

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.

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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 (NO₂) 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 PM₁₀ and ozone may have a NO_x motor vehicle emissions budget established in the PM₁₀ 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 NO₂ 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