designated Nonattainment Areas

A. What Are We Finalizing?

Today, EPA is adding the existing one-year conformity grace period for newly designated nonattainment areas for a given air quality standard to the transportation conformity rule. We are finalizing this change to make the transportation conformity rule consistent with an October 27, 2000, amendment to the Clean Air Act (42 U.S.C. 7506(c)(6)).

Specifically, the October 2000 amendment provides areas, that for the first time are designated nonattainment for a given air quality standard, with a one-year grace period before the conformity regulation applies with respect to that standard. This grace period begins upon the effective date of EPA's published notice in the **Federal Register** that designates an area as nonattainment. Although today's final rule incorporates the grace period into the transportation conformity rule, it has been available to newly designated nonattainment areas as a matter of law since Congress enacted the October 2000 amendment to the Act. For more information on what defines a "newly designated" nonattainment area, see the October 5, 2001, proposal to today's rulemaking.

B. How Soon Does Conformity Apply in a Newly Designated Nonattainment Area?

Under the current Clean Air Act as amended in October 2000, conformity applies one year after EPA first designates an area or portion of an area as nonattainment for a given air quality standard. More specifically, conformity applies one year after the effective date of EPA's final nonattainment designation, as published in the **Federal Register**.

Therefore, one year after the effective date of EPA's designation of an area to nonattainment for the first time for a given standard, metropolitan areas must have a conforming transportation plan and Transportation Improvement Program (TIP) in place to fund or approve transportation projects. If, at the conclusion of the one-year grace period, a metropolitan area is not able to make a conformity determination for its plan and TIP, the area will be in what is known as a "conformity lapse."

In the absence of a conforming transportation plan and TIP, no new project-level conformity determinations may be made. According to existing guidance, during a conformity lapse exempt projects listed in § 93.126 (*e.g.*, safety projects), projects listed in § 93.127 and § 93.128, and project phases that have received all applicable funding commitments or approvals from the FHWA, FTA or state and local authorizing agencies can proceed toward implementation. Transportation control measures (TCMs) that EPA has approved into a SIP can also proceed during a lapse. TCMs are projects that support air quality goals by reducing travel or relieving congestion.

The transportation plan and TIP must conform with respect to all pollutants for which the area is designated nonattainment to end the conformity lapse. Transportation conformity applies in areas that are designated nonattainment or maintenance for ozone, carbon monoxide, particulate matter, and nitrogen dioxide. For example, a carbon monoxide nonattainment area that is subsequently designated nonattainment for ozone has a one-year grace period before conformity determinations must be made for ozone; conformity would continue to apply in the interim for carbon monoxide. By the end of the one-year grace period, a conforming

transportation plan and TIP must be in place for all pollutants in a given area, in this case, for carbon monoxide and ozone.

C. What Comments Did We Receive?

In general, commenters supported amending the conformity rule to include the one-year conformity grace period for newly designated nonattainment areas. Most commenters believe that newly designated areas, especially those with little or no conformity experience, need the additional time to evaluate their long range transportation plans, TIPs and projects, and to complete the conformity process. Although the grace period has been available to newly designated areas since the enactment of the October 2000 Clean Air Act amendment, several commenters felt that its inclusion into the conformity rule will help to reduce confusion and provide assurance to future newly designated areas.

Though most commenters agreed with amending the conformity rule to include the one-year grace period, some commenters argued that one year is not enough time to complete the transportation planning and conformity processes when an area becomes designated nonattainment for a given air quality standard for the first time. Some of these commenters believe that a longer grace period of three years is more appropriate.

The October 2000 Clean Air Act amendment specifically provides newly designated areas with a one-year grace period, after which conformity applies. Therefore, we believe that the statutory language precludes EPA from extending the conformity grace period beyond one year for new areas. We should also emphasize, however, that areas will have prior notification of their pending designation well before the **Federal Register** notice announcing their designation is published. We encourage areas to use the time provided by the designation process to begin preparing themselves for implementing the conformity regulation.

One commenter also requested that EPA consider delaying the effective date of designation to 60–90 days after a **Federal Register** notice is published, so that areas will have more time beyond the one-year grace period to meet the conformity requirements. Generally, the amount of time between publication and effective date is established through EPA's administrative discretion on a case-by-case basis. Therefore, we do intend to consider how areas are designated, particularly for areas designated under new air quality standards, so that the transition to implementing the conformity regulation will be reasonable. Furthermore, as previously stated, the designation process will provide areas advanced notification of their pending designation. Areas should use this additional time prior to the one-year conformity grace period to prepare for the implementation of the conformity regulation and other Clean Air Act requirements. EPA can not now determine the appropriate effective date for all future designations, but will continue to do so, as appropriate on a case-by-case basis, in the course of future designation rulemaking.

Finally, EPA received a comment questioning whether the proposed rule text included in our October 5, 2001, proposal is consistent with the statutory language in the Clean Air Act, section 176(c)(6). Specifically, one commenter suggested that the proposed rule language does not incorporate the limitation that the one-year grace period only applies to areas that are designated nonattainment for a given pollutant for the "first" time. This commenter argued that the Clean Air Act precludes the availability of the grace period to areas that were once nonattainment for a standard, redesignated to attainment under Clean Air Act section 107(d)(3), but then designated back to nonattainment because they again violated the same air quality standard.

EPA agrees with this commenter's interpretation of the statutory language; we do not believe that the grace period is available to areas that are designated nonattainment for a given pollutant and standard more than one time. The preamble to the October 5, 2001, proposal further supports this limitation by stating that the conformity grace period is not available to areas that have been previously designated nonattainment for a given pollutant and standard.

Although EPA continues to believe that the proposed regulatory language for § 93.102(d) is consistent with the Clean Air Act, we are finalizing two minor clarifying changes to the proposed rule to ensure that the grace period is correctly implemented. Specifically, we have clarified in the final rule language that the grace period is only available to areas that have been "continuously" designated attainment for a given standard since 1990, or have not been designated at all for a given standard for that same period. In addition, we specify that for areas that are designated nonattainment for the first time for a given air quality standard, the one-year conformity grace period only applies "with respect to that standard." These minor clarifications ensure that the regulatory language limits the applicability of the one-year grace period to only areas that have been designated nonattainment for a given pollutant and standard for the first time, and therefore, is consistent with our interpretation and implementation of the Clean Air Act section 176(c)(6). EPA believes that a reproposal is not necessary to incorporate these minor clarifying changes in today's final rule, as these clarifications are consistent with EPA's original intentions and stakeholders' understanding of the proposed regulatory language.

III. Conformity Determinations for Initial SIP Submissions

A. What Are We Finalizing?

As in the proposed rule, this final rule revises § 93.104(e)(2) to change the trigger point or starting point of the requirement to determine conformity after an initial SIP submission is made. With this rule change, conformity must be determined within 18 months of the effective date of the **Federal Register** notice announcing EPA's finding that the budgets in an initial SIP submission are adequate. Today's action changes the 1997 conformity rule that required conformity to be determined within 18 months of the submission date for an initial SIP. The net effect is that areas will have the full 18 months to satisfy the conformity requirement for initial submissions once adequate budgets have become available for conformity. EPA is promulgating this minor rule revision to provide a reasonable response to an indirect impact of the March 2, 1999, court decision that requires EPA to first find the budgets from an initial SIP submission adequate before such budgets can be used in a conformity determination.

Today's final rule will also change the starting point for 18-month clocks that are currently running for areas with initial SIP submissions, so that these areas are given the full 18 months to determine conformity to their initial SIPs. In other words, in areas where a SIP has been submitted and EPA is currently reviewing it for adequacy, the 18-month clock required by § 93.104(e)(2) will not start until the effective date of our adequacy finding (*i.e.*, today's action voids the current 18-month clock that started from the SIP submission date for these areas). If we are currently reviewing the adequacy of a submitted SIP, and subsequently find it inadequate, the 18-month clock will not start because today's rule requires EPA to first find budgets in initial SIP submissions adequate before § 93.104(e)(2) applies. Finally, for areas

that have submitted initial SIPs that EPA has already found adequate and to which conformity has not yet been determined, this final rule will restart the 18-month clock from the effective date of EPA's positive adequacy finding.

Consistent with the proposed rule, today's final rule will not require an 18-month clock to begin if budgets from an initial SIP submission are found inadequate. Furthermore, this rule will void any 18-month clocks that are running for initial SIP submissions that EPA finds adequate, but subsequently finds inadequate before a conformity determination is made, at the time that EPA finds such budgets inadequate.

Today's action does not change the current requirement to redetermine conformity for each initial SIP that is submitted for a given pollutant, standard, and Clean Air Act requirement. For example, an 18-month clock will still be triggered for the first attainment demonstration that an area submits and EPA subsequently finds adequate, as well as for the first rate-of-progress SIP for a given year and maintenance plan that is submitted and found adequate. Today's rule changes only the date on which these 18-month clocks begin to run.

In addition, today's action does not change the current rule's requirement that an area need only satisfy the 18-month requirement to determine conformity to an initial SIP submission once for a given Clean Air Act requirement. Once § 93.104(e)(2) is satisfied, areas do not have to satisfy this requirement again for subsequent submissions of the same type prior to EPA SIP approval. EPA believes that the requirement to update conformity every three years (40 CFR 93.104), along with other transportation planning and conformity requirements, provides sufficient additional opportunity for periodically introducing new air quality information into the conformity process. Furthermore, this action does not change the conformity rule's requirement of 40 CFR 93.104(e)(3); areas are still required to demonstrate conformity within 18 months of EPA's approval of a SIP containing revised budgets.

Finally, as indicated in the proposal, today's final rule will not affect those SIPs that are submitted to reflect additional control measures or to update MOBILE5 interim estimates of federal Tier 2 vehicle and fuel standards with MOBILE6. EPA has already stated that these SIP revisions are not initial SIP submissions that start 18-month clocks under 40 CFR 93.104(e)(2). EPA addressed this issue in the July 28, 2000, supplemental notice of proposed rulemaking (65 FR 46386) for certain ozone attainment areas.

For more information on what defines an "initial SIP submission," see the October 5, 2001, proposal to today's final rule.

B. Why Is This Rule Change Necessary?

Today's rule change is necessary because it provides a reasonable response to an indirect impact of the March 2, 1999, court decision. In its March 1999, decision, the court ruled that EPA must first find newly submitted motor vehicle emissions budgets adequate before such budgets can be used in a conformity determination. An effect of the combination of the court decision and EPA's previous rule was that a significant portion of the 18-month period for demonstrating conformity could elapse prior to the time EPA made a determination that the submitted budgets were adequate.

As described in our May 14, 1999, guidance implementing the court's decision, EPA's current adequacy process for a newly submitted initial SIP starts when the SIP is submitted and ends with the effective date of our adequacy finding, which we formally announce through a **Federal Register** notice. EPA tries to complete an adequacy review in approximately three months, although in some cases additional time is needed. During the adequacy review period, the public is provided at least 30 days to comment on the appropriateness of the newly submitted budgets. EPA must then address all comments received for the submitted budgets before we can make our adequacy finding. Areas cannot begin the process of determining conformity using the submitted budgets with certainty until EPA has determined that the budgets are adequate.

Under the conformity rule prior to today and the court decision, a conformity determination cannot be made until budgets are found adequate, and therefore, transportation agencies should not be expected to invest valuable time and resources completing a regional emissions analysis and conformity determination prior to knowing which SIP budgets apply. As a result, under the prior rule, areas had a maximum of 15 months to determine conformity following an initial SIP submission (*i.e.*, the 18-month conformity clock for initial submissions minus the three months minimally required for EPA to determine adequacy). Where adequacy review was complex and subsequently delayed, particularly in situations with significant public involvement, areas may have had even less time to determine conformity under the previous rule. As a consequence, the shortening of the 18-month period by the amount of time needed for the adequacy review process could lead to significant difficulties for those that implement the conformity program.

If budgets cannot be used until EPA completes its adequacy review and the finding becomes effective, the 18-month clock for conformity should not start until that time. EPA believes this rule change is reasonable and necessary, given that this additional time needed for adequacy review was not contemplated when the original 18-month initial SIP conformity requirement was established.

There can also be situations where EPA finds submitted budgets adequate, but later finds them inadequate because new information has become available that affects the adequacy of the budgets. In these situations, conformity implementers may try in good faith to determine conformity to adequate budgets in an initial SIP submission within 18 months, only to have the budgets found inadequate before a conformity determination is made.

To address the situations described above and based on our experience in implementing conformity to date, EPA continues to believe that areas should have the full 18 months to determine conformity. In these cases, an 18-month period provides areas with the time needed to assess new information contained in a SIP, perform additional emissions analyses and provide the public with an opportunity to review new changes to the transportation plan and TIP and conformity determination. We continue to encourage air quality and transportation planners to coordinate their processes so that new air quality plans can be used expeditiously in the transportation conformity and planning processes.

For more information on EPA's adequacy process for initial SIP submissions, *see* the **SUPPLEMENTARY INFORMATION** section in this final rule to download a copy of EPA's May 14, 1999 memorandum implementing the court's decision.

C. What Comments Did We Receive?

The majority of commenters agreed that the 18-month requirement for conformity to initial SIP submissions should be aligned with EPA's adequacy finding for such submitted budgets. Most commenters supported this rule change, as it will allow for greater certainty in the conformity process and will provide transportation planners sufficient time to incorporate new

information into the transportation planning and conformity processes.

One commenter, however, believed that the proposed rule is arbitrary and capricious because it could potentially delay implementing new budgets in nonattainment areas where expeditious emissions reductions are necessary to meet statutory requirements and deadlines. The commenter asserted that 18 months is an excessive amount of time to allow for a revision of the plan and TIP to take place, and that the time frame for redetermining conformity when new budgets become available should be tailored to the time remaining before a required milestone or attainment year.

In addition, the commenter stated that EPA's proposal is inconsistent with the Clean Air Act's requirements for how often conformity determinations should be conducted. The commenter acknowledged that Clean Air Act section 176(c)(4)(B)(ii) provides EPA discretion in determining the frequency of conformity determinations, but believed that EPA must also consider Congress' intention to have transportation agencies be "active players" in implementing the emission reductions required for reasonable further progress or attainment. The commenter cited Congressional records from the development of the 1990 Clean Air Act that stated that transportation activities can only be accepted by DOT if they are consistent with the SIP's air quality goals; if a transportation plan and TIP does not meet the emissions targets set by the SIP and further motor vehicle emission reductions are needed to reach attainment, the plan and TIP must be modified to achieve the SIP's budgets.

EPA does not agree that the final rule will further delay the use of new budgets in the transportation planning and conformity processes. We are finalizing today's rule change to provide a reasonable response to an indirect effect of the March 2, 1999, court decision that requires EPA to formally review and find initially submitted budgets adequate before they can be used in a conformity determination. As a result of the court's ruling, we do not believe that starting an 18-month clock from the submission of a budget that may or may not be adequate and available for use for conformity purposes is environmentally sensible. We believe that good air quality results will be most effectively achieved by ensuring that new budgets are consistent with timely attainment or maintenance through the adequacy process before requiring their use in the transportation planning and conformity processes.

EPA also believes that the final rule is consistent with the Clean Air Act. While EPA agrees that the Clean Air Act requires transportation activities to conform to the SIP before federal funding and approval occurs and that the latest SIP budget should be used in such a conformity determination, the Clean Air Act does not specifically require conformity determinations to be done more often than every three years. Clean Air Act section 176(c)(4)(B) requires EPA to promulgate conformity procedures and criteria that "shall, at a minimum, * * * address the appropriate frequency for making conformity determinations, but in no case shall such determinations for transportation plans and programs be less frequent than every three years * * *."

EPA established the frequency requirements for conformity determinations covered by 40 CFR 93.104 in previous rulemakings, including the requirements to determine plan/TIP conformity within 18 months of certain SIP actions (*e.g.*, initial SIP submissions, EPA SIP approvals). The conformity rule's frequency requirements meet the statutory minimum and, along with the requirement that new plans, TIPs, and plan/TIP amendments must demonstrate conformity before they can be implemented in between 3-year update cycles, provide sufficient opportunities for reevaluating plans and TIPs in relation to new SIPs, especially in areas that have more significant air quality challenges. Therefore, even in cases where EPA's adequacy findings require more than three months to complete, existing conformity and transportation planning requirements provide a safeguard to prevent negative impacts on air quality.

Moreover, areas typically begin considering new air quality information during the transportation planning process prior to EPA's formal adequacy finding for initial SIP submissions, as our pending adequacy finding on newly submitted budgets may necessitate additional emissions reductions or alterations to an area's current plan and TIP. In other words, transportation planners frequently become aware through early consultation with their air quality partners of when new, more stringent budgets are being developed, and thus, have the opportunity to consider changes to the transportation plan and TIP to ensure conformity to those new budgets in the future. Therefore, EPA continues to believe that the iterative nature of the conformity and transportation planning processes, along with early and effective interagency consultation, allows for new transportation activities to be continuously evaluated to ensure that attainment is not delayed.

Furthermore, it is important to understand the role that transportation conformity plays in ensuring clean air. The transportation conformity process is one of many mechanisms established by the Clean Air Act for protecting public health. Although transportation conformity ensures that the SIP's motor vehicle emissions targets are achieved through the transportation planning process, air quality planners and EPA are primarily responsible for ensuring that SIPs containing sufficient emissions reductions to meet applicable air quality requirements are developed according to statutory requirements and are available in the transportation planning process in a timely manner.

This rule change will not have a significant impact on air quality because it in no way affects the overall statutory requirements and deadlines established to attain the air quality standards. The Clean Air Act defines the dates by which nonattainment areas must attain the air quality standards. It is the responsibility of EPA and the state and local air quality agencies to ensure that SIPs can achieve the necessary reductions to meet these deadlines, taking into account, among other factors, control measure implementation schedules and the timing of conformity.

EPA also believes that the suggested approach of tailoring the amount of time that an area has to redetermine conformity with the amount of time remaining before an area's next required milestone or attainment year would lead to inconsistencies and confusion in implementing the conformity rule. Moreover, the practical implementation of adjusting the time allowed to redetermine conformity following the submission of each initial SIP would introduce a great deal of uncertainty in the air quality and transportation planning processes, and would be logistically difficult and burdensome to implement.

Transportation conformity is a process that coordinates two different planning processes—transportation and air quality planning. As a result, EPA has an obligation to balance the need to incorporate new air quality planning information and the need of transportation planners to have sufficient time to incorporate this new information into their planning process. We believe that today's rule change regarding the conformity requirement for initial SIP submissions will achieve

this balance, as well as remain within the boundaries of the statutory requirements.

The same commenter also claimed that EPA provided no rational basis in the proposal for providing areas with an 18-month time period for redetermining conformity to an initial SIP submission. Alternatively, the commenter suggested providing areas with a shorter time period of nine months to meet the conformity requirement for initial SIP submissions, particularly when the time between submission of a SIP budget and a statutory attainment or reasonable further progress deadline is less than 24–36 months, or when such deadlines have not been met. According to the commenter, expediting conformity determinations in these situations would ensure that motor vehicle emissions control measures, such as transportation control measures and transit capital investments, will be in place in time to achieve necessary emissions reductions.

EPA does not believe that the role of conformity, or of this rule change in particular, is to facilitate emissions reductions in the manner in which this commenter has suggested. The conformity provisions of the statute merely require that transportation activities conform to the SIP, and that such determinations include new transportation activities and are conducted at least every three years.

For this rulemaking, EPA did not propose extending or reducing the 18-month time period that is already provided to areas to redetermine conformity to initially submitted SIPs under existing federal rules. The 18-month time period for initial SIP submissions was established through the November 14, 1995, final rule (60 FR 57182). When EPA promulgated this rulemaking, we concluded that 18-months was an appropriate time frame in which to incorporate new SIP submissions into the transportation planning process. Since that time, no new information has indicated that the 18-month time period is inappropriate, as explained further below. Today's final rule only changes the starting point of the 18-month time period for initial SIP submissions. This change is needed to response to an indirect impact of the March 2, 1999, court decision in which the court ruled that budgets could not be used for conformity purposes until EPA has found them adequate.

Moreover, from EPA's experience implementing the conformity rule to date, providing areas with 18 months to determine conformity to new SIP budgets is a reasonable time period, given the amount of time, resources and public participation that is required for the transportation planning and conformity processes. Prior to our November 14, 1995, amendment to the conformity rule, areas only had 12 months to redetermine conformity to an initial SIP submission. Due to the overwhelming difficulties areas had in meeting these 12-month clocks, EPA proposed, considered public comment, and finalized extending the conformity requirement for initial SIP submissions to 18 months. As a result, EPA continues to believe that 18 months from an initial SIP conformity trigger for all areas is the most reasonable and workable time frame for redetermining conformity to initial SIPs. For more information regarding EPA's rationale and response to comments for extending the initial SIP conformity trigger to 18 months, see our November 1995 rulemaking. An electronic version of this rulemaking can be downloaded from EPA's web site listed in the **SUPPLEMENTARY INFORMATION** section of this rule.

In addition, EPA believes that the existing transportation and air quality planning requirements do ensure that motor vehicle control measures that are approved into a SIP are implemented in such a manner that achieves the necessary emissions reductions in a timely fashion. Therefore, we do not believe that conformity determinations need to be expedited specifically for this purpose. Clean Air Act sections 174(a) and 176(c)(4) require the inclusion of transportation planners in the SIP development process and the formal establishment of consultation procedures among state and local transportation and air quality agencies involved in the conformity process, respectively. This required consultation among transportation and air quality agencies is intended to ensure that the transportation planning process becomes a routine component of any analysis (*e.g.*, determining implementation schedules, evaluating emissions benefits, *etc.*) involving transportation control measures slated for inclusion in a SIP. Furthermore, as a practical matter, transportation projects, including those that have emissions reduction benefits, cannot receive federal funding or approval unless they are contained in a fiscally constrained and conforming transportation plan and TIP that has been approved through the transportation planning process, pursuant to 23 CFR part 450 and 49 CFR part 613. Therefore, these transportation and air quality planning requirements ensure that any transportation measure that EPA approves into a SIP has been coordinated through the transportation planning process and is designed to timely reduce emissions in accordance with the SIP's purpose of achieving further progress, attainment or maintenance.

The same commenter expressed concern over not requiring a new 18-month clock when a conformity determination is made using budgets that EPA has found adequate, but not yet approved, prior to a subsequent submission of new, more stringent budgets for the same Clean Air Act requirement. In this particular case, the commenter believes that § 93.104(e)(2) should be triggered again, thus requiring areas to revise their plan and TIP to conform to the newly submitted revised budgets upon EPA's adequacy finding. By not requiring § 93.104(e)(2) to apply in this situation, the commenter argues that this rule will sever the link between the conformity process and the obligation of transportation agencies to revise plans and TIPs to achieve the Clean Air Act's objectives.

EPA disagrees. EPA did not propose the additional 18-month requirement for the unique situation the commenter describes, and therefore can not address this issue in today's final rule. Moreover, this suggested requirement is contrary to the historic position that EPA has held on this issue, as described in the preamble to our August 29, 1995 proposed rulemaking initially establishing the 18-month requirement (60 FR 44792). In that proposal to extend the conformity requirement for initial SIP submissions to within 18 months of their submissions, EPA states: "If conformity to the initial submission has been demonstrated and that submission is subsequently revised, no 18-month clock would start until * * * the SIP is approved by EPA." EPA's intent and implementation of § 93.104(e)(2) of the conformity rule has always been to serve as a one-time conformity requirement for initial SIP submissions, so that areas can use new motor vehicle emissions budgets in a conformity determination when no budgets for a particular year and/or purpose had previously existed. Historically, we have never considered § 93.104(e)(2) to be an iterative requirement that mandates continual conformity updates outside of the normal transportation planning process. Therefore, EPA continues to maintain that once conformity is determined and § 93.104(e)(2) is satisfied for a SIP having a given purpose (*e.g.*, attainment, rate-of-progress, maintenance), it is not necessary for areas to meet this requirement again for subsequent

submissions of the same type of SIP prior to EPA's approval. Areas will again be required to determine conformity within 18 months of EPA's approval of any revised budgets. However, in this situation, if new transportation activities are proposed after EPA finds the revised budgets adequate, but before SIP approval, a conformity determination based on the revised budgets along with all other applicable budgets would be required before such activities could be implemented. In other words, the revised budgets must be used (along with all other existing applicable budgets) in any determination after they have been found adequate, even though they are not subject to a new 18-month clock, pursuant to § 93.104(e)(2).

Furthermore, we do not agree that the integration of air quality and transportation planning via the conformity process will be compromised as a result of implementing § 93.104(e)(2) as a one-time requirement for each initial SIP consistent with the current rule. Due to the iterative nature of the transportation planning and conformity processes, the most current air quality information is incorporated on a regular and consistent basis. The three-year conformity requirement for transportation plans and TIPs, along with other transportation planning and conformity requirements, provides for the reasonable and timely introduction of the most current information into the conformity process.

The same commenter also requested from EPA a clarification that § 93.118(a) requires a conformity determination for a plan and TIP to show consistency with all applicable adequate and approved budgets at the time a conformity determination is made. EPA agrees that this requirement applies for all conformity determinations, including those made for TIPs that rely on a previous emissions analysis pursuant to § 93.122(e).

Like all conformity determinations, a determination for a TIP that relies on a previous emissions analysis must satisfy the emissions test requirements of § 93.118 (or § 93.119, if no applicable adequate or approved budgets exist), and must do so over the time frame of the transportation plan. EPA agrees with this clarification of § 93.118(a) and its requirement for demonstrating conformity using all applicable budgets, and will consider elaborating on this proposed clarification in a future rulemaking. Since EPA did not propose such a change, EPA is not making any changes in this final rule with regard to the described interpretation of § 93.118(a). Nonetheless, EPA reiterates that this clarification is the intent of the existing rule.

Finally, one commenter indicated that the October 2001 proposal was not clear as to how the one-year conformity grace period and the 18-month requirement for initial SIPs relate to one another. From the commenter's reading of the proposed rule amendments, it appeared that the one-year grace period and 18-month requirement for initial SIP submissions overlap.

In response, the one-year conformity grace period and the 18-month conformity requirement for initial SIPs are not interrelated. Typically, when areas are newly designated they do not have a submitted SIP for which an 18-month clock would start. In the unique situation where an area is newly designated and submits an initial SIP during the one-year grace period, conformity of the plan and TIP would still need to be demonstrated at the conclusion of the one-year grace period. If EPA has found adequate or approved the submitted SIP and budgets before the grace period expires, those adequate or approved budgets must be used for conformity. Therefore in this situation, both conformity requirements—a conforming plan and TIP one year after designation and the 18-month conformity requirement for the submitted SIP—would be satisfied if a conformity determination using the adequate or approved budgets is made prior to the expiration date of the one-year grace period.

If no adequate or approved budgets exist at the time that the one-year grace period expires, areas should use the conformity test(s) that EPA has deemed appropriate for satisfying the conformity requirement. EPA is currently considering what conformity test(s) will apply for areas that are designated nonattainment under new air quality standards (*e.g.*, EPA's ozone and particulate matter standards issued in 1997) and will address this issue in future guidance documents and rulemakings prior to area designations. In this situation, an 18-month conformity clock pursuant to § 93.104(e)(2) as amended today would not start until these areas submit an initial SIP and EPA has found the submitted budgets adequate for conformity purposes.

IV. What Comments That Addressed Topics Other Than Those Covered in This Rulemaking Did We Receive?

Several commenters raised concerns about aspects of the transportation conformity rule that are not germane to this specific rulemaking, including the implementation of the conformity regulation under EPA's new 8-hour ozone and PM–2.5 (particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) standards, and the impact of the March 2, 1999, court decision on projects that can proceed during a conformity lapse. These comments do not affect whether EPA should proceed with this final action, but EPA will be considering these comments when we develop policy guidance and future rulemakings to address these larger issues.

In addition, one commenter requested that EPA consider eliminating two additional conformity SIP triggers required in § 93.104(e). Specifically, the commenter requested that we eliminate the 18-month conformity frequency requirements for SIP approvals that establish new budgets (§ 93.104(e)(3)) and for SIP approvals that revise TCMs (§ 93.104(e)(4)). This commenter characterized these additional SIP requirements as being superfluous and onerous to the transportation planning process.

For today's rulemaking, EPA did not propose eliminating the conformity triggers outlined in 93.104(e)(3) and 93.104(e)(4), nor have we provided the public with an opportunity to comment on the suggested deletion of these provisions from the conformity rule. Therefore, we are not making any changes to these requirements at this time. However, we will consider this flexibility, along with others, for future rulemakings. A complete response to comments documents is in the docket for this rulemaking (see **ADDRESSES** for more information regarding the docket and additional documents relevant to this rulemaking).

V. How Does Today's Final Rule Affect Conformity SIPs?

Clean Air Act section 176(c)(4)(C) requires states to submit revisions to their SIPs to reflect the criteria and procedures for determining conformity. Section 51.390(b) of the conformity rule specifies that after EPA approves a conformity SIP revision (including those that have been approved as a Memorandum of Understanding or Memorandum of Agreement), the federal conformity rule no longer governs conformity determinations (for the parts of the rule that are covered by the approved conformity SIP). In some areas, EPA has already approved conformity SIPs that include § 93.104(e)(2) from the 1997 transportation conformity rule (62 FR 43780). In these areas, today's final rule changes will be effective only when EPA approves a conformity SIP revision

that includes the amendment to align the 18-month clock for initial SIP submissions with EPA's adequacy finding. EPA will work with states as appropriate to approve such revisions as expeditiously as possible through flexible administrative techniques such as parallel processing and direct final rulemaking to insure that all areas will be able to benefit from this rule change in a timely manner.

In some areas, however, EPA may have approved such provisions in error, if EPA had approved a conformity SIP that included § 93.104(e)(2) after the March 2, 1999, court decision, but prior to today. In these areas, EPA will publish, as appropriate, a technical correction in the **Federal Register** under section 110(k)(6) of the Clean Air Act to limit EPA's approval of such SIPs and clarify that § 93.104(e)(2) should not have been approved into a conformity SIP since the court's ruling indirectly affected this provision by requiring EPA to find submitted budgets adequate before the initial SIP requirement could be satisfied. Once EPA has corrected its approval of such SIPs to exclude the state's version of § 93.104(e)(2), these areas will become subject to the amended version of § 93.104(e)(2) and 18 month clocks will immediately begin to run from EPA's adequacy determination rather than from the submission date of an initial SIP.

In contrast, the one-year conformity grace period currently applies as a statutory matter for all newly designated nonattainment areas, including areas that have EPA-approved conformity SIPs, since this grace period was required as a matter of law once the Act was amended even prior to today's final rule.

VI. Administrative Requirements

A. Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more, or otherwise adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

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

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

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

It has been determined that this final rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB.

B. Paperwork Reduction Act

This final rule does not impose any new information collection requirements from EPA that require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number.

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

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires the Agency to conduct a regulatory flexibility analysis of any significant impact a rule will have on a substantial number of small entities. Small entities include small businesses, small not-for-profit organizations and small government jurisdictions.

EPA has determined that today's rule will not have a significant impact on a substantial number of small entities. This regulation directly affects federal agencies and metropolitan planning organizations that by definition, are designated only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities. The Regulatory Flexibility Act defines a "small governmental jurisdiction" as the government of a city, county, town, school district or special district with a population of less than 50,000.

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

D. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before EPA promulgates a rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. These rule amendments simplify the conformity rule and make it more practicable to implement, in accordance with the Clean Air Act and our

reasonable and thoughtful approach to an indirect impact of the court's decision. They do not impose any additional burdens. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA and EPA has not prepared a statement with respect to budgetary impacts.

E. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, the use of voluntary consensus standards does not apply to this final rule.

F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to Executive Order 13045 because it is not economically significant within the meaning of Executive Order 12866 and does not require the consideration of relative environmental health or safety risks.

G. Executive Order 13175

Executive Order 13175: "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

The Clean Air Act requires transportation conformity to apply in areas designated nonattainment and maintenance by EPA. Today's minor amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments. Specifically, this rulemaking will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

H. Executive Orders on Federalism

Executive Order 13132, Federalism (64 FR 43255, August 10, 1999), revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the Agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This final rule, that amends a regulation that is required by statute, will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in nonattainment and maintenance areas, and the U.S. Court of Appeals for the District of Columbia Circuit directed EPA to affirmatively find the motor vehicle emissions budgets contained in a SIP adequate before the budgets can be used in conformity determinations. To effectively implement the court's directive on this matter, we believe it is necessary to modify the timing of when one of our existing frequency requirements for conformity is required. The rule will also provide newly designated nonattainment areas with a one-year grace period before conformity becomes applicable, as required by an October 2000 amendment to the Clean Air Act.

In summary, one of the provisions in this final rule is required by statute and one provision will provide a reasonable response to an indirect impact of the court's decision, and by themselves will not have substantial impact on States. Thus, the requirements of section 6 of the Executive Order do not apply to this rulemaking.

I. Executive Order 13211

This rule is not subject to Executive Order 13211, "Action Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66

FR 28355; May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

J. Submission to Congress and the Comptroller General

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

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 7, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such a rule or action. This action may not be challenged later in proceeding to enforce its requirements. (See section 307(b)(2) of the Administrative Procedures Act.)

List of Subjects in 40 CFR Part 93

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

Dated: July 31, 2002.

Christine Todd Whitman,

Administrator.

For the reasons set out in the preamble, 40 CFR part 93 is amended as follows:

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

2. Section 93.102 is amended by adding paragraph (d) to read as follows:

§ 93.102 Applicability.

* * * * *

(d) *Grace period for new nonattainment areas.* For areas or portions of areas which have been continuously designated attainment or not designated for any standard for ozone, CO, PM_{10} or NO_2 since 1990 and are subsequently redesignated to nonattainment or designated nonattainment for any standard for any of these pollutants, the provisions of this subpart shall not apply with respect to that standard for 12 months following the effective date of final designation to nonattainment for each standard for such pollutant.

3. Section 93.104 is amended by revising paragraph (e)(2) to read as follows:

§ 93.104 Frequency of conformity determinations.

* * * * *

(e) * * *

(2) The effective date of EPA's finding that motor vehicle emissions budgets from an initially submitted control strategy implementation plan or maintenance plan are adequate pursuant to § 93.118(e) and can be used for transportation conformity purposes;

* * * * *

[FR Doc. 02–19797 Filed 8–5–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA–7789]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the **Federal Register**.

EFFECTIVE DATES: The effective date of each community's suspension is the third date ("Susp.") listed in the third column of the following tables.

ADDRESSES: If you wish to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

FOR FURTHER INFORMATION CONTACT: Edward Pasterick, Division Director, Program Marketing and Partnership Division, Federal Insurance Administration and Mitigation Directorate, 500 C Street, SW., Room 411, Washington, DC 20472, (202) 646–3098.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 *et seq.* Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the

ORIGINAL

BEFORE THE WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

In the matter of:

PUBLIC HEARING ON PROPOSED REVISIONS TO LEGISLATIVE RULE

45 CSR 36 "REQUIREMENTS FOR DETERMINING CONFORMITY OF TRANSPORTATION PLANS, PROGRAMS AND PROJECTS DEVELOPED, FUNDED OR APPROVED UNDER TITLE 23, U.S.C. OR THE FEDERAL TRANSIT LAWS TO APPLICABLE AIR QUALITY PLANS."

Transcript of proceedings had at a public hearing in the above-styled matter taken by Missy L. Young, Certified Court Reporter and Commissioner in and for the State of West Virginia, at the West Virginia Division of Environmental Protection, Office of Air Quality, Conference Room, 7012 MacCorkle Avenue, S.E., Charleston, West Virginia, commencing at 6:02 p.m., on the 15th day of July, 2003, pursuant to notice.

MISSY L. YOUNG, C.C.R.
POST OFFICE BOX 13221
SISSONVILLE, WEST VIRGINIA 25360
(304) 984-2300

FORM CSR - LASER REPORTERS PAPER & MFG CO 800-626-6313

1 P R O C E E D I N G S

2 MS. CHANDLER: The purpose of this
3 hearing is to accept comments on proposed revisions to
4 rule 45CSR36 - Requirements for Determining Conformity of
5 Transportation Plans, Programs, and Projects Developed,
6 Funded or Approved under Title 23 U.S.C. or the Federal
7 Transit Laws, to Applicable Air Quality Implementation
8 Plans (Transportation Conformity).

9 This rule establishes and adopts the
10 requirements of 40 CFR Part 93, Subpart A, "Conformity to
11 State or Federal Implementation Plans of Transportation
12 Plans, Programs, and Projects Developed, Funded or
13 Approved Under Title 23 U.S.C. or the Federal Transit
14 Laws".

15 This rule codifies general policy,
16 criteria, and procedures for demonstrating and assuring
17 conformity of such activities to applicable air quality
18 implementation plans developed pursuant to Section 112 and
19 Part D of the Clean Air Act, as amended. This rule adopts
20 by reference the transportation conformity requirements of
21 40 CFR Part 93, Subpart A promulgated by the U.S.
22 Environmental Protection Agency as of June 1, 2003.

23 All transportation plans, programs, and
24 projects developed, funded or approved in West Virginia,

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1 under Title 23 U.S.C. or the Federal Transit Laws, must
2 conform to applicable air quality implementation plans in
3 West Virginia.
4 Any agency, organization or party
5 responsible for making transportation conformity
6 determinations or is involved in transportation
7 conformity-related activities shall do so pursuant to the
8 provisions of 40 CFR Part 93, Subpart A and this rule.
9 The federal regulation could negatively impact certain
10 industries such as the construction industry and material
11 suppliers as well as political subdivisions if
12 transportation projects were canceled under a finding of
13 non-conformity.
14 Upon authorization and promulgation of
15 revisions to the 45CSR36, the rules will be submitted to
16 the U.S. Environmental Protection Agency as a revision to
17 the State Implementation Plan pursuant to the federal
18 Clean Air Act.
19 The floor is now open for public comment
20 on 45CSR36. There being nothing further, this public
21 hearing for the proposed revisions to 45CSR36 is
22 concluded.
23 (WHEREUPON, the public hearing
24 was concluded.)

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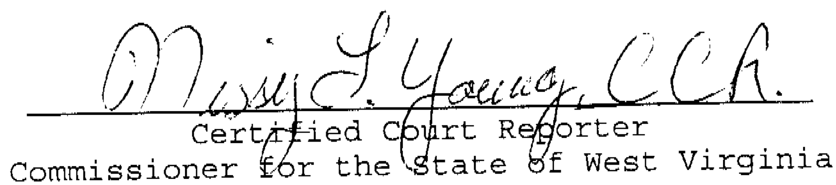
BEFORE THE WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, the undersigned, Missy L. Young, a Certified Court Reporter and Commissioner within and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings had in the aforementioned matter.

Given under my hand and official seal this 24th day of July, 2003.



Certified Court Reporter
Commissioner for the State of West Virginia

My commission expires April 15, 2008.

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45CSR36

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

RESPONSE TO COMMENTS

On June 13, 2003, the Division of Air Quality (DAQ) commenced the public comment period and subsequently held a public hearing on July 15, 2003 to accept oral comments on the proposed rule, 45CSR36. Written comments were also accepted through 6:00 PM on Monday, July 15, 2003. No person verbally commented at the public hearing concerning proposed rule 45CSR36. No commenter submitted substantive written comments regarding proposed rule 45CSR36. However, DAQ did receive one brief comment regarding proposed rule 45CSR36. DAQ addresses the comment below.

I. COMMENTER: Appalachian Center for the Economy and the Environment

COMMENT A. *The commenter states, "I understand that 45CSR1 and 45CSR36* [sic] *are proposed updates to the* NO_X *SIP and consist of only minor modification and adoptions by reference to federal regulation. Therefore I do not have substantial comments to provide to you at this time."*

RESPONSE A. DAQ notes that while proposed rule 45CSR1 is indeed a NO_X SIP rule under 40 CFR Part 96 (as is 45CSR26), proposed rule 45CSR36 is the "Transportation Conformity" rule, incorporating by reference the provisions of 40 CFR Part 93. The commenter submitted no substantive written comment regarding proposed rule 45CSR36. Therefore, no response is required by the Division.