

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 51 and 93**

[FRL-5527-8]

RIN 2060-AG16

**Transportation Conformity Rule Amendments: Flexibility and Streamlining**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing a more streamlined and 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 national ambient air quality standards.

Since publication of the original 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. The changes proposed today are a result of this experience and are intended to make the conformity rule less complex and make it a more effective planning tool. The proposed changes will not result in any change in health and environmental benefits.

This proposed rule would give state and local governments more authority in setting the performance measures used as tests of conformity and more discretion when a transportation plan does not conform to a SIP. The proposal would allow motor vehicle emissions budgets in a submitted SIP to be used to determine conformity instead of the "build/no-build" test. Modeling requirements would be tailored for different types of areas, and rural areas would be able to choose among several conformity tests.

**DATES:** Comments on this action must be submitted on or before September 9, 1996. EPA will conduct one public hearing on this proposal beginning at 10 a.m. on Tuesday, August 6, 1996, in Washington, DC. As described in section XVI. of today's action, the hearing will continue throughout the day until all testimony has been presented.

**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-96-05, 401 M Street, SW., Washington, DC 20460. (Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.)

The public hearing will be held in Washington, DC, at the Holiday Inn Capitol Hill, 550 C Street, SW., Washington, DC 20024, (202) 479-4000.

Materials relevant to this rulemaking are contained in Public Docket A-96-05 by EPA. The docket is located at the above EPA address in room M-1500 Waterside Mall (ground floor) and may be inspected from 8 a.m. to 5:30 p.m., Monday through Friday, including all non-government holidays.

**FOR FURTHER INFORMATION CONTACT:** Kathryn Sargeant, Transportation and Market Incentives Group, Regional and State Programs Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105, (313) 668-4441.

**SUPPLEMENTARY INFORMATION:**  
Regulated Entities

Entities potentially regulated by the conformity rule are those which adopt, approve, or fund transportation plans, programs, or projects under the Intermodal Surface Transportation Efficiency Act or Federal Transit Laws. 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 and 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 action. 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 in § 51.394/§ 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:

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- III. Implementation of the Budget Test
- IV. Non-Federal Projects
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- VI. Modeling Requirements
- VII. Consequences of SIP Disapproval
- VIII. Mismatch in SIP/Transportation Plan Timeframe
- IX. Public Participation
- X. Interagency Consultation
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- XII. TCM Flexibility
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- XIV. Signalization Projects
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**I. Background on Transportation Conformity Rule**

Today's action proposes to amend 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 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. It is that mutual

experience which leads to today's proposal, which is the third of a series of three anticipated 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 of 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.

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 allowed any transportation control measure (TCM) from an approved SIP to proceed during a conformity lapse; 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<sub>x</sub>) provisions of the transportation conformity rule consistent with the Clean Air Act and previous commitments made by EPA.

Today's proposal would further amend the conformity rule in response to several issues raised by conformity implementers and other interested parties. EPA has worked closely with these conformity stakeholders to develop this proposal. In March 1995, the National Governors' Association (NGA) and the Environmental Council of States (ECOS) hosted a meeting of state DOTs, environmental agencies, EPA, and DOT to discuss the conformity rule. At this meeting, ECOS presented nine specific proposals to change the conformity rule. EPA and DOT committed to address all nine issues. EPA requested that state workgroups prepare white papers examining four issues in greater depth: the build/no-build test, non-federal projects, rural nonattainment areas, and adding non-exempt projects to the transportation plan and transportation improvement program (TIP) without full regional

analysis. The remaining five issues are being addressed administratively.

In April 1995, EPA hosted in Washington, DC a conformity stakeholder meeting of state DOTs, state environmental agencies, MPOs, environmentalists, industry groups, and other public interest groups. EPA substantially shaped the meeting's agenda around NGA's four white papers in order to provide groundwork for stakeholder discussion on these issues. On June 30, 1995, EPA distributed to conformity stakeholders draft regulatory language addressing the issues discussed at the April meeting. EPA received written comments and followed up with a series of four conference calls in July 1995 to solicit additional reaction to the June draft language. The draft language and comments are available in the public docket.

On September 1, 1995, EPA distributed a letter to conformity stakeholders indicating what EPA and DOT intended to propose regarding key conformity issues. Today's proposal is based substantially on the approach described in the September letter.

## II. Applicability of the Budget Test and Emission Reduction Tests

### A. Description of Proposal

The proposal would change the time periods during which the budget test and the "emission reduction tests," commonly known as the "build/no-build test," are required. The proposal would eliminate the requirements for the 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 adequacy of the SIP submission and its motor vehicle emissions budget(s). The budget test would replace the emission reduction tests 45 days after the control strategy SIP or maintenance plan was submitted to EPA (provided EPA has not found the submission inadequate), or earlier if EPA has found the submission adequate.

Under the existing transportation conformity rule, both the emission reduction tests and the budget test are required until EPA's final approval of the control strategy SIP (or maintenance plan, where control strategy SIPs are not required). In addition, under the existing rule EPA has a review period of 90 days before the motor vehicle emissions budget in a newly submitted SIP may replace a previously submitted motor vehicle emissions budget.

The proposal would streamline the conformity process by eliminating the existing transportation conformity rule's

reliance on the classification system of "Phase II interim period," "transitional period," "control strategy period," and "maintenance period" to determine whether the budget test and/or emission reduction tests apply.

### 1. Applicability of Nitrogen Oxides (NO<sub>x</sub>) Emission Reduction Tests and Budget Tests in Ozone Areas

Under the proposal, the budget test would replace the emission reduction tests only for those pollutants for which the submitted SIP establishes a motor vehicle emissions budget. For example, 15% SIPs for ozone areas are only required to address volatile organic compounds (VOC), and as a result, most will not address NO<sub>x</sub> or establish a NO<sub>x</sub> emissions budget. In these areas, the VOC emission reduction tests ("build/no-build" and less-than-1990 tests) would no longer be required, but the NO<sub>x</sub> emission reduction tests would continue to be required until a NO<sub>x</sub> budget is established in a submitted SIP (unless the area had received a NO<sub>x</sub> waiver). In ozone nonattainment areas, Phase II attainment SIPs will establish NO<sub>x</sub> motor vehicle emissions budgets.

A submitted 15% or Phase I attainment SIP would be considered to establish a NO<sub>x</sub> motor vehicle emissions budget if the submitted SIP contains an explicit NO<sub>x</sub> budget that is intended to act as a ceiling on future NO<sub>x</sub> emissions and if the NO<sub>x</sub> budget represents a net reduction from 1990 NO<sub>x</sub> emissions levels. A submitted SIP that achieves 15% or reasonable further progress reductions by substituting some NO<sub>x</sub> reductions for the required VOC reductions would establish a NO<sub>x</sub> motor vehicle emissions budget.

### 2. EPA 45-Day Review Period

This proposal would allow conformity to be determined based on consistency with a submitted SIP's motor vehicle emissions budget(s), once the submitted SIP had been reviewed by EPA. (Of course, the submitted SIP cannot override the motor vehicle emissions budgets in an approved SIP for the years addressed by the approved SIP. See Section III.A.1.) The submitted SIP budget(s) would be used for conformity purposes beginning 45 days after the SIP's submission to EPA, provided EPA had not found the SIP and its budget(s) inadequate. The submitted SIP budget(s) would be used for determining conformity before EPA's 45-day review period expires if EPA finds the SIP and its budget(s) adequate before expiration of such 45-day period.

If EPA finds the submitted SIP and its budget(s) to be inadequate, they could not be used for conformity purposes, and conformity would have to be

determined using the previously established SIP budget(s), or the emission reduction tests, if there are no previously established SIP budgets. If EPA finds the submitted SIP and its budget(s) to be inadequate after EPA's 45-day review period and after conformity had already been determined using the submitted SIP, the conformity determination would still be valid. However, that submitted SIP and budget(s) could not be used for future conformity determinations. Projects would still be considered to come from a conforming plan and TIP if they were included in the transportation plan and TIP that were found to conform to a budget that was later declared inadequate.

In order for EPA to consider a submitted SIP's motor vehicle emissions budget(s) adequate for transportation conformity purposes, the submitted SIP must have been endorsed by the Governor (or his or her designee) and have been subject to a public hearing. The emissions budget(s) would have to be clearly identified and precisely quantified. Each emissions budget would have to be consistent with reasonable further progress, attainment, or maintenance, based upon a consideration of all emissions sources. The emissions budget(s) would have to be consistent with the area's emissions inventory and modeling assumptions for all sources and show a clear relationship between the control measures, the emissions reductions, and the resulting budgets. Each revision to a previously submitted SIP would have to identify the impacts on point, area, and mobile source emissions, as well as changes to any established safety margins. Changes to previously submitted budgets and the reasons for the changes would have to be explained and documented, including the basis for any changes related to emission factors or estimates of vehicle miles traveled (VMT), and what those changes imply for control strategies. If the revised emissions budget requires additional emission control strategies to demonstrate attainment or maintenance, such new strategies would have to be specified in the SIP submission. The SIP submission would have to contain a quantification of the emissions impacts of such new strategies and, at a minimum, commitments by appropriate agencies to a schedule for adoption and implementation, and the draft regulations or other relevant documents. Consultation among federal, state, and local agencies would have to occur and full documentation and justifications would have to be provided to EPA

before the SIP is submitted. Any EPA concerns would have to be addressed before submission if the SIP and its budget(s) are to be found adequate for conformity purposes. If a SIP submission does not satisfy these conditions, EPA may find it inadequate for conformity purposes.

EPA's review of the adequacy of a SIP submission for transportation conformity purposes is separate from EPA's completeness review. EPA may find a SIP incomplete after 45 days or after finding the SIP submission adequate for transportation conformity purposes. An incomplete SIP may still have appropriate motor vehicle emissions budgets for use in the conformity process, as recognized by EPA's use of "protective findings" under the November 1993 transportation conformity rule. If the SIP submission is both incomplete and inadequate for transportation conformity purposes, EPA would have to declare the submission inadequate for conformity purposes in addition to finding it incomplete.

### 3. Areas That Are Not Required to Submit Control Strategy SIPs

*Background.* Under the existing transportation conformity rule, areas that are not required to submit control strategy SIPs have two options for demonstrating conformity. The first option is to satisfy the "build/no-build" and less-than-1990 emission reduction tests; the second is to submit a SIP that demonstrates attainment and use the budget test to determine conformity. In the latter option, such an area would be required under the existing rule to satisfy both of the emission reduction tests until the SIP is approved by EPA.

*Areas affected by proposal.* 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 are not required by the Clean Air Act to submit control strategy SIPs. These classifications are listed in §§ 51.464 and 93.136 of the existing transportation conformity rule.

In addition, some moderate and above ozone nonattainment areas that are meeting the ozone 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 Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard").

Through today's action, EPA is proposing alternatives for demonstrating conformity for particular pollutants if areas are not required to submit control strategy SIPs for that pollutant. The first alternative is currently allowed under the existing transportation conformity rule and would continue to be available under this proposal with some additional flexibilities. The second and third options would provide new alternatives to these areas for demonstrating conformity. EPA would require these areas to satisfy only one of the alternatives described below in order to demonstrate conformity.

*Create a budget through the SIP process and use the budget test.* As stated above, the existing transportation conformity rule and this proposal would allow these areas to submit a SIP that establishes a motor vehicle emissions budget consistent with attainment or maintenance. These areas would then be required to satisfy the budget test for each emissions budget. However, unlike the existing rule, this proposal would allow the SIP budget to be used after the SIP has been submitted to EPA and before EPA approval. The emission reduction tests would not be required once a SIP is submitted and EPA's 45-day review period has occurred (as described above).

*Default budget for clean data areas.* This proposal would provide another alternative for demonstrating conformity in areas that are not required to submit control strategy SIPs, and have monitoring data indicating attainment of the standard ("clean data"), but have not yet submitted a maintenance plan. These clean data areas could demonstrate conformity using the budget test instead of the emission reduction tests, using as a "motor vehicle emissions budget" the motor vehicle emissions levels in the most recent year of clean data. The motor vehicle emissions levels in the most recent year of clean data would be determined by the state air quality agency through the interagency consultation process. This default "budget" would not have to be submitted as a SIP revision and would not require special public participation in addition to that otherwise required by the transportation conformity rule. If a clean data area wishes to use a budget other than emissions levels in the most recent year of clean data, the area could submit that budget through the SIP process as described above.

*Emission reduction test flexibility.* Today's action would allow areas that are not required to submit control strategy SIPs another alternative when demonstrating conformity. If these areas

do not have a SIP with a motor vehicle emissions budget, this proposal would allow these areas a choice of emission reduction tests. Specifically, this proposal would allow them to demonstrate conformity by either satisfying the build/no-build test or demonstrating that annual motor vehicle emissions will not be greater than 1990 levels (i.e., the "1990 test").

Under the existing transportation conformity rule, these areas are required to satisfy both the build/no-build and less-than-1990 emission reduction tests in the absence of a budget. For the reasons explained below, this proposal would offer CO and ozone areas not required to submit control strategy SIPs the same flexibility currently available to PM<sub>10</sub> (particles with an aerodynamic diameter of less than or equal to a nominal 10 micrometers) and nitrogen dioxide (NO<sub>2</sub>) nonattainment areas, which are required to satisfy either the build/no-build emission reduction test or ensure that annual motor vehicle emissions will not be greater than 1990 levels.

#### B. Rationale

##### 1. Elimination of the Emission Reduction Tests

A broad consensus of conformity implementers and interested parties have advised EPA that the "build/no-build test" has limited value in demonstrating contribution to emission reductions, or serving as the primary criterion on which conformity is based. Because of the limitations of currently available modeling tools, the build/no-build test may yield only slight differences in emissions, well within the range of modeling error. The parties have indicated that when motor vehicle emissions budget(s) have been established in submitted SIPs, they provide a more relevant basis for conformity determinations.

EPA agrees with this assessment by the transportation conformity stakeholders. EPA originally created the "build/no build test" and less-than-1990 tests (required by §§ 51.436–51.446 of the November 1993 transportation conformity rule) in order to implement the emission reduction requirements of Clean Air Act section 176(c)(3)(A)(iii) (for ozone and CO nonattainment areas), and to ensure that transportation activities would not increase the frequency or severity of existing violations (for PM<sub>10</sub> and NO<sub>2</sub> nonattainment areas), as required by Clean Air Act section 176(c)(1)(B)(ii). In light of the stakeholders' input, EPA now believes that consistency with the motor vehicle emissions budget(s) in a

submitted control strategy SIP or maintenance plan is sufficient to satisfy these Clean Air Act requirements.

Clean Air Act section 176(c)(3)(A)(iii) requires transportation plans, TIPs, and projects in ozone and CO nonattainment areas to contribute to annual emissions reductions consistent with sections 182(b)(1) and 187(a)(7). EPA believes that consistency with the motor vehicle emissions budgets in a submitted ozone or CO attainment SIP satisfies Clean Air Act section 176(c)(3)(A)(iii), because these budgets are intended to represent the emissions reductions necessary to attain the ozone or CO standard, as required by sections 182(b)(1) and 187(a)(7). Similarly, consistency with a submitted maintenance plan's emissions budgets fulfills the requirement to contribute to emissions reductions necessary to attain the standard, because the maintenance plan's emissions budgets represent emission levels consistent with attainment.

EPA carefully considered whether the motor vehicle emissions budget(s) established by an ozone area's submitted 15% SIP or post-1996 reasonable further progress SIP are sufficient to satisfy the requirements of Clean Air Act section 176(c)(3)(a)(iii), because such budgets do not necessarily represent the full emissions reductions necessary to attain the ozone standard. However, the motor vehicle emissions budgets in these SIPs do represent VOC emission reductions from 1990 levels. As a result, EPA believes that consistency with such a VOC budget is sufficient to satisfy the requirement of Clean Air Act section 176(c)(3)(A)(iii) for contribution to necessary emissions reductions.

EPA considered not allowing a submitted 15% SIP or post-1996 reasonable further progress SIP to establish a NO<sub>x</sub> motor vehicle emissions budget that would be used for determining conformity instead of the NO<sub>x</sub> emission reduction tests. The Clean Air Act does not require such SIPs to address NO<sub>x</sub>, so a NO<sub>x</sub> emissions budget in such a SIP could be unconstrained and would not necessarily be sufficient to satisfy section 176(c)(3)(A)(iii)'s requirement to contribute to annual emissions reductions. However, if a state establishes a NO<sub>x</sub> emissions budget that it intends to constrain future emissions and that does represent emissions reductions from 1990 levels, EPA now believes this budget would be a better basis for determining conformity than the "build/no-build test." As a result, EPA is proposing that a 15% SIP or post-1996 reasonable further progress SIP (Phase I attainment SIP) that

addresses NO<sub>x</sub> would be considered to establish a NO<sub>x</sub> emissions budget for the purposes of transportation conformity only if that budget represented net emission reductions from 1990. Whether or not a SIP establishes a NO<sub>x</sub> motor vehicle emissions budget should be determined in consultation with the SIP agency and the EPA Region.

For PM<sub>10</sub> and NO<sub>2</sub> nonattainment areas, the "build/no-build test" and the less-than-1990 test were intended to satisfy the general definition of conformity in section 176(c)(1)(B)(ii) that transportation activities not increase the frequency or severity of any existing violation. EPA believes that consistency with the motor vehicle emissions budget(s) established in the submitted attainment SIP or maintenance plan ensures that existing violations will not be worsened by transportation projects, because these budgets represent emissions levels that are consistent with attainment of the standards.

##### 2. Adequacy of Submitted (But Not Approved) Budgets

The November 1993 transportation conformity rule requires emission reduction tests as well as budget tests until EPA approves the submitted SIP, because EPA believed it could not be certain that submitted emissions budgets are consistent with Clean Air Act requirements for reasonable further progress, attainment, and maintenance until EPA approves the SIP. In contrast, this proposal would allow the motor vehicle emissions budgets established by submitted SIPs to be the basis of conformity determinations. (Of course, the submitted SIP cannot override the motor vehicle emissions budgets in an approved SIP for the years addressed by the approved SIP. See Section III.A.1.)

EPA now believes this is appropriate because a submitted SIP is a product of a state's interagency consultation process, which encourages discussion among state and local air quality and transportation agencies, and is ultimately endorsed by the Governor (or his/her designee). During the SIP process, states also gather information and comment from environmental groups and other interested parties at public hearings. EPA believes that these processes would ensure the credibility of a submitted SIP (and its motor vehicle emissions budgets) for the purposes of transportation conformity especially where the only alternative conformity test is the emission reduction tests. Given the limitations to the usefulness of the emission reduction tests, a submitted SIP's motor vehicle

emissions budgets are likely to be at least as good a basis for making conformity determinations, even if they are not yet approved by EPA.

EPA's proposed 45-day review period for newly submitted SIPs is intended to prevent conformity from being based on motor vehicle emissions budgets that are clearly not consistent with attainment, maintenance, or reasonable further progress. If EPA was not consulted, given sufficient information, or EPA's concerns were not satisfied prior to SIP submission sufficient for EPA to determine that the motor vehicle emissions budgets are adequate for conformity purposes during this 45-day review period, EPA could declare the motor vehicle emissions budgets inadequate and prevent their use for conformity purposes. In addition, if EPA finds the motor vehicle emissions budgets inadequate even after the 45-day review period, further conformity determinations may not be based on those budgets.

EPA considered a range of review periods after which submitted motor vehicle emissions budgets could replace emission reduction tests for determining conformity. Under the November 1993 transportation conformity rule, EPA has used a 90-day review period before a newly submitted SIP budget could replace a previously submitted budget. Many conformity stakeholders suggested a 30-day review period. EPA is proposing a 45-day review period as a compromise to balance the conflicting goals of using submitted SIP budgets as quickly as possible and preventing transportation investments from being made based on budgets that are not consistent with attainment, maintenance, or reasonable further progress. If budgets are found inadequate after conformity has already been determined, future plans and TIPs would have to offset the emissions from grandfathered projects that may have been inappropriately allowed under the inadequate budgets. This disruption could be avoided by allowing EPA enough time initially to determine the adequacy of budgets and prevent the use of inadequate budgets.

Regardless of the 45-day review period, EPA cannot ultimately ensure that a submitted SIP's motor vehicle emissions budget is consistent with reasonable further progress, attainment, or maintenance—and thus adequate to fulfill the conformity requirements of Clean Air Act section 176(c)—until EPA fully approves the SIP through notice-and-comment rulemaking. As a result, the proposal provides that reliance on a submitted SIP's motor vehicle emissions budgets for determining conformity is

deemed to be a statement by the MPO and DOT that they are not aware of any information that would indicate that emissions consistent with such budgets would cause or contribute to any new violation of the relevant standard(s); increase the frequency or severity of any existing violation of the relevant standard(s); or delay timely attainment of the relevant standards or any required interim emissions reductions or other milestones. (This provision clarifies that, in the absence of EPA approval of the SIP, the MPO and DOT may not base conformity determinations on submitted SIPs that they have reason to believe do not satisfy Clean Air Act requirements.)

### 3. Areas Not Required to Submit Control Strategy SIPs

EPA has received public comment to extend certain flexibilities to areas that are not required to submit control strategy SIPs. The existing transportation conformity rule requires these areas to either satisfy the "build/no-build" and less-than-1990 emission reduction tests or submit a control strategy SIP or maintenance plan and satisfy the budget test. Today's action proposes additional flexibilities for areas that are not required to submit control strategy SIPs, including marginal and below ozone nonattainment areas, not classified CO nonattainment areas, moderate CO nonattainment areas with a design value of 12.7 ppm or less, and some moderate and above ozone areas that are meeting the ozone standard. Please refer to section II.A.3. for additional background material.

*Create a budget through the SIP process and use the budget test.* Although the areas discussed in this section are not required by the Clean Air Act to submit control strategy SIPs, these areas could choose to submit a control strategy SIP or maintenance plan (which contains a motor vehicle emissions budget) and demonstrate conformity by using the budget test. The existing transportation conformity rule requires consistency with the SIP's motor vehicle emissions budget as stipulated in Clean Air Act section 176(c)(2)(A). This option is available both in the existing transportation conformity rule and this proposal.

*Default budget for clean areas.* This proposal would allow areas with clean monitoring data but no submitted or approved budget to determine conformity using the budget test, with the motor vehicle emissions levels in the most recent year of clean data serving as the "budget." In order for data to be considered "clean," it must meet EPA's requirements and guidance

for acceptable monitoring. EPA is also proposing this second option because many areas would prefer to determine conformity using a budget test rather than the emission reduction tests, but are nevertheless unwilling to devote resources to creating a motor vehicle emissions budget through the SIP process. The motor vehicle emissions in the most recent year with clean data is an adequate "default budget" that can be determined without using the formal SIP process. This level of motor vehicle emissions does not automatically demonstrate attainment, because it does not consider the levels of emissions from other sources. However, these areas are not required by the Clean Air Act to submit attainment demonstrations. Furthermore, this level of motor vehicle emissions does produce clean data. Therefore, EPA believes that requiring consistency with the level of motor vehicle emissions in the most recent year of clean data is a reasonable test, and one that is likely to be more meaningful than the emission reduction test (for the reasons discussed earlier).

*Emission reduction test flexibility.* This proposed alternative would allow areas that are not required to submit control strategy SIPs that do not choose the other two options in this section to satisfy either the build/no-build test or demonstrate that annual motor vehicle emissions will not be greater than 1990 levels (i.e., the "1990 test"), provided these areas do not have an approved budget in a control strategy SIP or maintenance plan. EPA is proposing this flexibility because conformity stakeholders have indicated that, like PM<sub>10</sub> and NO<sub>2</sub> areas, the ozone and CO classifications listed in §§ 51.464 and 93.136 of the transportation conformity rule and moderate and above ozone nonattainment areas that are affected by the May 10, 1995, EPA memorandum (see section II.A.3. for more information) are not subject to sections 182(b)(1) and 187(a)(7) of the Clean Air Act.

The existing transportation conformity rule requires that areas without motor vehicle emissions budgets must satisfy both the build/no-build and less-than-1990 emission reduction tests in order to demonstrate conformity. EPA originally created these tests in order to implement the emission reduction provisions of Clean Air Act section 176(c)(3)(A)(iii), which requires ozone and CO areas to contribute to annual emission reductions consistent with sections 182(b)(1) and 187(a)(7). However, sections 182(b)(1) and 187(a)(7) only apply to moderate and above ozone nonattainment areas and

CO nonattainment areas that are moderate greater than 12.7 ppm.

PM<sub>10</sub> and NO<sub>2</sub> areas are similarly not required to satisfy the annual emission reduction provisions of Clean Air Act section 176(c)(3)(A)(iii). The existing transportation conformity rule and this proposal require PM<sub>10</sub> and NO<sub>2</sub> areas to satisfy either the build/no-build or 1990 test in order to demonstrate conformity.

EPA originally required both the build/no-build and less-than-1990 tests for all ozone and CO areas in order to ensure that transportation planning does not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS, as required by Clean Air Act section 176(c)(1)(B). However, EPA now believes that, for these areas which were never subject to the emission reduction mandate of section 176(c)(3)(A)(iii), either the build/no-build test or the 1990 test is sufficient to satisfy the requirements of the Clean Air Act.

### III. Implementation of the Budget Test

#### A. Which Budgets Apply?

##### 1. Approved SIPs Versus Submitted SIPs

*Years that are directly addressed by the approved SIP.* Motor vehicle emissions budgets in an approved SIP (i.e., the applicable implementation plan) must always be used for demonstrating satisfaction of the budget test for those years in the timeframe of the transportation plan that are addressed by the approved SIP. That is, if the approved SIP establishes a motor vehicle emissions budget for a year in the timeframe of the transportation plan, consistency with that budget must be demonstrated for that year. A submitted SIP cannot override the motor vehicle emissions budgets in an approved SIP for the years addressed by the approved SIP.

Clean Air Act section 176(c) specifically requires conformity to approved implementation plans. The provisions of an implementation plan that EPA has approved under Clean Air Act section 110 are enforceable and cannot be changed on the basis of a submission. As a result, although some conformity implementers and interested parties requested that they be permitted to replace approved SIP budgets with submitted SIP budgets, EPA believes that this cannot be legally allowed. In addition, approved SIP budgets have 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.

*Years that are not directly addressed by the approved SIP.* However, this

proposal would allow a submitted SIP's motor vehicle emissions budgets to be used instead of the approved SIP's budgets for those years not directly addressed by the approved SIP. For example, for a serious ozone nonattainment area, the approved 15% SIP's VOC budget would have to be used to demonstrate the budget test for 1996, but the submitted attainment SIP's budget would be used to demonstrate the budget test for the attainment year (1999).

Similarly, this proposal would allow a submitted maintenance plan's motor vehicle emissions budgets to be used for the years after the attainment year, instead of continuing to use the approved attainment year budget for those subsequent years. Under the existing transportation conformity rule, a submitted maintenance plan's motor vehicle emissions budget(s) may not be used for transportation conformity purposes until the maintenance plan has been approved.

EPA believes this flexibility is appropriate because any given approved SIP is only intended to address a certain period of time. In general, attainment SIPs address only the period through the attainment year, and maintenance plans address at a minimum a ten-year period. EPA believes that the Clean Air Act's reference to conformity to "approved implementation plans" applies to the years which the approved SIP addresses, and that this language should not prohibit using as the relevant test of conformity subsequent SIP submissions that address later years. EPA believes that the submitted maintenance plan's motor vehicle emissions budgets are more relevant to the years after the attainment year than the attainment year budget in the approved attainment SIP. Similarly, a submitted attainment SIP's budget is more relevant for the attainment year than an approved post-1996 SIP budget. EPA had previously required use of the last budget in the approved SIP for all subsequent years only because there was no other budget against which to determine conformity. Once such a budget is submitted, it provides the most relevant basis for testing conformity.

If no SIP is submitted that addresses the years after the approved SIP, the approved SIP's budget(s) would continue to apply for the future years in the timeframe of the transportation plan.

*Changes to approved SIPs.* This proposal would not alter the fact that proposed changes to an approved SIP cannot be used for the purposes of transportation conformity until those changes are approved. For example, if

an area submits a proposed revision to a SIP with an attainment year budget to replace the approved attainment SIP, that SIP submission cannot be used until it is approved by EPA.

##### 2. Multiple SIP Submissions

###### *How soon can a newly submitted SIP replace a previously submitted SIP?*

Under this proposal, the most recent SIP submissions would replace other prior SIP submissions that have not yet been approved. If an area submits a SIP to revise motor vehicle emissions budgets in a SIP that has not yet been approved, the most recent SIP submission would be used for demonstrating the budget test beginning 45 days after submission to EPA (provided EPA has not found the submission inadequate), or earlier, if EPA has found the submission to be adequate.

Under the existing transportation conformity rule, a newly submitted SIP is not permitted to replace a complete SIP submission for 90 days. If EPA found the newly submitted SIP complete in less than 90 days, either SIP submission could be used for conformity determinations made during the first 90 days after SIP submission. This proposal would require the most recent SIP submission to be used for conformity purposes after 45 days (if it has not been found inadequate), or as soon as it has been found adequate, if this occurs in less than 45 days after submission to EPA.

EPA is proposing this change for several reasons. First, due to conformity stakeholder suggestions that submitted SIPs should be used sooner for conformity purposes, EPA is proposing to shorten the existing transportation conformity rule's 90-day grace period to 45 days. In addition, EPA is interested in streamlining the transportation conformity rule and reducing ambiguity in its implementation. There has been substantial confusion in implementation of the existing transportation conformity rule regarding which submitted SIP's budgets should be used for conformity purposes, and at which times. EPA believes that it is simpler and truer to the spirit of conformity to require the most recently submitted SIP (that has undergone 45-day EPA review) to be used for determining conformity.

EPA believes that the simplicity gained from this change outweighs any potential limitation to the flexibility of areas to choose among SIP submissions in the first few weeks after submission. In many instances, SIP submissions intended to replace previous SIP submissions were either inspired by conformity considerations or represent a more accurate basis for conformity. As

a result, most areas would not choose to use the previous SIP submission even if given the opportunity.

In addition, the protection EPA originally intended the 90-day grace period to provide is under the state's control. EPA did not originally require newly submitted SIPs to be used in the first 90 days, because EPA did not want conformity determinations that were underway at the time of the SIP submission to be disrupted. However, this protection is not necessary in the conformity rule itself, because the state controls when it submits a SIP, and the interagency consultation process gives state and local agencies an opportunity to coordinate conformity determinations and SIP submissions to avoid disruption of the conformity process. EPA believes that the ambiguity regarding which SIP submission is used for conformity is more problematic than the remote possibility that a SIP submission would interfere with a conformity determination that was underway.

*When should different submitted SIPs be used?* When a series of control strategy SIPs have been submitted to fulfill different Clean Air Act requirements for a particular pollutant, the budget test would be demonstrated using each relevant submitted SIP that is adequate for conformity purposes. For example, the proposal would require the submitted post-1996 reasonable further progress SIP's motor vehicle emissions budgets to be used for demonstrating the budget test for milestone years, and would require the submitted attainment demonstration's budget(s) to be used for demonstrating the budget test for the attainment year. SIP budget(s) that address the latest future year would apply for all subsequent years in the timeframe of the transportation plan.

#### *B. Control Strategy SIPs and Maintenance Plans That Do Not Establish Motor Vehicle Emissions Budgets*

This proposal would clarify that the emissions budget test must be satisfied only for those pollutants and pollutant precursors for which a motor vehicle emissions budget is established. Normally, a control strategy SIP or maintenance plan would by its nature include a motor vehicle emissions budget for each pollutant and pollutant precursor for which the area was designated nonattainment. These budgets are created by the control strategy SIP or maintenance plan even if they are not clearly identified, and failure to clearly identify a motor vehicle emissions budget does not relieve the requirement to satisfy the budget test. However, as explained

further below, there are some cases in which a SIP could specifically provide that no motor vehicle emissions budget was established for transportation conformity purposes, and in such cases, the budget test would not have to be satisfied for that pollutant or precursor.

Certain nonclassifiable ozone areas have the option to submit a "limited maintenance plan," which would not establish motor vehicle emissions budgets. According to the November 16, 1994, memorandum from Sally Shaver, Director of EPA's Air Quality Strategies and Standards Division, to EPA Regional Air Division Directors, entitled "Limited Maintenance Plan Option for Nonclassifiable Ozone Nonattainment Areas," nonclassifiable ozone areas whose design values are at or below 0.106 ppm (85% of exceedance levels of the ozone standard) at the time of redesignation may choose to submit a less rigorous maintenance plan than required for other areas. This "limited maintenance plan" would not be required to project emissions over the maintenance period, and as a result, no motor vehicle emissions budget would be established. There are similar policies for CO and PM<sub>10</sub> areas that may also result in no motor vehicle emissions budgets being established.

In other cases, the control strategy SIP or maintenance plan could explicitly demonstrate that motor vehicle emissions are not a significant contributor to the nonattainment problem, and the SIP could explicitly state that it is not establishing a motor vehicle emissions budget for transportation conformity purposes. This could occur, for example, in CO and PM<sub>10</sub> areas that are dominated by stationary sources. In order for EPA to approve or find adequate for conformity purposes a SIP that makes a claim of insignificance, the SIP would have to demonstrate that it would be unreasonable to expect that such an area would experience enough motor vehicle emissions growth for a violation to occur. Such a demonstration would have to be based on a number of factors, including the percentage of the inventory comprised by motor vehicle-related emissions currently and in the future, how close the monitoring data is to the standard, the absence of SIP motor vehicle control measures, historical trends in the growth of motor vehicle emissions and VMT, and projections of motor vehicle emissions and VMT.

If EPA's 45-day review period expires without EPA finding the SIP either adequate or inadequate for conformity purposes, the submitted SIP's claim of insignificance may be used to justify not

demonstrating satisfaction of the budget test (unless or until EPA finds the SIP inadequate).

When a control strategy SIP or maintenance plan does not establish motor vehicle emissions budgets, no regional emissions tests would be required to be satisfied. That is, neither the emissions budget test nor the emission reduction tests would be required to be satisfied.

#### *C. For Which Years Would the Budget Test Be Demonstrated?*

This proposal would clarify (without changing the substance of) the existing transportation conformity rule's requirements regarding the years for which the budget test must be demonstrated. The proposal would explicitly require the budget test to be demonstrated for each year for which the SIP establishes a motor vehicle emissions budget. For example, the attainment SIP generally establishes a budget for the attainment year, and the 15% SIP establishes a VOC budget for 1996. SIPs may explicitly include motor vehicle emissions budgets for other years not specifically required to be addressed by the Clean Air Act. For example, an attainment SIP or a maintenance plan may address more years than required by the Clean Air Act and explicitly include motor vehicle emissions budgets for those years. In such cases, the budget test would have to be demonstrated for the years for which a budget was specifically established.

The budget test must be demonstrated for the last year of the maintenance plan and any other years for which the maintenance plan establishes motor vehicle emissions budgets. An area may choose to explicitly establish motor vehicle emissions budgets for years in the timeframe of the maintenance plan other than the last year. In such cases, compliance with the budget test would have to be demonstrated for those years. Some maintenance plans may include specific motor vehicle emissions projections for some or all years in the timeframe of the maintenance plan, without intending that such projections operate as limitations on emissions. The budget test would not be required to be demonstrated for these years unless it was the intent of the maintenance plan to establish a budget for these years. Such issues should be addressed when developing the control strategy SIP or maintenance plan. For control strategy SIPs and maintenance plans that have already been submitted, the state's intent regarding the use of motor vehicle emissions budgets may be clarified

through the interagency consultation process.

In addition to the years for which the SIP establishes a motor vehicle emissions budget, the budget test must be demonstrated for the last year of the transportation plan's forecast period. If there are more than ten years between the years for which the SIP specifically establishes motor vehicle emissions budgets, the budget test must also be demonstrated for some intermediate years so that the budget test is demonstrated at ten-year (or shorter) intervals.

#### *Regional emissions analysis.*

Satisfaction of the budget test requires comparison of the motor vehicle emissions budget with regional emissions predicted for a given year. A regional emissions analysis must be performed for each pollutant and precursor for the last year of the transportation plan's forecast period and the attainment year (if it is in the timeframe of the transportation plan). For the other years for which the budget test is required to be demonstrated, the estimate of regional emissions does not necessarily need to be based on a regional emissions analysis performed for that specific year; the estimate of regional emissions may be based on an interpolation between the years for which the regional emissions analysis was performed. However, the years for which the regional emissions analysis is performed must be no more than ten years apart.

#### *D. Maintenance Plans*

The proposal would require that 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.

Because the maintenance plan is required by the Clean Air Act to demonstrate maintenance of the standards over a 10-year period, general consistency between the latest planning assumptions and the maintenance plan's assumptions and projections is a basis for finding that there will not be new or worsened violations during that period. Each maintenance plan will have different assumptions and projections, so the specific basis for an area's qualitative finding will need to be determined through the interagency consultation process. The qualitative

finding would be contained in the documentation that demonstrates that the budget test has been satisfied.

EPA believes a qualitative finding is necessary if the budget only addresses the last year of the maintenance plan, because the budget test alone is not sufficient to determine, as required by the Clean Air Act, that the transportation action will not cause a new violation. The emissions impacts in the initial ten years of the maintenance plan must be considered in some manner in order to determine conformity.

EPA believes that requiring a qualitative finding is preferable to requiring maintenance plans to establish motor vehicle emissions budgets for specific years. Although maintenance plans contain projections for intermediate years that could be used as motor vehicle emissions budgets, EPA believes that the years for which budgets are established should be decided by the state. EPA is willing to allow states to establish budgets only for the last year of the maintenance plan, provided conformity determinations are accompanied by a qualitative finding addressing the intermediate years. Alternatively, states could choose to establish motor vehicle emissions budgets for intermediate years in the maintenance plan, which would then be used to determine conformity.

#### IV. Non-federal Projects

##### *A. Description of Proposal*

This proposal would allow regionally significant transportation projects that 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) which do not rely at all on any FHWA/FTA funding or approvals (i.e., "non-federal 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. Also, the project's design concept and scope could not have changed significantly from that included in the previous emissions analysis.

The existing transportation conformity rule requires a currently conforming transportation plan and TIP to be in place at the time a recipient of federal funds adopts or approves a regionally significant non-federal project. As a result, no regionally significant non-federal projects can be adopted or approved during a

transportation plan/TIP conformity lapse.

Under both this proposal and the existing transportation conformity rule, adoption or approval of non-federal projects that are not regionally significant is not subject to any transportation conformity requirements. In addition, under both this proposal and the existing transportation conformity rule, there is a provision for regionally significant non-federal projects to be added to the existing transportation plan and TIP's regional emissions analysis, if the transportation plan and TIP are currently conforming. That is, if a regionally significant non-federal project has not previously been included in the regional emissions analysis supporting the transportation plan and TIP conformity determinations, another regional emissions analysis could be performed including the transportation plan and TIP projects and the additional regionally significant non-federal project. If this analysis demonstrates that the currently conforming transportation plan and TIP would still conform if the non-federal project were implemented, the non-federal project could be adopted or approved.

Some commenters have suggested that if certain non-federal projects are to be permitted to be adopted or approved during a transportation conformity lapse as EPA is currently proposing, each such project should be approved by the Governor. This provision would provide greater assurance that the emissions consequences of proceeding with projects during a conformity lapse are consciously accepted. However, EPA is not proposing this limitation at this time because such a limitation is not explicitly required by the Clean Air Act, and it is not clear which state and local government officials should have the authority to adopt or approve non-federal projects during a conformity lapse. EPA is interested in receiving comment on this subject.

##### *B. Rationale*

EPA is proposing to allow some regionally significant non-federal projects to be adopted or approved during a conformity lapse in response to comments from conformity implementers. These comments stated that state and local governments should have the discretion to accept the emissions consequences of projects that are under their control to fund and approve, even when there was not a conforming transportation plan and TIP. Future transportation plans and TIPs are required to consider the emissions from regionally significant non-federal

projects, so any necessary offsets would ultimately be achieved.

EPA believes this proposal is consistent with the requirements of Clean Air Act section 176(c). Section 176(c)(2)(C) requires transportation projects to "come from a conforming plan and TIP." EPA has interpreted this in the existing conformity rule to mean that a conforming transportation plan and TIP must be in place at the time of project adoption or approval, and that the project must be included in the transportation plan and TIP (or regional emissions analysis supporting the conformity determination for the transportation plan and TIP). EPA now believes that because non-federal projects are not federally funded or approved, it is not necessary for a conforming transportation plan and TIP to be in place at the time of project adoption or approval. The transportation plan and TIP are not relevant as a funding mechanism for non-federal projects. The crucial requirement for non-federal projects is previous inclusion in the regional emissions analysis supporting a conforming transportation plan and TIP. That is, the area had previously considered the emissions of the non-federal project and concluded that they could be accommodated in the planned transportation network without adversely affecting air quality.

The option provided in section 176(c)(2)(D) for new projects that were not previously included in a transportation plan/TIP or supporting regional emissions analysis to demonstrate conformity cannot apply during a transportation plan/TIP conformity lapse, because it requires a demonstration that "conforming transportation plans and TIPs" would still conform when the emissions of the new project are considered. Without a conforming transportation plan and TIP in place, this cannot be demonstrated.

This proposal would require that a regionally significant non-federal project be included in the regional emissions analysis supporting the most recent transportation plan and TIP conformity determinations, rather than any previous conformity determination. This is because each regional emissions analysis must include all regionally significant transportation projects in the timeframe of the transportation plan. Therefore, even if there is no current activity on a particular non-federal project at the time of the most recent transportation plan/TIP conformity determination, it still will have been included in the regional emissions analysis. If a non-federal project were included in the regional emissions

analysis from an older transportation plan/TIP conformity determination and not from the most recent, this would indicate that the project is no longer expected to occur in the timeframe of the transportation plan and TIP. As a result, it could no longer be assumed that implementation of the project could be accommodated with no adverse air quality impact.

EPA has received comment opposing the adoption or approval of non-federal projects during a transportation conformity lapse. Commenters believe that building new projects during a time when a conforming transportation plan and TIP has not been developed would only increase the difficulty of plan/TIP development in the future. However, as described above, EPA believes that this proposal is consistent with the Clean Air Act. In addition, the limitation that regionally significant non-federal projects must have been part of the most recent prior regional emissions analysis supporting the most recent conforming transportation plan and TIP ensures that the emissions consequences of the projects have been considered, and the decision to proceed with such projects during a conformity lapse could be made with full knowledge of the possible emissions implications. These non-federal projects would then have been considered as part of the transportation planning process, and because these projects are not able to avoid the scrutiny of the metropolitan planning process during a conformity lapse, there would not be unequal requirements that would provide an incentive to shift the funding of projects from federal to non-federal sources.

EPA has also received comment that any non-federal project, whether or not it has previously been included in a regional emissions analysis supporting a transportation plan/TIP conformity determination, should be allowed to proceed during a transportation plan/TIP conformity lapse. However, EPA continues to believe, as described in the preamble to the November 24, 1993, transportation conformity rule, that Clean Air Act section 176(c)(2)(C)'s requirements for "transportation projects" refer to any highway or transit projects, not just those that are federally funded or approved. Thus, EPA believes that regionally significant non-federal projects must have been considered in a previously conforming emissions analysis in order to be adopted or approved.

V. Rural Nonattainment and Maintenance Areas

#### A. Description of Proposal

Isolated rural nonattainment and maintenance areas with submitted or approved control strategy SIPs or maintenance plans would be allowed, under this proposal, to choose among several tests for demonstrating conformity for years after the time period addressed by the SIP (e.g., years after the attainment year or the last year of the maintenance plan).

These areas could either (1) demonstrate consistency with the most recent motor vehicle emissions budget(s), as normally required; (2) satisfy the emission reduction tests ("build/no-build test" and/or less-than-1990 test, depending upon classification); or (3) demonstrate through air quality dispersion modeling that the FHWA/FTA project, in combination with all other regionally significant projects expected in the area in the timeframe of the statewide transportation plan, satisfies the general definition of conformity in Clean Air Act section 176(c)(1) (i.e., the project will not cause or contribute to any new violations; increase the frequency or severity of any existing violation; or delay timely attainment or required interim emission reductions).

The choice among these conformity tests and the methodology for air quality dispersion modeling would be determined through the interagency consultation process and reflect the consensus of the state and local air and transportation agencies and the project sponsor. EPA and DOT would also have to be consulted through the usual interagency consultation process.

Isolated rural areas would be defined as nonattainment and maintenance areas (or portions thereof) that do not have a metropolitan transportation plan or TIP and whose projects are not part of the emissions analysis of any MPO's transportation plan or TIP. This would not include "donut" areas that are outside the metropolitan planning boundary and inside the nonattainment/maintenance area boundary, because these projects must be considered in the context of the MPO's transportation plan and TIP, even if the MPO does not specifically include them in the transportation plan/TIP or the MPO's own regional emissions analysis.

Because air quality dispersion modeling for ozone is often complex and resource-intensive, EPA does not expect that this particular option will be viable for isolated rural ozone nonattainment and maintenance areas. However, this is a more realistic option

for such CO and PM<sub>10</sub> nonattainment and maintenance areas and is being considered at the request of several commenters.

This proposal differs from the existing transportation conformity rule by offering several options for demonstrating conformity in years after the time period addressed by the SIP. The existing transportation conformity rule would require the motor vehicle emissions budget established for the most recent prior year to be used for the purpose of demonstrating transportation conformity for all subsequent years in the timeframe of the transportation plan.

#### *B. Rationale*

In response to comments from those implementing conformity as well as from other interested parties, EPA is proposing flexibility for isolated rural nonattainment and maintenance areas. The general issue of conformity for years outside the timeframe of the SIP is explained below in section VIII., "Mismatch in SIP/Transportation Plan Timeframe." EPA is here proposing flexibility for isolated rural nonattainment and maintenance areas, and not for other areas, because isolated rural areas face unique challenges in addressing this issue.

Isolated rural areas generally do not have a metropolitan transportation planning process that could serve as a forum for identifying and addressing long-term growth issues in years not addressed by the SIP. In addition, regionally significant, federally funded or approved projects usually occur infrequently in isolated rural areas. Conformity demonstrations for such areas as required by the existing conformity rule would place the burden of long-term planning on a few or even a single transportation project.

EPA believes this places an inappropriately large burden on sponsors of such federally funded or approved transportation projects. Although conformity is intended to assure long-term planning, EPA believes it is appropriate to impose conformity requirements involving less rigorous long-term planning in areas where comprehensive planning processes including land use and other issues do not otherwise exist or are not otherwise required.

Some conformity implementers suggested that the flexibility for isolated rural areas should apply for "donut" areas that are outside MPO planning boundaries but within urbanized nonattainment areas. EPA does not believe this is appropriate because donut areas do not face the same challenges as truly isolated rural areas.

Conformity determinations by the MPO must consider motor vehicle emissions from all projects in the nonattainment or maintenance area, including emissions from projects in the donut area. Thus, there is a planning process that in some manner addresses the donut area. The Intermodal Surface Transportation Efficiency Act (ISTEA) envisioned that in most cases, the MPO planning boundary would be consistent with the nonattainment area boundary. To the extent that conformity poses a burden on the donut area because the area does not have long-term planning capabilities, arrangements could be made with the adjacent MPO.

EPA believes that providing some flexibility for the years not addressed by the SIP is consistent with the Clean Air Act (see section VIII. below). The Clean Air Act requirement for consistency with the SIP's emissions reduction goals could be construed to apply only for the years that an individual SIP revision addresses. The time period later than that addressed by SIPs is in some ways analogous to the time period before SIPs are developed, and as such the emission reduction tests ("build/no-build" and less-than-1990 tests) may also be appropriate for the time period after that addressed by SIPs. Air dispersion modeling that directly demonstrates satisfaction of the general definition of conformity is clearly also consistent with Clean Air Act section 176(c).

EPA is proposing that the choice of conformity tests for isolated rural areas for years not addressed by a SIP should be made with the agreement of relevant state and local agencies. EPA believes this is necessary because MPOs are authorized by the Clean Air Act to determine conformity and there are no MPOs in isolated rural areas; thus, there is no single state or local agency with authority for determining conformity. Various state and local agencies may have differing perspectives on the practicality and benefits of the different conformity tests. As a result, EPA believes the method for demonstrating conformity should be a consensual decision by all relevant state and local agencies, so that all relevant actors in an area can weigh the advantages and disadvantages of each method of demonstrating conformity.

EPA also believes that the methodology for performing air quality dispersion modeling should have the agreement of all relevant state and local agencies. The air agency traditionally has responsibility for performing air quality dispersion modeling, but some other agency may take responsibility for such modeling with respect to a given project for the purposes of

transportation conformity in rural areas. Therefore, EPA believes that all agencies should agree on the methodology to be used.

EPA considered requiring EPA approval of the modeling methodology used in isolated rural areas, because air quality dispersion modeling used in SIPs is traditionally governed by EPA guidance and regulations. If air quality dispersion modeling that is used to demonstrate conformity with the purpose of the SIP is based on different assumptions than the SIP itself used, the determination of conformity could be suspect. However, commenters convincingly argued that requiring concurrence of the state air agency accomplishes the goal of assuring consistency with the SIP's air quality dispersion modeling methodology, and that further concurrence by EPA would be an unnecessary administrative burden for isolated rural areas.

The option to demonstrate conformity using air quality dispersion modeling in certain cases was specifically requested by conformity implementers. Because EPA believes using air quality dispersion modeling for conformity demonstrations for years not addressed by SIPs would be consistent with Clean Air Act section 176(c) requirements (see above), EPA is proposing this additional flexibility for all isolated rural areas. Areas for which air quality dispersion modeling is too resource-intensive may of course choose one of the other methods of demonstrating conformity.

EPA considered allowing isolated rural areas to include non-federal projects in either the "build" or "no-build" case when performing the "build/no-build test," at the discretion of state and local air and transportation agencies. Conformity implementers and interested parties had noted that because regionally significant federally funded or approved transportation projects occur relatively infrequently in isolated rural areas, considering (and potentially offsetting) the emissions impacts of non-federal projects posed an unfair burden on the few federal projects. However, EPA believes that despite the differing practical considerations for urban and rural areas, there is no legally defensible distinction between what constitutes a contribution to emissions reductions in rural vs. urban areas. Because EPA believes that the "build/no-build" test demonstrates contribution to emissions reductions only when new non-federal projects are included in the "build" case, EPA is not proposing to alter the build/no-build test's treatment of non-federal projects in rural areas.

Some conformity implementers suggested to EPA that conformity in isolated rural areas be demonstrated using a project-level "build/no-build test." Although it is true that isolated rural areas do not have local transportation plans and TIPs as referred to in Clean Air Act section 176(c)(2) (C) and (D), EPA believes that it is the intent of the Clean Air Act for the regional emissions impacts of transportation projects to be considered in the context of other transportation projects in the nonattainment or maintenance area. Furthermore, EPA questions whether it is possible for areas concerned with regional pollutants to determine whether a project will cause or contribute to new violations or exacerbate existing violations without considering other transportation projects planned for the area. Therefore, EPA is not proposing the option to use a project-level analysis for the build/no-build test in rural areas.

## VI. Modeling Requirements

### A. Network Modeling Requirements

#### 1. Deadline for Use of Network Models

This proposal would require that serious CO and serious, severe, and extreme ozone areas use network models to support conformity determinations by January 1, 1997. This requirement would apply only to those metropolitan planning areas with an urbanized area population over 200,000. Areas that are already using accepted network modeling practices would be required to continue using them for conformity analyses performed before January 1, 1997. Areas would continue to be required to have a consultation process to select regional models and assumptions.

The existing transportation conformity rule required that all serious CO and serious and above ozone areas use network modeling for conformity analyses by January 1, 1995. This proposal extends the deadline to January 1, 1997. EPA received several comments related to the ambitious nature of the 1995 deadline, and it has become increasingly apparent that the original deadline is creating difficulties for several areas that have been unable to comply by that date. Based on comments received, EPA has determined that January 1, 1997, would be a reasonable extension of the deadline. EPA believes that this deadline would allow areas experiencing difficulties to improve and implement their network models, while requiring that areas currently using network modeling continue to do so prior to that date.

In serious CO areas and serious and above ozone areas, conformity determinations may be made after January 1, 1997, based on regional emissions analysis that does not use network modeling only if that regional emissions analysis was performed in support of the proposed conformity determination before January 1, 1997. It is not necessary for the MPO or DOT to complete its determination process before January 1, 1997, if the regional emissions analysis supporting the determination was completed before January 1, 1997. It is also permissible for a proposed transportation plan or TIP, and/or the regional emissions analysis associated with it, to be modified to a reasonable degree after January 1, 1997, as a result of the public participation process.

This interpretation of the deadline for modeling improvements is described in a December 30, 1994, letter from Philip A. Lorang, EPA's Director of Emission Planning and Strategies Division, to Cynthia Burbank, FHWA's Environmental Analysis Division Chief, and Samuel Zimmerman, FTA's Director of the Office of Planning.

#### 2. Areas Subject to Deadline for Use of Network Models

This proposal would limit the requirement to use network modeling to metropolitan planning areas with an urbanized area population over 200,000, whereas the existing rule's requirements apply to all nonattainment areas in these classifications, regardless of population or urbanization. The proposed limitation results from a general concern that the modeling requirements are overly burdensome for small and rural areas within serious ozone nonattainment areas, such as Martha's Vineyard Island, Massachusetts. EPA considered but is not proposing a three-tiered scenario in which an area's modeling requirements would have varying specificity based on its population and whether it was urban or rural. Commenters believed that such a detailed proposal would unnecessarily increase the rule's complexity. As a result, EPA decided to specify requirements only for those serious, severe and extreme areas with an urbanized area population over 200,000. The 200,000 population level was chosen because it is also the population level used to delineate transportation management areas (TMAs). EPA believes that these limitations would ensure that smaller areas no longer are required to use unnecessarily stringent network modeling procedures and methods.

EPA received a comment that suggested a specific, two-part process for network model improvements in serious CO and serious and above ozone nonattainment areas. The first part recommended an expanded, tiered set of deadlines based on nonattainment status, population, and growth rate, with added flexibility through a waiver provision if mobile sources were clearly not a factor in an area's nonattainment problem. The second part suggested that the MPO prepare a strategic plan for the area's modeling improvements. The MPO would also be responsible for encouraging public participation in this process and making available for public comment the documentation of conformity determinations and information relevant to improving the regional analysis systems.

EPA decided not to propose this approach for several reasons. First, the tiered deadline concept would expand the modeling requirements to areas not currently affected under the existing rule. EPA believes that these modeling requirements are not necessary in all nonattainment areas and that this concept would further increase the rule's complexity. Second, although EPA agrees with the importance of strategic planning in modeling improvements, the Agency believes that the existing interagency consultation process provides areas with the necessary flexibility in planning for modeling improvements.

#### 3. Content of Modeling Requirements: Request for Comment

In today's proposal, EPA is proposing regulatory text that would amend the requirements addressing the characteristics of network models. Under § 51.452(b)(93.130(b)) of the November 1993 conformity rule, network-based models used in serious and above CO and ozone areas for conformity analyses are required to possess eleven specific modeling attributes. EPA originally developed these eleven attributes in consultation with conformity stakeholders and with the understanding that they represented modeling procedures that are currently available and in practice. EPA continues to believe that these modeling attributes would encourage improved network-based modeling.

However, stakeholders have since suggested that the modeling requirements in the existing rule create too much complexity and rigidity in the conformity rule. As a result, EPA is proposing regulatory text today that would remove these eleven modeling attributes from the rule and replace them with modeling guidance

periodically issued by EPA and DOT. Today's proposal is described below as Option 1.

Since several stakeholders have expressed concern over the primary option EPA is proposing today (Option 1), two alternative options are also described below. All three of the options described below would apply to nonattainment areas with urbanized population over 200,000, as described above. EPA requests comment on all of these options, and depending on the public comment received, EPA may finalize one of these alternative approaches, instead of the primary option EPA is proposing today.

EPA believes that the conformity rule would still be consistent with the letter and intent of Clean Air Act section 176(c) if any of the proposed changes to the modeling requirements are adopted. Since the statute does not specifically address modeling requirements, EPA believes that so long as the modeling requirements continue to ensure that conformity determinations are based on sound quantitative analysis, EPA has the discretion to determine appropriate methods for implementing those requirements.

*Option 1: Address Network Modeling Attributes in Guidance.* EPA proposes today that the specific attributes of network models that are required under the existing transportation conformity rule be removed from the regulatory text and instead be addressed in guidance documentation. EPA believes that this proposal will simplify the conformity rule and ensure that areas will be able to choose the modeling procedures that best match their current modeling and air quality planning needs, resource constraints, and technical expertise capability.

In order to ensure that appropriate modeling tools are employed, EPA and DOT will periodically issue modeling guidance comprised of technical documentation and other references describing available modeling procedures. This guidance is likely to be a combination of existing and new documents or references to technical information taken from a variety of sources. Many of the detailed attributes required under the existing transportation conformity rule will be referenced in this guidance. By issuing technical guidance documents on a regular basis, EPA and DOT will be able to communicate new modeling practices and encourage continuous improvement over time.

EPA is aware that removing the regulatory requirements governing network model performance may be perceived by some to be an endorsement

of less rigorous modeling practices. However, EPA and DOT remain committed to developing and encouraging improved transportation models and to ensuring that areas continue to employ good modeling practices. Today's proposal is intended as a streamlining measure, not a relaxation of standards for acceptable modeling. EPA believes that guidance regarding available modeling techniques will facilitate model improvement at least as well as including specific modeling requirements in the conformity rule, while responding to local needs for flexibility. The agencies believe that agreement regarding appropriate modeling techniques and improvements for each area should be an important focus of the interagency consultation process as currently required by § 51.402 (c)(1)(i) and (c)(6) and § 93.105 (c)(1)(i) and (c)(6).

*Option 2: Retain Network Model Performance Requirements in Existing Conformity Rule.* This option would retain all of the eleven characteristics of network models that are required in the November 1993 conformity rule. For example, network models in these areas would continue to be required to meet performance-based standards such as capacity-sensitive assignment and reasonable agreement between travel times used in trip distribution and resulting from assignment. EPA continues to believe that these modeling attributes reflect the current consensus in the transportation and air quality planning professions on minimum acceptable modeling practices.

*Option 3: Streamline Existing Modeling Attributes and Address Additional Attributes in Guidance.* This option would streamline the existing conformity rule, but retain certain requirements that provide for minimum acceptable model performance.

The streamlined requirements would be as follows: (1) Network-based models must be validated against observed peak and off-peak ground counts for a base year that is not more than 10 years prior to the date of the conformity determination; (2) land use, population, employment, and other network-based modeling inputs must be based on the best available information and must be appropriate to the validation base year; (3) peak and off-peak travel demand and travel times must be provided, and a capacity-sensitive assignment methodology must be used; (4) the model(s) must use and document a logical correspondence between the assumed scenario of land development and use and the future transportation system for which emissions are being estimated; and (5) network-based

models must 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 would address the remaining attributes in modeling guidance that would be jointly issued and regularly updated by EPA and DOT. Conformity stakeholders would be involved in the development of this modeling guidance to encourage a wide exchange of ideas about current and available modeling practices. EPA believes that this process itself would ensure that the modeling guidance is a useful, effective tool in informing areas about available modeling improvements.

#### *B. Adding Non-exempt Projects to the Plan/TIP Without Regional Analysis*

##### 1. Description of Proposal

This proposal would, under some circumstances, allow a transportation plan and TIP to be amended to include additional non-exempt projects without a full-scale regional emissions analysis based on network modeling. The alternate emissions analysis procedure would require the concurrence of the federal, state, and local air and transportation agencies. This flexibility would not become effective until EPA and DOT have completed their review and evaluation of alternate procedures that are suggested during the public comment period (see "Request for Information for Guidance," below) and made this documentation publicly available. This proposal would still require a conformity determination for the plan/TIP amendment, including public participation, interagency consultation, and other relevant requirements of the transportation conformity rule. This proposal would only change the rigor of the supporting regional emissions analysis.

Under the existing rule, every plan/TIP and plan/TIP amendment requires a conformity determination based on a regional emissions analysis that meets the requirements of § 51.452/§ 93.130. The regional emissions analysis, which includes projects in the plan/TIP and all other regionally significant projects in the nonattainment or maintenance area, is used to demonstrate that the budget test and/or emission reduction tests are satisfied. Under § 51.452, certain areas are required to use network modeling to perform this regional emissions analysis.

This proposal would allow less rigorous analysis to demonstrate that the plan/TIP as amended satisfies the budget test and/or emission reduction tests. Subsequent plan/TIP conformity

determinations based on full regional emissions analysis would, of course, include the recently added projects, because regional emissions analysis must include all regionally significant projects that are planned or underway. Any plan/TIP conformity determination based on less rigorous analysis would not be considered a conformity determination for the purposes of § 51.400/§ 93.104, "Frequency of Conformity Determinations," which require that conformity determinations be made no less frequently than every three years. The less rigorous analysis would not provide a complete consideration of projects in the transportation plan and TIP using the latest emissions projections and assumptions. The transportation plan and TIP would therefore have to be found to conform based on a full-scale regional emissions analysis (including network modeling, where required) at least every three years.

## 2. Rationale

EPA is proposing this change in response to stakeholder requests for this flexibility. Some stakeholders commented that it may be costly and resource-intensive to perform a full-scale regional emissions analysis to add a regionally significant project to a transportation plan and TIP. These stakeholders proposed that the conformity rule allow areas the flexibility to establish alternative procedures for regional emissions analysis that would demonstrate that an additional project, when considered with emissions projected for the conforming transportation plan and TIP, does not cause the plan/TIP to exceed the motor vehicle emissions budget and/or fail to satisfy the emission reduction tests. Stakeholders supporting this flexibility suggested that it is necessary only in extraordinary circumstances and would not be used on a routine basis. Other stakeholders expressed concern that such flexibility could be used to advance significant projects without the full scrutiny of the conformity process.

EPA agrees that there may be limited instances where the impact of regionally significant non-exempt projects on emissions from the currently conforming transportation plan and TIP could be determined without full-scale regional analysis, and that exceptional circumstances may arise where such flexibility is appropriate. However, this flexibility is to be exercised as an exception and not on a regular basis.

EPA would allow this flexibility to be used only after a review and evaluation of types of alternate procedures has been documented, because of the

potential for this flexibility to undermine the integrity of the conformity process if improperly used. Conformity's purpose is to consider the long-term impacts of projects and to make transportation planning decisions within the context of all proposed projects, instead of on a project-by-project basis. In almost all cases, regional emissions impacts cannot be determined on a project-by-project basis or without considering the aggregate of projects in an area and the interactions among them. The conformity provisions were in part a response to the difficulty of assessing air quality impacts on a project-by-project basis. As a result, it is not clear what type of limited analysis would be appropriate and under what circumstances. Areas will need guidance to address these issues. This guidance will be provided in the review, evaluation, and documentation of alternate procedures that are suggested during the public comment period, through periodic updates of reasonable and available measures, and through the interagency consultation process.

Stakeholders proposed that the federal, state, and local transportation and air agencies should concur on each use of this flexibility. EPA agrees with such a concurrence requirement since there are not well-established, existing alternatives and because the transportation planning process and the conformity process should not be compromised if there is not agreement among all of the agencies that the existing circumstances warrant the use of this flexibility. As described in the conformity rule's consultation requirements, 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.

EPA foresees instances where use of this flexibility would not be appropriate. For example, it would not be appropriate if planning assumptions have changed, or if other information indicates that the regional emissions analysis supporting the currently conforming transportation plan and TIP is not adequate to determine that the budget test and/or the emission reduction tests would be satisfied. It would also be inappropriate if the transportation plan and TIP amendment is not only adding projects, but deleting other projects and changing implementation dates in order to remain fiscally constrained. In this case, the plan/TIP amendment's scope would be too broad to justify a limited emissions analysis.

## 3. Request for Information for Guidance

EPA and DOT recognize that there may be some alternate procedures for determining the impact projects would have on regional transportation-related emissions that are more expeditious and less costly than a network-based analysis. As a result, EPA and DOT are requesting suggestions for procedures to add non-exempt projects to the plan/TIP without a complete network-based analysis. If documentation is available for these procedures, please provide it if possible.

Reasonable methods or approaches may be included in guidance. However, EPA and DOT believe that the flexibility for non-exempt projects (as described above) should not be finalized if reasonable alternate approaches have not been identified for determining the regional emissions impacts from individual transportation projects. Therefore, this flexibility would not be offered unless EPA and DOT receive comment that identifies such alternate methods or approaches.

Some stakeholders commented about the resources needed to perform a full-scale regional emissions analysis to add a regionally significant project. EPA and DOT are therefore requesting information in the following areas: (1) How often the need arises to add non-exempt projects between TIP update cycles; (2) the number of projects that may be delayed without this flexibility; (3) the full-scale network modeling process currently used for the regional emissions analysis to support conformity determinations (including number of model runs, number of emissions model runs, etc.); (4) the difference in effort required to add a single or limited number of projects as compared to a full-scale conformity analysis; and (5) which agencies are responsible for socioeconomic data development, travel modeling, and emissions modeling, including the percentage of each agency's involvement in conducting the conformity analysis.

## VII. Consequences of SIP Disapproval

### A. Description of Proposal

In today's action EPA proposes as a primary alternative regulatory language that specifies that following a 120-day grace period after final EPA disapproval of a control strategy SIP or maintenance plan without a protective finding, the only transportation projects that could be approved (and thus grandfathered from future conformity lapses) would be those included in the first three years of the currently conforming transportation plan and TIP (and exempt projects). No

new transportation plans, TIPs, plan/TIP amendments or projects (or projects in the out-years of the transportation plan and TIP) could be approved. If any single phase of a transportation project is included in the first three years of the transportation plan/TIP, all phases of the project would be able to proceed following a disapproval, provided that all phases of the project were included in the transportation plan/TIP conformity analysis. Conformity determinations are required to analyze entire projects rather than individual phases.

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 motor vehicle emissions budgets inadequate during its 45-day review period. If such a replacement SIP does not become applicable to conformity determinations 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 currently conforming plan and TIP.

During the 120-day grace period, transportation plans, TIPs, and projects could be found to conform using the disapproved budgets (if no replacement SIP applies for transportation conformity purposes). This 120-day grace period is intended to allow areas to complete conformity determinations that were in process at the time of EPA's final disapproval.

Under both today's proposal and the existing conformity rule, consequences would occur following any EPA final disapproval action on a control strategy SIP or maintenance plan without a protective finding, even if the disapproval is limited or partial. The motor vehicle emissions budget is sufficient only if the SIP as a whole satisfies the Clean Air Act requirements for reasonable further progress, attainment, or maintenance. 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 reasonable further progress, attainment, or maintenance, and it is not possible to determine whether consistency with the motor vehicle emissions budget will result in a level of emissions consistent with reasonable further progress, attainment, or maintenance.

#### *B. Request for Comment*

Pending the opportunity to consider thoughtful comments from all interested parties, EPA is proposing today as a primary alternative the regulatory text discussed above because EPA believes it balances the conflicting goals articulated by stakeholders. EPA requests comment on how this proposal addresses stakeholder issues and concerns identified below. EPA also requests comment on whether other approaches are preferable, such as aligning the conformity lapse timeframe with the highway sanctions time clocks for SIP disapprovals without protective findings to make this process consistent with the conformity lapse process for other SIP failures. Alternatives to the primary option EPA is proposing today are described below. Depending on the public comment received, EPA may finalize one of these alternative approaches, instead of the primary alternative.

#### *C. Discussion of Issue*

Conformity stakeholders have raised the issue of the appropriate conformity consequences when EPA disapproves a control strategy SIP without making a protective finding. EPA disapproval of a SIP without a protective finding is essentially a finding that the SIP does not have identified strategies to reach attainment (or reasonable further progress or maintenance), and the motor vehicle emissions budget is not adequate to satisfy Clean Air Act requirements. Final EPA SIP disapprovals require full notice-and-comment rulemaking.

The November 1993 transportation conformity rule states that after a 120-day grace period following final EPA SIP disapproval, no new transportation plans, TIPs, or projects may be approved. Only previously approved projects ("grandfathered" projects) and exempt projects may proceed. In other words, transportation plan/TIP conformity lapses. The lapse is removed when a new control strategy SIP or maintenance plan (including motor vehicle emissions budgets) is submitted to EPA.

Some stakeholders have suggested that conformity should never lapse as a result of a SIP failure before Clean Air Act highway sanctions are imposed, because highway sanctions (not transportation conformity) are the Clean Air Act mechanism for addressing SIP failures. To a considerable degree EPA agrees with this reasoning, and EPA has amended the conformity rule to align conformity lapse with highway sanctions imposition in the case of all

SIP failures except disapproval without a protective finding.

However, there are substantive conformity issues with respect to SIP disapproval without a protective finding. If an area does not have sufficient adopted control strategies to attain the standards or make reasonable further progress towards attainment, should the area be committing funds to new transportation projects? If so, on what basis? Should it proceed with projects that already have been planned and upon which businesses and the public may already be relying in their own future plans, but stop creating new plans and expectations? In these cases, how would an area demonstrate that the transportation plan, TIP, or project would not increase the frequency or severity of existing violations, or contribute to new violations, or delay attainment?

These issues are particularly important in the context of the conformity flexibilities in today's proposal. As described in sections II. and III. of today's action, EPA is proposing that consistency with submitted SIP budgets would become the sole emissions-related conformity test for transportation plans and TIPs, even before EPA approves the SIP and confirms that consistency with its motor vehicle emissions budget is sufficient to achieve reasonable further progress, attainment, or maintenance. Some stakeholders are concerned that because a significant amount of time is likely to elapse between initial submission of the control strategy SIP and any subsequent EPA disapproval, a significant number of transportation projects could be found to conform (and thus grandfathered) on the basis of an ultimately unacceptable motor vehicle emissions budget before final EPA disapproval actually occurs. These stakeholders are concerned about irreversible commitments that might make Clean Air Act requirements increasingly difficult to meet.

Other stakeholders emphasize that the disruption to the ongoing transportation planning process should be minimized. They believe that people and businesses begin to rely on projects in an approved plan and TIP even though project-level conformity findings have not been made, and conformity lapse immediately upon EPA's final disapproval is unduly disruptive.

#### *D. Discussion of Options*

Stakeholders have identified a number of options to address the consequences of EPA SIP disapproval without a protective finding. These options address the concerns described

above to varying degrees. EPA is interested in receiving comments on the alternative options described below and may finalize one of these options, instead of the primary option described above.

#### 1. No Project Approvals (Conformity Lapse) Beginning Immediately Upon EPA Final Disapproval Without a Protective Finding

Some stakeholders have suggested that no more projects should be approved (grandfathered) once EPA issues a final disapproval. However, these stakeholders generally accept that projects found to conform between submission and final disapproval should not be halted, even once the SIP has been disapproved. This option would minimize commitments that could ultimately be inconsistent with attainment or maintenance, until another SIP that would be a better basis for determining conformity is submitted to EPA.

#### 2. Retain Existing Conformity Rule

As described above, the November 1993 transportation conformity rule allows transportation plans, TIPs, and projects to be approved for 120 days following EPA's final disapproval of a SIP without a protective finding. Following the 120-day grace period, no transportation plans, TIPs, or projects can be approved. This approach is similar to option 1 above, but the 120-day grace period helps reduce disruption to approvals that are underway at the time of EPA's final disapproval.

#### 3. Allow Approval of Projects in the First Two Years of the Transportation Plan/TIP

Some stakeholders advocate allowing previously planned transportation projects to be approved and grandfathered, but not approving new transportation plans, TIPs, or projects until a new SIP has been submitted to EPA. For example, some stakeholders endorsed a proposal that no transportation plans, TIPs, or amendments should be found to conform after EPA's final disapproval of a SIP, and only those projects scheduled for implementation during the first two years of the TIP, and projects found by the MPO and the state air agency to contribute to emissions reductions, should be allowed to proceed.

This option is similar to that being proposed by EPA today as the primary alternative. This option prevents new commitments from being made, but allows projects previously planned to occur in the short term to proceed, in

order to minimize disruption to the transportation planning process.

#### 4. No Consequences Until Clean Air Act Highway Sanctions Are Applied

Other stakeholders advocate allowing new transportation plans, TIPs, and projects to be approved and grandfathered using the build/no-build test or the disapproved motor vehicle emissions budget until Clean Air Act highway sanctions are imposed. Highway sanctions under section 179 would be imposed two years following EPA's final disapproval unless the deficiency leading to the disapproval has been corrected prior to that time. These stakeholders believe that it is more consistent with the Clean Air Act to have Clean Air Act section 179 highway funding sanctions being the trigger for consequences of a SIP disapproval. This change would also simplify the conformity rule by having all conformity lapses associated with SIP failures occur when highway sanctions are imposed.

#### *E. Rationale for Primary Option Being Proposed*

EPA believes that the primary option it is proposing today (as described in section VII.A.) best balances the concerns expressed by stakeholders. EPA is proposing to allow projects in the first three years of the transportation plan/TIP to proceed, instead of those in the first two years, as suggested in option 3. Some conformity stakeholders expressed concern that restricting the "grandfathering" to the first two years of the transportation plan/TIP would be unduly disruptive to the transportation planning process, especially because the TIP normally addresses a minimum of three years. EPA believes that the primary option provides a better balance between the competing objectives of minimizing new commitments and minimizing disruption to the transportation planning process.

#### VIII. Mismatch in SIP/Transportation Plan Timeframe

##### *A. Description of the Issue*

The existing transportation conformity rule requires the conformity of transportation plans and TIPs to be demonstrated for the entire 20-year timeframe of the transportation plan. However, control strategy SIPs and maintenance plans generally address a significantly shorter timeframe. For example, attainment demonstrations are only required to address the years through the attainment year, and maintenance plans are only required to initially address a 10-year period (with

a provision for a second 10-year appraisal).

For the years in the timeframe of the transportation plan that are not addressed specifically by a SIP, the existing conformity rule requires emissions to be consistent with the SIP motor vehicle emissions budget(s) for the last year for which the SIP defines control strategies and budgets. For example, before a maintenance plan has been submitted, emissions predicted for the years after the attainment year must be consistent with the attainment year budget(s). Emissions in years after the first maintenance plan must be consistent with the motor vehicle emissions budget(s) for the last year of that maintenance plan.

Several conformity implementers have commented that there should be a more flexible conformity test for the years that are not specifically addressed by the SIP. Conformity implementers have pointed out several difficulties caused by the existing transportation conformity rule's requirements for the "out-years" of the transportation plan.

First, there are generally no adopted control measures to address VMT growth in years that are not specifically addressed by the SIP. As a result, it becomes the burden of the conformity process—and potentially the MPO alone—to address long-term growth issues and offset emissions increases. Placing the burden on the MPO to offset emissions from long-term growth can be problematic because MPOs generally lack the authority to adopt and enforce areawide emission controls. In areas such as PM<sub>10</sub> areas this problem is particularly acute, because motor-vehicle-related PM<sub>10</sub> emissions are directly related to VMT. Technological improvements in the motor vehicle fleet over time do not significantly reduce motor vehicle PM<sub>10</sub> emissions related to reentrained dust.

In addition, the existing conformity rule's requirement to use the budget established for the last year of the maintenance plan for all subsequent years poses special difficulties. In many areas, the motor vehicle emissions budget will decline over the 10 years of the first maintenance plan. This is generally because newer, cleaner cars will be added to the motor vehicle fleet as older cars are retired, so the emissions per VMT decrease. At the same time, emissions from stationary sources are often related to economic and population growth, and are thus projected to increase over time. As a result, many areas demonstrate maintenance of air quality standards with declining motor vehicle emissions

budgets and increasing stationary source emissions.

However, over time the effect of fleet turnover decreases, because all cars in the fleet eventually meet applicable standards. In addition, increases in VMT may begin to offset the emissions decreases resulting from fleet turnover. Thus, motor vehicle emissions generally are projected to increase in the years after the first 10-year maintenance plan, and the motor vehicle emissions budget established for the last year of that maintenance plan may in fact represent a low point in the motor vehicle emissions projected for the 20-year maintenance period. Requiring motor vehicle emissions in the years after the first maintenance plan to be consistent with the budget for the last year of that maintenance plan may be difficult without additional control measures for stationary or mobile sources.

#### *B. Request for Comment*

EPA is not proposing specific regulatory text to address this "mismatch" issue at this time. However, EPA requests comment on three options, and EPA proposes to include one of the options in the regulatory text of the final rule.

##### 1. Existing Transportation Conformity Rule

The first option is to continue the existing conformity rule's requirements. According to the Clean Air Act, one of the purposes of conformity is to ensure that transportation improvements do not cause or contribute to new violations. The motor vehicle emissions budget for the attainment year represents the level of motor vehicle emissions that is consistent with attainment of the standard. Therefore, keeping motor vehicle emissions in future years equal to or less than that budget should ensure that motor vehicles will not cause or contribute to a new violation. If motor vehicle emissions increase above levels that the SIP identifies as necessary for attainment, it may be difficult to state that a new violation would not result, as conformity requires.

Regarding the comments that the existing conformity rule inappropriately places the burden on the MPO to address long-term growth issues, it is in fact an important goal of conformity to focus attention on the long-term impacts of transportation investments and policies. To the extent that an area has not reconciled the impacts of growth and transportation policy with air quality goals, it is appropriate that conformity provide the forum and impetus for state and local governments to do so. Although the MPO may not

itself have the authority to adopt and enforce necessary measures, conformity is determined through an interagency process which includes the state and local governments which do have that authority. It is appropriate that the long-term growth issues affecting a local area be addressed through the cooperation of state and local air and transportation agencies. The fact that the MPO has legal responsibility to determine conformity does not mean it alone must develop and implement the additional control measures that are necessary. The state also shares an interest in developing conforming metropolitan transportation plans and TIPs and would be expected to share responsibility for facilitating conformity.

Maintaining the existing conformity rule's requirements regarding the applicability of motor vehicle emissions budgets for future years would also encourage the SIP process to address longer timeframes, which is ultimately the preferable solution. Doing so should avoid costs and burdens of not addressing long-term issues now. The difficulties associated with demonstrating conformity in years that are not addressed by the SIP would be reduced if the SIP established acceptable motor vehicle emission levels for such future years. This has already occurred in some areas.

The existing conformity rule already has some provisions to address the difficulties associated with using the budget for the last year of the maintenance plan for subsequent years. For example, the maintenance plan could establish larger motor vehicle emissions budgets for years after the last year of the maintenance plan by projecting motor vehicle emissions and emissions from other source categories in future years. Provided the projected total emissions are less than the total emissions in a previous year with clean data, the motor vehicle emissions projections could be used to establish a motor vehicle emissions budget. If the projected total emissions are less than the total emissions in a previous year with clean data, the difference ("safety margin") could also be applied to the motor vehicle emissions budget.

##### 2. Emission Reduction Tests

A second option would be to require the emission reduction tests ("build/no-build test" and less-than-1990 test) for demonstrating conformity in years not addressed by submitted or approved control strategy SIPs or maintenance plans. Demonstrating conformity for years later than those addressed by SIPs is in some ways analogous to the

situation of demonstrating conformity for years before SIPs are submitted, that is, no budget has been specifically developed for assessing conformity in such years. The Clean Air Act allows for "contribution to annual emission reductions" to serve as the test of conformity in the latter case, so by extension, it could be argued that such a test is also appropriate for years later than those addressed by SIPs. The Clean Air Act requirement for consistency with emissions in SIPs could be argued to apply only for those years that are specifically addressed by the SIP.

Although this option provides more flexibility than the existing rule for emissions increases due to population and economic growth, it has several disadvantages. First, satisfying the emission reduction tests would not ensure that motor vehicle emissions are at a level consistent with attainment or maintenance. Although the conformity test would ensure that motor vehicle emissions are no greater than they would have been without further transportation improvements, the focus is not on attainment or maintenance of air quality standards. As a result, the impact of long-term growth on attainment and maintenance will not necessarily be addressed.

The Clean Air Act requires a second 10-year maintenance plan to be submitted eight years after an area's redesignation to attainment, so the SIP process in redesignated areas will ultimately address the emissions in the years after the first 10-year maintenance plan. In the case of areas that have not yet been redesignated, however, allowing motor vehicle emissions to increase above the attainment year budget may make it increasingly difficult to develop a SIP demonstrating maintenance, and thus may delay or complicate redesignation of such areas to attainment.

Finally, conformity implementers and other interested parties have commented that the emission reduction tests are not meaningful indicators of air quality impacts, particularly because transportation modeling and emission factor modeling are often not sufficiently precise to determine significant differences between "build" and "no-build" scenarios. Experience to date has found that the emission reduction tests are frustrating and difficult to explain because they do not address the performance-oriented goals of attainment and maintenance. Although practical alternatives have not been identified for use during the period before SIPs have been developed, for years later than those addressed by SIPs,

the previously established motor vehicle emissions budgets are available.

### 3. Default Motor Vehicle Emissions Budget

A third option is to maintain the existing rule's requirements for the years after the attainment deadline and before a maintenance plan has been submitted, but to allow a default motor vehicle emissions budget for the years outside the maintenance plan's timeframe. Instead of requiring the motor vehicle emissions budget for the last year of the maintenance plan to continue to apply for subsequent years, the motor vehicle emissions budget for subsequent years could be the motor vehicle emissions in the year of redesignation.

Like the emission reduction tests option, this option would not ensure that motor vehicle emissions are consistent with maintenance of air quality standards. Without considering emissions from sources other than motor vehicles, there is no assurance that the motor vehicle emissions in the year of redesignation will also be consistent with continued maintenance of the standard in future years. However, this problem could be at least somewhat reduced with additional features to this option. For example, the rule could require the default budget to be established in the maintenance plan and accompanied by some type of demonstration that when the default motor vehicle emissions budget is considered together with expected growth in area and stationary source emissions, the standard will be maintained.

The default emissions budget option may be preferable to the emission reduction tests option for the years after those addressed by maintenance plans for two reasons. First, conformity implementers have expressed a preference for budget tests instead of the more abstract emission reduction tests. Second, unlike the emission reduction tests option, this option would provide a cap on motor vehicle emissions growth. Although the cap is not necessarily tied to maintenance, it does not allow emissions due to population and economic growth to revert back to 1990 levels, as the emission reduction tests allow. As a result, the conformity process could still provide significant protection for the public while providing the impetus for serious consideration of long-term growth effects.

Unlike the emission reduction tests option, this option would maintain the existing rule's requirements (i.e., the attainment budget would continue to

apply for the years after the attainment deadline) until a maintenance plan is submitted. This will help prevent delays in attainment and/or redesignation.

Allowing conformity to be demonstrated using a default emissions budget that is not part of an overall maintenance strategy that addresses all emissions sources could be considered inconsistent with the Clean Air Act section 176(c) and the conformity rule's other interpretations of those provisions. However, it is also possible to argue that such an allowance is reasonable and defensible in the special circumstance of demonstrating conformity for years that have not yet been addressed by the maintenance plan.

For example, the legislative history of the Clean Air Act reveals a specific choice to require maintenance plans to address 10-year increments rather than an entire 20-year period. It could therefore be argued that it is not conformity's responsibility to ensure maintenance over a 20-year period; provided the transportation community keeps motor vehicle emissions constrained to some level previously associated with maintenance, future maintenance plans could address emissions from other sources and revise motor vehicle emissions budgets as necessary for an overall maintenance strategy. It could also be argued that the Clean Air Act's Prevention of Significant Deterioration requirements are intended to address growth in non-mobile source emissions in years not addressed by maintenance plans, and that EPA can issue SIP calls if growth in non-mobile source emissions threatens maintenance.

## IX. Public Participation

### A. Description of the Proposal

This proposal would clarify the timeframe within which information must be provided for public access under the public participation requirements in the existing conformity rule. The proposal would specify that affected agencies must provide public access to information considered by the agency in making transportation plan and TIP conformity determinations at the beginning of the designated public comment period and prior to taking formal action on conformity determinations. This proposal would define the information to include all technical and policy information considered by the agency in supporting conformity determinations.

This proposal would continue to reference and be consistent with DOT's metropolitan planning regulation (23

CFR 450.316(b)), which, among other things, requires at least a 30-day comment period in serious and above nonattainment areas. Agencies affected by this proposal would be referred to DOT's January 1995 guidance, "Public Involvement and Questions and Answers" (60 FR 5508-5512), for specific identification of the types of information to be provided to the public. EPA expects that affected agencies would refer to this guidance in providing information for public comment. The guidance specifies input assumptions such as population projections, land use projections, fares, tolls, levels of service, the structure and specifications of travel demand and other evaluation tools.

Since information supporting conformity determinations is stored in many forms, EPA interprets that this proposal's requirement would apply to information in written, graphic, and electronic form. Under this proposal, any charges imposed by affected agencies for public inspection and copying would be required to be consistent with the fee schedule in 49 CFR 7.95, which EPA believes would ensure reasonable public access to the information. EPA also notes that under the DOT metropolitan planning regulations, each MPO conducts public involvement under its own custom-tailored public involvement procedures. These procedures describe how the MPO intends to meet the performance standards of the conformity rule and metropolitan planning regulations.

### B. Discussion of Proposal

EPA is proposing this clarification to address stakeholder concerns that public participation is hindered when public access to information relied on for conformity determinations is not provided in enough time to allow for adequate public involvement. EPA agrees that public access to all of the information considered by the agency at the beginning of the public comment period is critical to ensuring effective public participation in the conformity process.

In its "Public Involvement and Questions and Answers" guidance, DOT emphasizes that an effective public involvement process should provide for an open exchange of information and ideas between the public and transportation decisionmakers, and as an overall objective, an area's public involvement process should be proactive, provide complete information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement. EPA believes that this

proposal would not only be consistent with these objectives, but that it would further the purposes emphasized in the guidance.

EPA does not believe that this proposal would be burdensome for affected agencies since it would only require that agencies provide public access to information already in their possession. This proposal would not require the affected agencies to edit, summarize existing files, or to compile new files beyond those already prepared as a part of the plan and TIP development process.

#### X. Interagency Consultation

This proposal includes several new provisions which require interagency consultation, including the choice of conformity tests and modeling methodology for rural areas; the establishment of a "default budget" in clean data areas; and the addition of non-exempt projects to the transportation plan/TIP without full regional emissions analysis. EPA is not proposing to amend § 51.402/§ 93.105 ("Consultation") to add these consultation needs to the list of specific processes that must be included in the conformity SIP's consultation procedures. EPA believes that it is clear that consultation procedures must be developed in order to use these new provisions. As a result, EPA does not believe that the complexity resulting from adding items to § 51.402 is justified. Furthermore, the proposed provisions involving additional consultation procedures are for the most part optional flexibilities for unique situations, so consultation procedures to implement these flexibilities will not be relevant for all conformity SIPs.

However, EPA emphasizes that interagency consultation on these specific provisions is a necessary part of their implementation. EPA recommends that in order to facilitate future conformity determinations, areas should develop appropriate consultation procedures as soon as possible if they expect to use these provisions.

#### XI. Streamlining and Clarification

This proposal includes numerous wording and organizational changes that would streamline and clarify the existing transportation conformity rule. Although these changes affect most sections of the existing transportation conformity rule, highlights are discussed below.

#### A. Frequency of Conformity Determinations

##### 1. Three-year Requirement

This proposal would clarify that both the MPO and DOT must redetermine conformity of transportation plans/TIPs within three years of DOT's transportation plan/TIP conformity determination. The existing transportation conformity rule is not explicit regarding the start of the three-year clock and which agencies' conformity determinations must be completed before expiration of that clock. This clarification is consistent with implementation practice to date and would help reduce confusion and ambiguity for future implementers.

##### 2. Triggers for Redetermination

This proposal would streamline the paragraph that describes which events trigger an 18-month clock for redetermination of conformity. This proposal would also move § 51.448(a)(1)/§ 93.128(a)(1), as amended on November 14, 1995, so that the requirement to determine conformity within 18 months of the initial submission of a control strategy SIP or maintenance plan is in the frequency section with the other triggers for conformity redetermination. Although the substance of the requirement is unchanged, the restructuring improves the flow and clarity of the rule.

The relocation of § 51.448(a)(1) highlights the fact that a conformity determination is required within 18 months of both the initial submission and final EPA approval of a control strategy SIP or maintenance plan. Both submission and approval trigger a redetermination of conformity, because it is not uncommon for the SIP to change between initial submission and final approval. If conformity was determined to the initial SIP submission and the SIP did not change between initial submission and final approval, the requirement to determine conformity after final approval could be satisfied without new regional emissions analysis.

##### 3. Requirement for TIP Conformity Within Six Months of Transportation Plan Conformity

This proposal would clarify existing § 51.400(a)(3)/§ 93.104(a)(3) by specifying that the TIP must be determined by DOT to conform within six months of DOT's conformity determination on a new or revised transportation plan. The existing requirement starts the six-month clock with the date of adoption of the plan.

EPA received comment suggesting that the six-month limit between transportation plan and TIP conformity determinations is not necessary and should be removed. EPA believes that this requirement should be retained because of ISTEA's (and hence, conformity's) expectation that the TIP will flow from, and be consistent with, the transportation plan. The conformity rule requires TIP conformity to be based on a consideration of all projects in the 20-year timeframe of the transportation plan. As a result, changes to the transportation plan should be reflected in the TIP's conformity determination in a timely manner.

EPA expects that in almost all cases, the plan and TIP will be developed concurrently and one regional emissions analysis will be performed to support both conformity determinations. In cases where the transportation plan and TIP are not developed concurrently, EPA believes the six-month requirement is critical to ensure that, given the changes to the transportation plan, projects from the TIP would still result in a level of regional emissions in 20 years that would not cause a new violation, worsen existing violations, or delay timely attainment.

#### B. Criteria and Procedures for Determining Conformity of Transportation Plans, Programs, and Projects: General

This proposal would consolidate several parts of the existing transportation conformity rule into § 51.410/§ 93.109 in order to create a section that provides a comprehensive overview of when and in what circumstances the budget test, emission reduction tests, and hot-spot tests are required. The section would have separate paragraphs for ozone, CO, PM<sub>10</sub>, and NO<sub>2</sub> areas and isolated rural areas so that the rule is easier to use and so that the conformity implications of Clean Air Act requirements and classifications that are unique to each pollutant are specifically addressed.

This consolidation would allow the elimination of existing § 51.464/§ 93.136 ("Special provisions for nonattainment areas which are not required to demonstrate reasonable further progress and attainment") and § 51.452(d)/§ 93.130(d) ("Projects not from a conforming plan and TIP in isolated rural nonattainment and maintenance areas"). The provisions for special situations would be discussed in the same place as provisions for other areas, thus making these provisions easier to locate and improving the clarity and user-friendliness of the rule.

As discussed in section II., the existing rule's classification system of "Phase II interim period," "transitional period," and "control strategy period" would be eliminated.

#### C. Latest Planning Assumptions

This proposal would clarify that conformity determinations must use the latest existing information regarding the effectiveness of all relevant SIP control measures, including TCMs, that have already been implemented. This would reduce confusion regarding what emission reduction credit should be assumed from vehicle inspection and maintenance programs that are included in approved SIPs and that are already being implemented.

#### D. Consultation Criterion

This proposal would clarify § 51.416/§ 93.112 ("Criteria and procedures: Consultation"), which is the section requiring conformity to be determined according to the consultation procedures of the rule, the conformity SIP, and DOT's planning regulations.

This proposal would remove the reference to the MPO so that it is clear that rural areas must also abide by interagency and public consultation requirements. In addition, this proposal removes ambiguous language that could imply that areas are not required to comply with public participation procedures after the conformity SIP is approved.

#### E. Hot-spot Tests

This proposal would consolidate and streamline existing §§ 51.424 and 51.434 (§§ 93.116 and 93.121), which address localized CO and PM<sub>10</sub> violations (hot spots). The two sections would be combined, and paragraph (c) of each of these sections would be moved to the section addressing procedures for determining localized CO and PM<sub>10</sub> concentrations (hot-spot analysis). This would reduce confusion regarding the distinction between the two hot-spot tests and streamline the discussion of both the conformity tests and the methodological requirements.

#### F. Compliance With PM<sub>10</sub> Control Measures

This proposal would clarify the existing requirement of § 51.426/§ 93.117 for SIP PM<sub>10</sub> control measures to be included in the project's final plans, specifications, and estimates. Because the final plans, specifications, and estimates are generally not developed until after the project's conformity determination, it is problematic for the existing rule to make the plans, specifications, and estimates

a condition of the project-level conformity determination. This proposal would require the conformity determination to include a written commitment to include SIP PM<sub>10</sub> control measures in the project's plans, specifications, and estimates. Such commitments would be enforceable, as required by existing § 51.458/§ 93.133 ("Enforceability of design concept and scope and project-level mitigation and control measures").

#### G. Budget Test

This proposal would combine existing §§ 51.428–51.432 (§§ 93.118–93.120) into one streamlined section that describes the budget test for the transportation plan, TIP, and project not from a conforming plan and TIP. As described in section III. of this preamble, the implementation of the budget test and the years for which budgets apply would be clarified.

#### H. Emission Reduction Tests

This proposal would combine existing §§ 51.436–51.446 (§§ 93.122–93.127), which describe the tests for emission reductions in the interim period for ozone, CO, PM<sub>10</sub>, and NO<sub>2</sub> areas, into one streamlined section that addresses all pollutants and the transportation plan, TIP, and project not from a conforming plan and TIP. This would avoid the repetition of the definitions of the "Baseline" and "Action" scenarios and improve the readability of the transportation conformity rule.

This proposal would provide that the first analysis year shall be no more than five years beyond the year in which the conformity determination is being made. The existing conformity rule requires the first analysis year to be 1995 in CO nonattainment areas and 1996 in ozone nonattainment areas. This requirement is obviously no longer appropriate, because conformity is not intended to be assessed retrospectively.

This proposal would also modify the definition of the "Baseline" scenario so that only projects that come from the first year of the previously conforming transportation plan/TIP are required to be included in the "Baseline" scenario. The existing conformity rule requires projects from the first three years of the previously conforming transportation plan/TIP to be included in the "Baseline" scenario. The proposed modification is intended to correct the perverse incentive that the existing requirement creates for areas to withhold projects with air quality benefits. Some stakeholders have commented that because the air quality benefits of projects in the second and third year of the TIP are included in the

"Baseline" after the initial TIP conformity determination, areas are holding back some projects for use in future "Action"/"Baseline" comparisons.

#### I. Transition From the Interim Period to the Control Strategy Period

Because the proposal would no longer use the terms "interim period" and "control strategy period," this proposal would consolidate and streamline existing § 51.448/§ 93.128 and better integrate its provisions into the rest of the transportation conformity rule.

Under the proposal, this section would address only the conformity consequences of various SIP failures. This section would streamline the existing requirements regarding conformity lapse resulting from SIP failures, as amended August 7, 1995, and November 14, 1995. The term "protective finding" would be included in the definitions section in order to decrease the wordiness of the requirements and improve the readability of the rule.

Some of the existing requirements of § 51.448 would be incorporated in the frequency section, the general overview of the criteria and procedures, and the budget test. Existing paragraphs (e) through (i) would be eliminated. Existing § 51.448(e) requires consultation on individual capacity-increasing projects in areas that have not yet submitted control strategy SIPs. Because all areas that are already required to submit control strategy SIPs have made such submissions, EPA believes that the requirements of paragraph (e) are no longer necessary.

Existing § 51.448(f) describes conditions under which new regional emissions analysis is not necessary in order to determine conformity to a newly submitted control strategy SIP. EPA continues to believe that new regional emissions analysis would not be necessary under the conditions described in paragraph (f). However, EPA does not believe that this provision needs to be included in the regulatory text, because the provision is not commonly used and EPA believes the provision is sufficiently well understood.

Existing paragraphs 51.448 (g) through (i) are no longer relevant given the other changes to the transportation conformity rule proposed in this notice.

#### J. Procedures for Determining Regional Transportation-Related Emissions

This proposal would generally streamline and clarify existing § 51.452/§ 93.130. Some of the clarifications are highlighted below.

### 1. Credit for Delayed Measures

This proposal would clarify that if TCMs or any other measures in the approved SIP are delayed beyond the scheduled date, emission reduction credit may not be included in the emissions analysis until implementation is assured. This clarification would ensure that the requirements for latest planning assumptions and restrictions on assuming credit for regulatory measures are logically and consistently applied. As described in the discussion of the clarification to the "Latest planning assumptions" section, broadening discussion of TCMs to include other SIP measures would reduce confusion regarding emission reduction credit for vehicle inspection and maintenance programs.

### 2. Credit for Future Measures

This proposal would streamline and clarify the conditions under which emission reduction credit from future regulatory measures could be assumed. In addition, the proposal would add language regarding control measures that do not need a regulation in order to be implemented, but are not included in the transportation plan/TIP or the SIP. This language is intended to address measures such as increased street sweeping or street sanding specifications, which are external to the usual transportation planning process and which require some form of commitment that may not be explicitly regulatory or included in the SIP.

This proposal would allow emission reduction credit from such measures to be assumed if the conformity determination includes written commitments to implementation of the measures by appropriate entities (e.g., government agencies, private project sponsors). The conformity SIP would have to provide that written commitments that are included in conformity determinations are enforceable under the SIP. This language regarding enforceability is similar to that in existing § 51.458/§ 93.133 ("Enforceability of design concept and scope and project-level mitigation and control measures") and that included in the general conformity rule (58 FR 63214, November 30, 1993).

The proposed additional language would reduce confusion regarding these types of control measures and would allow more explicit flexibility for these measures to be developed and credited in the conformity process. The proposal would require written commitments to be included as part of the conformity determination, but would not require the commitments to be specifically

included in the SIP. By making such commitments enforceable under the SIP as a general matter, the SIP would not have to be revised to include each specific commitment.

The proposal would also allow regional emissions analyses to include emission reductions from projects, programs, or activities that are committed to in the control strategy SIP submission or the maintenance plan submission, similar to the existing conformity rule's § 51.452(a)(4). Consistent with EPA's SIP policy, SIP commitments must include a demonstration that the agency making the commitment has authority to implement the measure and that adequate personnel and funding are available for implementation.

### 3. Highway Performance Monitoring System (HPMS)

This proposal would clarify existing § 51.452(b)(2)/§ 93.130(b)(2) to specify that although HPMS estimates of VMT shall be considered the primary measure of VMT in certain cases, locally developed count-based programs and other variations from the procedure described in the conformity rule are permitted subject to the interagency consultation process. This paragraph applies to serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas with an urbanized area population over than 200,000.

In its experience implementing the transportation conformity rule since 1993, EPA has received several questions regarding what should be used as the measure of VMT in areas that are not serious or above ozone or CO areas. These areas may use HPMS (including the factoring procedure described in existing § 51.452(b)(2)/§ 93.130(b)(2)) or other locally developed programs and procedures, subject to the interagency consultation process.

### 4. Reliance on Previous Regional Emissions Analysis

This proposal would consolidate in the section on procedures for regional emissions analysis the discussion of circumstances under which new regional emissions analysis may not be necessary. This discussion is currently included in the description of the budget test for TIPs and projects not from a conforming plan and TIP (§ 51.430/§ 93.119 and § 51.432/§ 93.120). This change would streamline these budget test sections and allow a simpler discussion of what must be demonstrated in order to satisfy the budget test.

### K. Procedures for Determining Localized CO and PM<sub>10</sub> Concentrations (Hot-spot Analysis)

This proposal would restructure the procedural requirements for hot-spot analysis in order to clarify that the hot-spot tests should be satisfied using EPA "Guideline" models in specified cases and in other cases may be satisfied using other quantitative or qualitative methods. This proposal would retain the existing rule's description of what projects should have hot-spot analysis according to EPA's "Guideline" models, but would clarify that other methods may be agreed upon through the interagency consultation process and with the approval of the EPA Regional Administrator.

EPA is willing to consider methods that identify different thresholds for determining which projects would require EPA "Guideline" models. For example, although the existing rule requires all projects affecting intersections at Level-of-Service D, E, or F to be quantitatively modeled using EPA "Guideline" models, an area may develop other thresholds for quantitative analysis based on delay times, traffic volume, queue lengths, background CO levels, and/or receptor locations. EPA will consider alternative methods for thresholds provided they are sufficient to determine that projects will not cause or contribute to new CO violations or increase the frequency or severity of existing CO violations (as described by the hot-spot criterion).

In addition, if an individual project affects multiple intersections, EPA is willing to approve procedures that require quantitative modeling initially only for those intersections with the greatest potential for CO violations. If quantitative modeling of those intersections does not predict CO violations, the other intersections affected by the project would not have to be quantitatively modeled.

### L. Enforceability of Design Concept and Scope and Project-Level Mitigation and Control Measures

This proposal would clarify existing § 51.458/§ 93.133 by stating that a waiver of mitigation measures is subject to the conformity rule's public participation requirements for project-level conformity determinations. The conformity rule requires public involvement in conformity determinations for projects where otherwise required by law (e.g., the National Environmental Policy Act (NEPA)). This clarification is consistent with EPA's original intent for a waiver of mitigation measures to be permitted

through a process similar to the original conformity determination. This clarification is in response to the May 26, 1994, Petition for Reconsideration by the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club Legal Defense Fund.

#### M. Exempt Projects

This proposal would clarify Table 2 of existing § 51.460/§ 93.134 by specifying that the advance land acquisitions that are exempt are those emergency/hardship acquisitions provided for by 23 CFR 712.204(d).

As described in the preamble to the November 1993 conformity rule (58 FR 62213), the advance land acquisitions referred to in Table 2 are those "parcels that are acquired to protect a property from imminent development and increased costs which would tend to limit a choice of transportation alternatives, or are acquired to alleviate particular hardship to a property owner at his or her request. This is only allowed in emergency or extraordinary cases, and only after the state department of transportation has given official notice to the public that a preferred highway or transit location has been selected, held a public hearing, or provided an opportunity for a public hearing."

This proposal would make this intention clearer in the rule by providing the specific citation that enables this type of hardship acquisition and protective buying.

#### XII. TCM Flexibility

During the 1995 spring stakeholder meetings, EPA made a commitment to provide sample language for a SIP mechanism that would allow substitution of TCMs in a previously approved SIP without additional EPA approvals. As EPA indicated at that time, EPA believes that such a substitution mechanism is possible under existing EPA SIP policy, and no conformity rule amendment is necessary. As a result, EPA is not proposing language addressing TCM flexibility in today's action.

EPA will be drafting model SIP language and distributing it to conformity stakeholders for comment.

#### XIII. PM<sub>10</sub> Hot Spots

Section 51.454(d) (93.131(d)) of the existing conformity rule requires quantitative PM<sub>10</sub> hot-spot analysis in certain cases, but states that the requirements will not take effect until EPA releases modeling guidance and announces in the Federal Register that the requirements are in effect.

EPA has not yet released guidance on dispersion modeling for PM<sub>10</sub> hot spots due to transportation projects. As a result, the requirements for quantitative PM<sub>10</sub> hot-spot analysis are not currently in effect.

EPA has received comment requesting that these requirements should continue to be deferred until research that is underway by other organizations has been completed. For example, several PM<sub>10</sub> studies are being sponsored by the California Air Resources Board and the California Department of Transportation.

EPA hereby announces its intention to delay the further development and issuance of its PM<sub>10</sub> hot-spot modeling guidance pending the completion of research by organizations external to EPA. EPA does not intend to issue PM<sub>10</sub> hot-spot modeling guidance before 1998. As a result, the requirements of existing § 51.454(d)/§ 93.131(d) will continue to be deferred until such time as EPA releases modeling guidance and announces in the Federal Register that the requirements are in effect.

#### XIV. Signalization Projects

EPA has received several comments suggesting that signalization projects, including areawide traffic signal synchronization projects and automated traffic surveillance and control projects, should be exempt from transportation conformity requirements. However, for the reasons described below, EPA is not proposing to change the exempt project lists (Tables 2 and 3 of the conformity rule) to exempt signalization projects.

##### A. Background

The transportation conformity rule does not require conformity determinations for certain types of projects. These "exempt" projects are listed in Table 2 of the conformity rule. In contrast to other transportation projects, exempt projects can proceed toward implementation even if a currently conforming transportation plan or TIP is not in place. These projects are exempt from conformity requirements because EPA considers them to have a neutral or de minimis impact on air quality. EPA does not exempt projects that could have regional impacts—even if those impacts may be positive—because EPA believes that regionally significant projects must be analyzed together, in the context of all other regionally significant projects. In this way, the interactions among projects may be considered, and there is a meaningful estimate of regional emissions that can be compared to the SIP's motor vehicle emissions budget.

In addition to the Table 2 projects that are exempt from conformity requirements, the transportation conformity rule also exempts certain projects from regional emissions analysis. These projects, which are listed in Table 3 of the conformity rule, are not required to be included in the regional emissions analysis for the transportation plan and TIP, and can proceed toward implementation even if a currently conforming transportation plan or TIP is not in place. However, conformity determinations are required for these projects, and the local effects of these projects on CO and PM<sub>10</sub> concentrations must be considered in CO and PM<sub>10</sub> nonattainment and maintenance areas.

The existing transportation conformity rule exempts intersection signalization projects at individual intersections from regional emissions analysis, as indicated in Table 2.

##### B. Comments Supporting Exemption of Signalization Projects

EPA has received comments that advocate the exemption of signalization projects because of positive air quality and congestion mitigation impacts of signalization projects and because of the implementation delays that may result from conformity requirements.

For example, some commenters state that signalization projects decrease emissions by reducing acceleration, deceleration, and idling. They cite studies of certain signalization efforts that indicate significant reductions in CO, VOC, and NO<sub>x</sub> emissions. In addition, they state that improved efficiency of the roadway network benefits buses and high occupancy vehicle (HOV) users.

In addition, some commenters support exempting signalization projects in order to avoid delays that could result from the requirement for these projects to be included in the transportation plan and TIP's regional emissions analysis. Some commenters expressed concern that signalization projects could be delayed for up to a year while going through conformity analysis.

##### C. Rationale For Decision Not To Exempt Signalization Projects

EPA is not proposing to exempt signalization projects from conformity requirements because some of the projects may be complex, regionally significant projects whose emissions impacts must be assessed in the context of all regionally significant projects. For signalization projects that are not regionally significant, options exist to decrease the analysis burden and

potential delay of the conformity requirements, as described below.

As described above, EPA's list of exempt projects is intended to include only those projects with neutral or de minimis emissions impacts. The types of signalization projects that commenters suggest exempting are clearly not de minimis. For example, some signalization projects are areawide synchronizations that affect hundreds of intersections. Even the more limited signalization projects are often complex projects associated with roadway construction and improvement. Traffic signalization projects are not always limited to simple upgrades of hardware or installation of new signals.

In addition, signalization projects cannot generally be considered de minimis because they may affect traffic flow on a regional level. The emissions impacts may be positive or negative depending on the pollutant of concern, the speeds on the affected roads, and the effects on other roads in the network. For example, improved traffic flow and corresponding increases in traffic speed may reduce CO emissions, but may increase NO<sub>x</sub> emissions in certain speed ranges. PM<sub>10</sub> emissions may also increase. Significant changes in travel time may redistribute travel on other roads and affect mode choice. These effects need to be considered at a regional level, and the cumulative emissions impacts cannot be qualitatively determined.

EPA recognizes that not all signalization projects at multiple intersections are regionally significant, particularly if they affect a small number of miles in a large metropolitan area, or if an area's modeling capabilities are not sensitive to the more subtle regional effects of signalization projects. The existing conformity rule allows projects that are not regionally significant to be amended into the transportation plan and TIP without a new regional emissions analysis, if the regional emissions analysis supporting the currently transportation plan and TIP is still valid (e.g., planning assumptions have not changed). As a result, EPA believes that there are already sufficient opportunities to minimize the analysis burden and potential project implementation delays in cases where the signalization projects are relatively simple.

EPA considered trying to identify a threshold for determining which signalization projects at multiple intersections would not be considered regionally significant, so that these projects could be included in Table 3's list of projects that are exempt from regional emissions analysis. However,

EPA decided that this approach would be unnecessarily complex and unlikely to provide a threshold that was appropriate for all areas. Areas currently have the discretion to determine which projects are regionally significant through the interagency consultation process, and thus have sufficient flexibility to minimize the analysis burden associated with signalization projects where appropriate.

Finally, although EPA agrees that the conformity process should minimize project implementation delays as much as possible, EPA does not believe the delays associated with regionally significant signalization projects are unreasonable. If signalization projects are identified at the time the transportation plan and TIP are being developed, they can be included in the transportation plan and TIP's regional emissions analysis initially, and implementation delays should not occur. In many instances TIPs are developed annually. If transportation plan/TIP amendments between TIP cycles can be avoided with improved planning, implementation delays could be reduced.

#### XV. Conformity SIPs

Section 51.396(a) of the existing conformity rule (as amended November 14, 1995) requires conformity SIP revisions to be submitted to EPA within 12 months after the date of publication of final amendments to the conformity rule. As a result, when EPA takes final action on today's proposal, conformity SIP revisions consistent with that final action will be due to EPA within 12 months.

As specified in § 51.396(b) of the conformity rule, after EPA approves a conformity SIP revision, the federal conformity rule does not govern conformity determinations. Therefore, for areas whose conformity SIP revision has already been approved by EPA, the final amendments that will result from today's proposal will not be effective until they are included in the conformity SIP revision and EPA approves that SIP revision.

#### XVI. Public Hearing

Anyone who wants to present testimony about this proposal at the public hearing (see **DATES**) should, if possible, notify the contact person (see **FOR FURTHER INFORMATION CONTACT**) at least seven days prior to the day of the hearing. The contact person should be given an estimate of the time required for the presentation of testimony and notification of any need for audio/visual equipment. A sign-up sheet will be available at the registration table the

morning of the hearing for scheduling those who have not notified the contact earlier. This testimony will be scheduled on a first-come, first-serve basis to follow the previously scheduled testimony.

EPA requests that approximately 50 copies of the statement or material to be presented be brought to the hearing for distribution to the audience. In addition, EPA would find it helpful to receive an advance copy of any statement or material to be presented at the hearing at least one week before the scheduled hearing date. This is to give EPA staff adequate time to review such material before the hearing. Such advance copies should be submitted to the contact person listed.

The official records of the hearing will be kept open until the close of the comment period to allow submission of rebuttal and supplementary testimony. All such submittals should be directed to the Air Docket, Docket A-96-05 (see **ADDRESSES**). The hearing will be conducted informally, and technical rules of evidence will not apply. A written transcript of the hearing will be placed in the above docket for review. Anyone desiring to purchase a copy of the transcript should make individual arrangements with the court reporter recording the proceeding.

#### XVII. 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. 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.*

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 through 11/96, with OMB Control Number 2132-0529. Send any comments on the recordkeeping and reporting requirements of Transportation Conformity to:

Mr. Sean Libberton, US 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 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 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: June 21, 1996.

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:

#### **PART 51—[AMENDED]**

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

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

2. Subpart T is amended by removing §§ 51.392 through 51.464 and by revising § 51.390 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 rule must submit to the EPA and DOT

a revision to their implementation plan which contains criteria and procedures for DOT, MPOs and other State or local agencies to assess the conformity of transportation plans, programs, and projects, consistent with these regulations. This revision is to be submitted by November 25, 1994 (or within 12 months of an area's redesignation from attainment to nonattainment, if the State has not previously submitted such a revision). 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 these regulations only if the State's conformity provisions apply equally to non-federal as well as Federal entities.

(b) The Federal conformity rules under this subpart and part 93 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 required conformity implementation plan revision. 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 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 revises 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 section, the plan must address all requirements of this subpart in a manner which gives them full legal effect. In particular, the revision shall incorporate the provisions of the following sections of this subpart in verbatim form, except insofar as needed to clarify or to give effect to a

stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in these 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 of this chapter.

#### **PART 93—[AMENDED]**

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

Authority: 42 U.S.C. 7401–7671q.

4. Subpart A is revised to read as follows:

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

Sec.

- 93.100 Purpose.
- 93.101 Definitions.
- 93.102 Applicability.
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- 93.118 Criteria and procedures: Motor vehicle emissions budget.
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- 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.
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- 93.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).
- 93.125 Enforceability of design concept and scope and project-level mitigation and control measures.
- 93.126 Exempt projects.
- 93.127 Projects exempt from regional emissions analyses.

#### **§ 93.100 Purpose.**

The purpose of this subpart is to implement § 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.

*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.

*FTA* means the Federal Transit Administration of DOT.

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

*Highway project* is an undertaking to 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 of this subpart.

*Hot-spot analysis* is an estimation of likely future localized CO and PM<sub>10</sub> 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.

*ISTEA* means the Intermodal Surface Transportation Efficiency Act of 1991.

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

*Maintenance 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. 1607. It is the forum for cooperative transportation decision-making.

*Milestone* has the meaning given in sections 182(g)(1) and 189(c) of the CAA. A milestone consists of an emissions level and the date on which it is required to be achieved.

*Motor vehicle emissions budget* is that portion of the total allowable emissions defined in 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 § 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 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).

*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.

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

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

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

*Transportation project* is a highway project or a transit project.

**§ 93.102 Applicability.**

(a) *Action applicability.* (1) Except as provided for in paragraph (c) of this section or § 93.126, 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 rule 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<sub>2</sub>), and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>).

(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<sub>x</sub>) in ozone areas;

(ii) NO<sub>x</sub> in NO<sub>2</sub> areas; and

(iii) VOC, NO<sub>x</sub>, and PM<sub>10</sub> in PM<sub>10</sub> 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<sub>10</sub> 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 regulation 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<sub>10</sub> or NO<sub>2</sub> 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) and resolution of conflicts.

(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 general factors listed below and the specific processes in paragraph (c) of this section:

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

(ii) The organizational level of regular consultation;

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

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

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

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

(c) *Interagency consultation procedures: Specific processes.*

Interagency consultation procedures 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(d), projects located at sites in PM<sub>10</sub> 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<sub>10</sub> hot-spot analysis; and

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

(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.

(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 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—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—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) The following table indicates the criteria and procedures in §§ 93.110–93.119 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.—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 <sub>10</sub> hot spots.
§ 93.117 .....	PM <sub>10</sub> 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 <sub>10</sub> hot spots.
§ 93.117 .....	PM <sub>10</sub> control measures.

TABLE 1.—CONFORMITY CRITERIA—Continued

§ 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 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 paragraphs.

(1) In ozone 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 moderate and above ozone 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 SIP 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<sub>x</sub>, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% SIP or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO<sub>x</sub>. The implementation plan will be considered to establish a motor vehicle emissions budget for NO<sub>x</sub> if the implementation plan or plan submission contains an explicit NO<sub>x</sub> motor vehicle emissions budget that is

intended to act as a ceiling on future NO<sub>x</sub> emissions, and the NO<sub>x</sub> motor vehicle emissions budget is a net reduction from NO<sub>x</sub> emissions levels in 1990.

(4) Marginal and below ozone nonattainment areas that have three consecutive years of clean data and that have not submitted a maintenance plan must satisfy one of the following requirements:

- (i) The emission reduction tests as required by § 93.119;
- (ii) The State air quality agency shall determine (subject to the interagency consultation process required by § 93.105) the motor vehicle emissions of ozone precursors in the most recent year of clean data. The budget test required by § 93.118 must be satisfied, with these motor vehicle emission levels serving as the motor vehicle emissions budget; or
- (iii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment or maintenance 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) Marginal and below ozone nonattainment areas that do not have three consecutive years of clean data 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).

(6) 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 State air quality agency shall determine (subject to the interagency consultation process required by

§ 93.105) the motor vehicle emissions of ozone precursors in the most recent year of clean data. The budget test required by § 93.118 must be satisfied, with these motor vehicle emission levels serving as the motor vehicle emissions budget.

(d) *CO nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 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 paragraphs.

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot spot test required by § 93.116 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 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 moderate CO nonattainment areas with a design value greater than 12.7 ppm and serious 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 SIP or a previously submitted control strategy implementation plan revision or maintenance plan.

(4) If a moderate CO nonattainment area with a design value of 12.7 ppm or less or a not classified CO nonattainment area has two consecutive years of clean data and has not submitted a maintenance plan, one of

the following requirements must be satisfied:

(i) The emission reduction tests as required by § 93.119;

(ii) The State air quality agency shall determine (subject to the interagency consultation process required by § 93.105) the motor vehicle emissions of CO in the most recent year of clean data. The budget test required by § 93.118 must be satisfied, with these motor vehicle emission levels serving as the motor vehicle emissions budget; or

(iii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment or maintenance 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)(1) of this section).

(5) If a moderate CO nonattainment area with a design value of 12.7 ppm or less or a not classified CO nonattainment area does not have two consecutive years of clean data, one of the following requirements must be satisfied:

(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)(1) of this section).

(e) *PM<sub>10</sub> nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 that are required to be satisfied at all times, in PM<sub>10</sub> 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 paragraphs.

(1) FHWA/FTA projects in PM<sub>10</sub> nonattainment or maintenance areas must satisfy the hot spot test required by § 93.116.

(2) In PM<sub>10</sub> 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<sub>10</sub> 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 SIP or a previously submitted control strategy implementation plan revision or maintenance plan; or

(iii) 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<sub>2</sub> nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 that are required to be satisfied at all times, in NO<sub>2</sub> 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 paragraphs.

(1) In NO<sub>2</sub> 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<sub>2</sub> 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 SIP 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<sub>10</sub> 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)–(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 (Emission reductions in areas without motor vehicle emissions budgets); or

(C) Air quality dispersion modeling must demonstrate that the FHWA/FTA project, in combination with all other regionally significant projects expected

in the area in the timeframe of the statewide transportation plan, will 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 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 DOT 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 §§ 93.111–93.119, 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 rule 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 § 93.105(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 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<sub>10</sub> 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<sub>10</sub> violations or increase the frequency or severity of any existing CO or PM<sub>10</sub> violations in CO and PM<sub>10</sub> 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<sub>10</sub> control measures.**

The FHWA/FTA project must comply with PM<sub>10</sub> 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<sub>10</sub> 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)–(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 SIP 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)(3) 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 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) 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 determination 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)–(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 Clean Air Act 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<sub>10</sub> and NO<sub>2</sub> nonattainment areas; marginal

and below ozone nonattainment areas and other ozone nonattainment areas that are not subject to the reasonable further progress requirements of Clean Air Act 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<sub>10</sub> 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 nonattainment areas;

(2) NO<sub>x</sub> in ozone nonattainment areas, unless the EPA Administrator determines that additional reductions of NO<sub>x</sub> would not contribute to attainment;

(3) CO in CO nonattainment areas;

(4) PM<sub>10</sub> in PM<sub>10</sub> areas;

(5) Transportation-related precursors of PM<sub>10</sub> in PM<sub>10</sub> nonattainment areas if the EPA Regional Administrator or the director of the State air agency has made a finding that such precursor emissions from within the nonattainment area are a significant contributor to the PM<sub>10</sub> nonattainment problem and has so notified the MPO and DOT; and

(6) NO<sub>x</sub> in NO<sub>2</sub> nonattainment 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)(1) 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 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)(1) 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 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.

(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 Clean Air Act 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 in the disapproved control strategy implementation plan, unless another control strategy implementation plan revision has been submitted and its motor vehicle emissions budget applies for transportation conformity purposes, pursuant to § 93.109.

(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 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.

(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 paragraphs are met:

(1) The project was included in the regional emissions analysis supporting the most recent transportation plan and TIP conformity determination (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 paragraphs 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 vehicles 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 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 area vehicle miles traveled 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) and (2) 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 modeling 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. Areas performing network modeling with some or all procedures and methods that are available and in practice elsewhere as of January 1, 1995, must continue to do so.

(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 model.

(3) Highway Performance Monitoring System (HPMS) estimates of 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 models, a factor (or factors) may be developed to reconcile and calibrate the network-based 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 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).

(4) A transportation plan and TIP may satisfy the requirements of §§ 93.118 and 93.119 based on an alternate emissions analysis that does not use network modeling, if Federal, State, and local air and transportation agencies concur in the emissions analysis approach, and if the transportation plan and TIP in question is a revision of the previously conforming transportation plan and TIP to include a limited number of additional projects. This paragraph will not be effective until EPA and DOT review and evaluate suggested alternate methods and approaches for determining the regional emissions impact of projects and make documentation of this review and evaluation publicly available.

(5) A conformity determination based on an alternate emissions analysis as described in paragraph (b)(4) of this section would not fulfill the requirements of § 93.104(b)(3) and § 93.104(c)(3) regarding frequency of conformity determinations. Conformity must be determined according to all the otherwise applicable criteria and procedures of this subpart within three years of the last determination which did not rely on paragraph (b)(4) of this section.

(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 vehicle miles traveled 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 (Revised)" (1988), supplement A (1987) and supplement B (1993), EPA publication no. 450/2-78-027R). These procedures shall be used in the following cases, unless different procedures are developed through the interagency consultation process required in § 93.105 and approved by the EPA Regional Administrator:

(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 require hot-spot analysis.

(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 paragraph (b) of this section 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<sub>10</sub> 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 a SIP revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such a SIP revision, once it is endorsed by the Governor and has been subject to a public hearing, may be used for the purposes of transportation conformity before it is approved by EPA.

(c) A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, without a SIP revision or a SIP which establishes mechanisms for such trades.

(d) If the applicable implementation plan (or implementation plan submission) estimates future emissions by geographic subarea of the nonattainment area, the MPO and DOT are not required to consider this to establish subarea budgets, unless the applicable implementation plan (or implementation plan submission) explicitly indicates an intent to create such subarea budgets for the purposes of conformity.

(e) If a nonattainment area includes more than one MPO, the SIP may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

**§ 93.125 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<sub>10</sub> 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 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 is not exempt if the MPO in consultation with other agencies (see § 93.105(c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation.

TABLE 2.—EXEMPT PROJECTS

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**Safety**


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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.

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**Mass Transit**


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Operating assistance to transit agencies.  
 Purchase of support vehicles.  
 Rehabilitation of transit vehicles.<sup>1</sup>  
 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.<sup>1</sup>  
 Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR part 771.

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**Air Quality**


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Continuation of ride-sharing and van-pooling promotion activities at current levels.  
 Bicycle and pedestrian facilities.

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**Other**


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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.

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<sup>1</sup> In PM<sub>10</sub> 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 are exempt from regional

emissions analysis requirements. The local effects of these projects with respect to CO or PM<sub>10</sub> concentrations must be considered to determine if a hot-spot analysis is required prior to making a project-level conformity

determination. These projects may then proceed to the project development process even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 3 is not exempt from regional

emissions analysis if the MPO in consultation with other agencies (see § 93.105(c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potential regional impacts for any reason.

TABLE 3.—PROJECTS EXEMPT FROM  
REGIONAL EMISSIONS ANALYSES

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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.

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