

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 51 and 93**

[EPA-HQ-OAR-2006-0612; FRL-8303-9]

RIN 2060-AN82

**Transportation Conformity Rule Amendments to Implement Provisions Contained in the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** In this action EPA is proposing to amend the transportation conformity rule to make it consistent with Clean Air Act section 176(c) as amended by SAFETEA-LU, which was signed into law on August 10, 2005 (Pub. L. 109-59). The Clean Air Act requires federally supported transportation plans, transportation improvement programs, and projects to be consistent with ("conform to") the purpose of the state air quality implementation plan.

To make the transportation conformity rule consistent with SAFETEA-LU's revisions to the Clean Air Act, this proposal would change the regulations to reflect that the statute now provides more time for state and local governments to meet conformity requirements, provides a one-year grace period before the consequences of not meeting certain conformity requirements apply, allows the option of shortening the timeframe conformity determinations, and streamlines other provisions.

EPA is also including other proposals not related to SAFETEA-LU, such as a proposal to allow the Department of Transportation (DOT) to make categorical hot-spot findings for appropriate projects in carbon monoxide areas. EPA has consulted with DOT, and they concur with this proposal.

**DATES:** Comments must be received on or before June 1, 2007.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2006-0612, by one of the following methods:

• [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.

• E-mail: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).

• Fax: (202) 566-1741.

• Mail: Air Docket,

Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460,

Attention Docket ID No. EPA-HQ-OAR-2006-0612. Please include two copies.

• Hand Delivery: EPA Docket Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include two copies.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OAR-2006-0612. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

For additional instructions on submitting comments, go to Section I.C. of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in

[www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Rudy Kapichak, State Measures and Conformity Group, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, e-mail address: [kapichak.rudolph@epa.gov](mailto:kapichak.rudolph@epa.gov), telephone number: (734) 214-4574, fax number: (734) 214-4052; or Laura Berry, State Measures and Conformity Group, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, e-mail address: [berry.laura@epa.gov](mailto:berry.laura@epa.gov), telephone number: (734) 214-4858, fax number: (734) 214-4052.

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

- I. General Information
- II. Background
- III. Frequency of Conformity Determinations
- IV. Deadline for Conformity Determinations
  - When a New Budget Is Established
- V. Lapse Grace Period
- VI. Timeframes for Conformity Determinations
- VII. Conformity SIPs
- VIII. Transportation Control Measure Substitutions and Additions
- IX. Categorical Hot-spot Findings for Projects in Carbon Monoxide Nonattainment and Maintenance Areas
- X. Deletion of Regulation 40 CFR 93.109(e)(2)(v)
- XI. Miscellaneous Revisions
- XII. Statutory and Executive Order Reviews

**I. General Information***A. Does This Action Apply to Me?*

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

Category	Examples of regulated entities
Local government.	Local transportation and air quality agencies, including metropolitan planning organizations (MPOs).

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

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this proposal. This table lists the types of entities of which EPA is aware that potentially could be regulated by the transportation conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in 40 CFR 93.102. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

#### B. What Should I Consider As I Prepare My Comments for EPA?

##### 1. Submitting CBI

Do not submit this information to EPA through [www.regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

##### 2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

- Explain why you agree or disagree, suggest alternatives and

substitute language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.

- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns, and suggest alternatives.

- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

##### 3. Docket Copying Costs

You may pay a reasonable fee for copying docket materials.

#### C. How Can I Get Copies of This Proposed Rule and Other Documents?

##### 1. Docket

EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OAR-2006-0612. You can get a paper copy of this **Federal Register** document, as well as the documents specifically referenced in this action, any public comments received, and other information related to this action at the official public docket. See **ADDRESSES** section for its location.

##### 2. Electronic Access

You may access this **Federal Register** document electronically through EPA's Transportation Conformity Web site at <http://www.epa.gov/otaq/stateresources/transconf/index.htm>. You may also access this document electronically under the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the official public docket is available through [www.regulations.gov](http://www.regulations.gov). You may use [www.regulations.gov](http://www.regulations.gov) to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the electronic public docket. Information claimed as CBI and other information for which disclosure is restricted by statute is not available for public viewing in the electronic public docket. EPA's policy is that copyrighted material will not be placed in the electronic public docket but will

be available only in printed, paper form in the official public docket.

To the extent feasible, publicly available docket materials will be made available in the electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in the electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Section I.B.1. above. EPA intends to work towards providing electronic access in the future to all of the publicly available docket materials through the electronic public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to the electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in the electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in the electronic public docket along with a brief description written by the docket staff.

For additional information about the electronic public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

## II. Background

### A. What Is Transportation Conformity?

Transportation conformity is required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with ("conform to") the purpose of the state air quality implementation plan (SIP). Conformity currently applies to areas that are designated nonattainment and those redesignated to attainment after 1990 ("maintenance areas" with plans developed under Clean Air Act section 175A) for the following transportation-related criteria pollutants: Ozone, particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>),<sup>1</sup> carbon monoxide (CO), and nitrogen dioxide (NO<sub>2</sub>). Conformity to the purpose of the SIP means that transportation activities will not cause or contribute to new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS or "standards").

<sup>1</sup> 40 CFR 93.102(b)(1) defines PM<sub>2.5</sub> and PM<sub>10</sub> as particles with an aerodynamic diameter less than or equal to a nominal 2.5 and 10 micrometers, respectively.

### B. History of the Transportation Conformity Rule

EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the SIP. EPA first promulgated the transportation conformity rule on November 24, 1993 (58 FR 62188), and subsequently published a comprehensive set of amendments on August 15, 1997 (62 FR 43780), that clarified and streamlined language from the 1993 rule. EPA has made other amendments to the rule both before and after the 1997 amendments.

On July 1, 2004, EPA published a final rule (69 FR 40004) that amended the conformity rule to accomplish three objectives. The final rule:

- Provided conformity procedures for state and local agencies under the 8-hour ozone and PM<sub>2.5</sub> standards;
- Incorporated existing EPA and U.S. Department of Transportation (DOT) federal guidance into the conformity rule consistent with a March 2, 1999, U.S. Court of Appeals decision; and
- Streamlined and improved the conformity rule.

On May 6, 2005, EPA promulgated a final rule entitled, "Transportation Conformity Rule Amendments for the New PM<sub>2.5</sub> National Ambient Air Quality Standard: PM<sub>2.5</sub> Precursors" (70 FR 24280). This final rule specified transportation-related PM<sub>2.5</sub> precursors and when they apply in transportation conformity determinations in PM<sub>2.5</sub> nonattainment and maintenance areas.

Finally, on March 10, 2006, EPA promulgated a final rule (71 FR 12468) that established the criteria for determining which transportation projects must be analyzed for local particulate matter emissions impacts in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas. This rule established requirements in PM<sub>2.5</sub> areas and revised existing requirements in PM<sub>10</sub> areas.

### C. Why Are We Issuing This Proposed Rule?

On August 10, 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) was signed into law (Pub. L. 109-59). SAFETEA-LU section 6011 amended Clean Air Act section 176(c) by:

- Changing the required frequency of transportation conformity determinations from three years to four years;
- Providing two years to determine conformity after new SIP motor vehicle emissions budgets are either found adequate, approved or promulgated;

- Adding a one-year grace period before the consequences of a conformity lapse apply;

- Providing an option for reducing the time period addressed by conformity determinations;

- Streamlining requirements for conformity SIPs; and
- Providing procedures for areas to use in substituting or adding transportation control measures (TCMs) to approved SIPs.

SAFETEA-LU section 6011(g) requires that EPA revise the transportation conformity rule as necessary to address the new statutory provisions no later than August 10, 2007. Today's proposed rule addresses the relevant changes that SAFETEA-LU made to the Clean Air Act.

In response to the revised statutory requirements, on February 14, 2006, EPA and DOT issued joint interim guidance to provide areas that are subject to transportation conformity with guidance on implementing the changes. This guidance, as well as additional information on the transportation conformity rule and associated guidance, can be found on EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/index.htm>.

EPA has consulted with DOT on the development of this proposed rule, and DOT concurs with its content. EPA has also met with transportation and environmental organizations to discuss this rulemaking. The proposal reflects our consideration of the comments that we received through these stakeholder discussions. Documentation of these stakeholder meetings and items discussed are included in the docket for this rulemaking.

### III. Frequency of Conformity Determinations

#### A. Proposal

EPA proposes to change § 93.104(b)(3) to require that the MPO and DOT determine conformity of a transportation plan at least every four years, and § 93.104(c)(3) to require that the MPO and DOT determine conformity of a transportation improvement program (TIP) at least every four years.

#### B. Rationale

These proposed changes to § 93.104 are necessary to make the conformity regulation consistent with the law. In SAFETEA-LU, Congress amended Clean Air Act section 176(c)(4)(D)(ii) to require that conformity be determined with a frequency of four years, unless the MPO decides to update its transportation plan or TIP more frequently, or the MPO is required to

determine conformity in response to a trigger (see Section IV.). The Clean Air Act previously required transportation plan and TIP conformity to be determined every three years. These Clean Air Act provisions have been in effect as of August 10, 2005.

### C. Overlap With Transportation Planning Frequency Requirements

It is important to note how today's proposal would interact with the implementation of SAFETEA-LU's transportation planning requirements, although this proposal would not amend those requirements. In addition to changing the required frequency of conformity determinations from at least every three years to every four years, SAFETEA-LU also changed the required frequency for updating transportation plans and TIPs for transportation planning purposes. Prior to SAFETEA-LU, transportation plans in nonattainment and maintenance areas had to be updated every three years and TIPs updated every two years; now both transportation plans and TIPs must be updated every four years in these areas. However, MPOs can voluntarily update their transportation plans and TIPs more frequently. Consequently, conformity may still need to be determined more frequently than every four years, because an updated or amended transportation plan or TIP still must conform before it is adopted, regardless of the last time a conformity determination was done.

In addition, section 6001(b) of SAFETEA-LU requires DOT to issue guidance on a schedule for implementing SAFETEA-LU's transportation planning provisions, and specifically states, "The Secretary shall not require a State or metropolitan planning organization to deviate from its established planning update cycle to implement changes" made by SAFETEA-LU prior to July 1, 2007. The DOT guidance, which is available at <http://www.fhwa.dot.gov/hep/legreg.htm>, provides information on the development of transportation plans and TIPs prior to and on/after July 1, 2007, as part of SAFETEA-LU implementation. Conformity determinations continue to be required when such updates are made, as well as for any other amendments to the transportation plan and TIP made mid-cycle, unless the amendment merely adds or deletes exempt projects (see 40 CFR 93.104(b)(2) and (c)(2)). Further discussion of the implementation of the SAFETEA-LU update cycles can also be found in DOT's February 14, 2007, final

rulemaking on metropolitan and statewide transportation planning (72 FR 7224).

EPA's proposal does not change other details for implementing conformity and planning frequency requirements. Both the transportation planning update clock and the conformity update clock continue to be reset on the date of the FHWA and FTA conformity determination for the respective transportation plan and/or TIP. For more information, see DOT's May 25, 2001, guidance, available at <http://www.fhwa.dot.gov/environment/conformity/planup—m.htm>.

#### *D. Related Proposed Change: Consequences of a Control Strategy SIP Disapproval*

##### 1. Proposal

EPA is proposing to revise § 93.120(a)(2) to allow projects in the conforming TIP, rather than the first three years of the conforming transportation plan and TIP, to proceed after final EPA disapproval of a control strategy SIP without a protective finding, i.e., when a conformity freeze occurs.

##### 2. Rationale

EPA is proposing this minor change to be consistent with general implementation of SAFETEA-LU. Since 1997, the conformity rule has allowed projects in the first three years of the conforming transportation plan and TIP to proceed when a control strategy SIP is disapproved without a protective finding. EPA's rationale for allowing projects from the first three years of the transportation plan and TIP to proceed was that previous statutory provisions required TIPs to address a duration of three years. See the proposed rule of July 9, 1996, (61 FR 36124-6), and the final rule of August 15, 1997, (62 FR 43796-7) for this discussion.

SAFETEA-LU section 6001(a) revised DOT's metropolitan planning requirements by extending the duration of TIPs from three years to four years. Therefore, EPA believes that it is appropriate to revise § 93.120(a)(2) to take into account the revised duration of TIPs. As we stated in the 1996 proposed and 1997 final conformity rules, EPA believes that aligning the requirements of § 93.120(a)(2) with the duration of the TIP provides the right balance between the competing objectives of minimizing new transportation commitments after a SIP disapproval and minimizing disruption to the transportation planning process.

Instead of changing "three years" to "four years" in the proposed regulatory text, EPA simply proposes to allow a

project to proceed during a freeze if it is included in the conforming TIP. EPA is generalizing this language in order to account for the transition to new SAFETEA-LU planning requirements, because some MPOs will have three-year TIPs prior to developing four-year TIPs for SAFETEA-LU.

However, this proposed general language is not intended to change other rule requirements. Although EPA's proposed change to § 93.120(a)(2) would no longer include the phrase "conforming transportation plan," the requirements of § 93.114 continue to apply. Specifically, there must still be a currently conforming transportation plan in place to approve projects during a conformity freeze (except as noted in Section V.E., below).

#### **IV. Deadline for Conformity Determinations When a New Budget Is Established**

##### *A. Proposal*

EPA is proposing to revise § 93.104(e), which requires a new transportation plan and TIP conformity determination to be made after actions that establish a new motor vehicle emissions budget for conformity, also known as "triggers." EPA is proposing that MPOs and DOT would have two years to determine conformity of a transportation plan and TIP when a new budget is established, increased from the current rule's 18 months. An MPO and DOT must make a conformity determination within two years of the effective date of:

<bullet> EPA's finding that a motor vehicle emissions budget(s) ("budget(s)") in a submitted SIP is adequate (40 CFR 93.104(e)(1));

<bullet> EPA's approval of a SIP, if the budget(s) from that SIP have not yet been used in a conformity determination (40 CFR 93.104(e)(2)); and

<bullet> EPA's promulgation of a federal implementation plan (FIP) with a budget(s) (40 CFR 93.104(e)(3)).

The requirement to determine conformity within two years of these triggers is not directly related to SAFETEA-LU's transportation planning update requirements.

##### *B. Rationale*

The proposed change is necessary to make the conformity regulation consistent with the law. In SAFETEA-LU, Congress amended the Clean Air Act to give MPOs and DOT two years before conformity must be determined in response to one of the conformity triggers above. This Clean Air Act provision has been in effect as of August 10, 2005. The 18-month clocks that started prior to August 10, 2005, were

extended by six months by statute, bringing the total time of any existing clocks to two years. Additionally, any clocks started by EPA adequacy findings or approvals on or after August 10, 2005, are two-year clocks.

Prior to the passage of SAFETEA-LU, EPA's regulation required conformity of a transportation plan and TIP to be determined when a new budget was established, but the Clean Air Act did not include this specific requirement. In the conformity regulations, EPA required that conformity of transportation plans and TIPs be determined within 18 months of the SIP or FIP triggers described above to ensure that new air quality information was introduced into the conformity process in a timely manner.

With the passage of SAFETEA-LU, the Clean Air Act now includes the requirement to determine conformity of a transportation plan and TIP within two years of a trigger. The language added to the Clean Air Act in section 176(c)(2)(E) closely followed EPA's regulation at § 93.104(e). Therefore, EPA is merely proposing to align the deadline in § 93.104(e) with the new deadline under the statute.

No change is proposed for the events that trigger a new conformity determination, because they are already consistent with the amendments made to the Clean Air Act in SAFETEA-LU. Though the language added to the Clean Air Act to describe the SIP approval trigger is slightly different than EPA's regulation, EPA believes that 40 CFR 93.104(e)(2) is already consistent with the law's requirements without any other changes.

Clean Air Act 176(c)(2)(E)(ii) states that conformity must be determined when EPA approves a SIP that establishes a budget "if that budget has not yet been determined to be adequate \* \* \*" The regulation at 40 CFR 93.104(e)(2) states that conformity must be determined when EPA approves a SIP that establishes a budget "if the budget(s) from that SIP have not yet been used in a conformity determination." EPA believes this statement in the regulation is substantively the same as the law, because a budget from an approved SIP would have been used in a conformity determination prior to the SIP's approval only if that budget had previously been found adequate. If a budget had previously been found adequate, a clock for that budget would already have started on the effective date of EPA's adequacy finding, so no new clock would start at the time of

EPA's approval of the budget in the SIP. This interpretation is consistent with how state and local agencies have implemented 40 CFR 93.104(e)(1) and (2) for some time, and changing this language may cause confusion without adding value.

EPA also notes that no change is necessary for the point at which the two-year clocks begin. As is currently required under the conformity rule and Clean Air Act, the two-year clocks begin on the effective date of EPA's adequacy finding or the effective date of EPA's SIP approval or FIP promulgation action. (For more details regarding the triggers, see Section III. of the August 6, 2002, final rule at 67 FR 50810 and Section XIX. of the July 1, 2004, final rule, at 69 FR 40050).

## V. Lapse Grace Period

### A. Proposal

EPA is proposing to add a one-year grace period before a conformity lapse would occur when an area misses an applicable deadline. The applicable deadlines are those that result from:

- The requirements to determine conformity of a transportation plan and TIP every four years under § 93.104(b)(3) and § 93.104(c)(3) (see Section III.),

- The requirement to determine conformity within two years of a trigger under § 93.104(e) (see Section IV.), and

- The pre-SAFETEA-LU planning requirements to update a transportation plan every three years, and update a TIP every two years, during the transition to SAFETEA-LU's four-year planning cycle for transportation plans and TIPs.<sup>2</sup>

EPA notes that the regulatory changes discussed in Section V. of this preamble do not impact isolated rural nonattainment or maintenance areas, because these areas do not include an MPO with a transportation plan or TIP conformity determination that would lapse. Isolated rural areas continue to be covered by the requirements in 40 CFR 93.109(l).

We are also proposing a new § 93.104(f), which would provide the rules to allow projects to meet conformity requirements<sup>3</sup> during the lapse grace period.

- New § 93.104(f)(1) would clarify that non-exempt FHWA/FTA

projects can be found to conform during the lapse grace period if they are included in the currently conforming transportation plan and TIP.

- New § 93.104(f)(2) would allow non-exempt FHWA/FTA projects to be found to conform during the lapse grace period if they were included in the most recent conforming transportation plan and TIP. However, even though EPA proposes in § 93.104(f)(2) that a project could be found to conform when the transportation plan and TIP have expired, a project must also meet DOT's planning requirements to receive federal funding or approval.

Today's rulemaking does not change how exempt projects and traffic signal synchronization projects are addressed under the transportation conformity rule. These projects are able to proceed during the lapse grace period, and for that matter during a conformity lapse, because exempt projects and traffic signal synchronization projects do not require project-level conformity determinations. EPA does not need to propose that exempt projects or traffic signal synchronization projects can proceed during the grace period because they are exempted from the requirement to determine conformity altogether, per 40 CFR 93.126 and 93.128.

In addition, EPA is also proposing to revise §§ 93.114, 93.115, and 93.121 by including a reference to § 93.104(f) to account for the lapse grace period:

- Section 93.114 currently requires that there be a currently conforming transportation plan and TIP at the time of project approval. EPA proposes that during the lapse grace period, there does not need to be a currently conforming plan and TIP at the time of project approval. However, EPA proposes that non-exempt projects must come from the most recent conforming transportation plan and TIP. (A project must also meet DOT's planning requirements to receive federal funding or approval. See Section V.C. below for further discussion.)

- Section 93.115 currently requires that non-exempt FHWA/FTA projects come from a conforming transportation plan and TIP. EPA proposes to add that during the lapse grace period, a project could come from the most recent conforming plan and TIP. (A project must also meet DOT's planning requirements to receive federal funding or approval. See Section V.C. below for further discussion.)

- Similarly, § 93.121 currently requires that regionally significant non-federal projects either come from the currently conforming transportation plan and TIP, or the regional emissions analysis that supports such a

transportation plan and TIP. EPA proposes to add that during the lapse grace period, regionally significant non-federal projects could be approved if they are from the most recent conforming transportation plan and TIP, or the regional emissions analysis that supported the most recent conforming transportation plan and TIP.

### B. Rationale

These proposed changes are necessary to make the conformity regulation consistent with the amended law and the intentions of Congress. In SAFETEA-LU, Congress amended the Clean Air Act to provide a one-year grace period before the consequences of a conformity lapse apply in section 176(c)(9) and added a definition of "lapse" in section 176(c)(10). The changes to the law have been in effect as of August 10, 2005. However, SAFETEA-LU's addition of paragraphs (9) and (10) to the Clean Air Act conformity provisions in section 176(c) and today's proposal do not affect other requirements not related to conformity, such as the statutory transportation planning requirements and DOT's regulations that implement them. These other requirements are unchanged by the addition of Clean Air Act sections 176(c)(9) and (10) and thus continue to apply during the lapse grace period. See Section V.C. below for further discussion.

Through SAFETEA-LU, Congress created new Clean Air Act section 176(c)(9) to provide a one-year grace period before the consequences of a conformity lapse apply. This section states that if a conformity determination for a transportation plan or TIP "is not made by an applicable deadline and such failure is not corrected \* \* \* within 12 months after such deadline \* \* \*, the transportation plan shall lapse."

Congress also added a statutory definition for the word "lapse" in Clean Air Act section 176(c)(10) which states, "the term 'lapse' means that the conformity determination for a transportation plan or transportation improvement program has expired, and thus there is no currently conforming transportation plan or transportation improvement program." This statutory definition is generally consistent with EPA's existing definition of the word "lapse" in 40 CFR 93.101.

EPA concludes from these two Clean Air Act paragraphs that the conformity status of a transportation plan and TIP does not lapse for 12 months from an applicable deadline. Thus, as long as they are still valid in terms of meeting other federal requirements, the transportation plan and TIP continue to

<sup>2</sup> Prior to July 1, 2007, MPOs can still develop and adopt transportation plans and TIPs consistent with the "pre-SAFETEA-LU" requirements (see DOT's guidance at <http://www.fhwa.dot/hep/legreg.htm> for more information).

<sup>3</sup> By the phrase "meet conformity requirements," EPA means that FHWA/FTA projects can be found to conform, and non-federal projects can be approved.

exist as the currently conforming transportation plan and TIP during the lapse grace period.

Through § 93.104(f)(1), EPA proposes that projects from the currently conforming transportation plan and TIP (or regional emissions analysis) can be found to conform during the lapse grace period. Clean Air Act section 176(c)(2)(C)(i) states,

a transportation project may be adopted or approved by a metropolitan planning organization or any recipient of funds designated under title 23 or chapter 53 of title 49, or found in conformity by a metropolitan planning organization or approved, accepted, or funded by the Department of Transportation only if it meets either the requirements of subparagraph (D) or the following requirements—  
(i) such a project comes from a conforming plan and program.

Similarly, the existing language in Clean Air Act section 176(c)(2)(D) and § 93.121(a) allows regionally significant non-federal projects in metropolitan and donut areas to proceed during the lapse grace period if they are from a currently conforming transportation plan and TIP (or regional emissions analysis).

In the case where during the lapse grace period, the transportation plan or TIP expire (i.e., the transportation plan or TIP has reached the end of the transportation planning cycle and has not yet been updated), EPA believes that Clean Air Act sections 176(c)(2)(C)(i) and (D) are ambiguous in light of the addition of sections 176(c)(9) and (10). EPA proposes in § 93.104(f)(2) that non-exempt FHWA/FTA projects and regionally significant non-federal projects from the most recent conforming transportation plan and TIP (or regional emissions analysis) can meet conformity requirements during the lapse grace period, based on our reading of Congressional intent. (As discussed in C. of this section, although EPA interprets the added paragraphs (9) and (10) of Clean Air Act 176(c) to allow projects to meet conformity requirements without a currently conforming transportation plan and TIP, a project must also meet DOT's planning requirements to receive federal funding or approval.)

EPA believes the statute is ambiguous in the case where the transportation plan or TIP expires because on its face, Clean Air Act sections 176(c)(2)(C)(i) and (D) require a conforming transportation plan and TIP to be in place for a project to meet conformity requirements.

However, by adding sections 176(c)(9) and (10) to the Clean Air Act in SAFETEA-LU, Congress clearly meant to give areas the ability for

transportation projects to meet conformity requirements when transportation plan and TIP conformity is not determined on time. Part of the definition of “lapse” in Clean Air Act section 176(c)(10) is that “there is no currently conforming transportation plan or TIP.” An area that has a conforming transportation plan and TIP is not in a lapse and thus would have no need of a lapse grace period.

If the requirement to have a conforming transportation plan and TIP in place for projects to meet conformity requirements still had to apply during the lapse grace period, the lapse grace period could only be used in certain cases. The lapse grace period could not be used at all in the case when a lapse occurs because an area's transportation plan or TIP expires.

SAFETEA-LU has made the required frequency of transportation plan updates, TIP updates, and conformity determinations to be the same. EPA believes that in the future, four-year transportation plan and TIP update cycles will likely expire at the same time as a four-year conformity deadline, because transportation plans and TIP must conform when they are adopted. Therefore, if projects could not meet conformity requirements during the lapse grace period because the transportation plan or TIP expired, (i.e., there ceases to be a currently conforming transportation plan or TIP), the effect of the lapse grace period in these cases would be nil. In effect, if Clean Air Act sections 176(c)(2)(C)(i) and (D) must apply during the lapse grace period in all cases, the lapse grace period could rarely be used in practice.

Because the statute is ambiguous in this case, EPA turns to the legislative history to clarify Congressional intent. The SAFETEA-LU conference report language states:

During the 12-month grace period, only transportation projects in the most recent conforming plan and TIP could be funded or approved until the required determinations are made pursuant to Section 176(c) of the Clean Air Act.<sup>4</sup>

The report language says that projects from the “most recent conforming plan and TIP” can be funded or approved during the lapse grace period. It does not say that a currently conforming transportation plan and TIP need to be in place at the time of project approval. EPA concludes from this language that Congress meant to allow conformity requirements to be met for projects during the lapse grace period even if

there is no conforming transportation plan and TIP at that time.

In other words, based on the legislative history, EPA interprets the lapse grace period established in Clean Air Act section 176(c)(9) as a time where the Clean Air Act section 176(c)(2)(C)(i) and (D) requirements for a project to come from a currently conforming transportation plan and TIP (or regional emissions analysis) could be met if the project comes from the most recent conforming transportation plan and TIP (or regional emissions analysis). In sum, the addition of Clean Air Act section 176(c)(9) allows a project to meet conformity requirements during the grace period as long as the project was in the “most recent conforming plan and TIP” (or in the regional emissions analysis that supported the most recent conforming transportation plan and TIP) prior to the start of the lapse grace period.

Note, however, that EPA believes this conclusion only applies to transportation conformity—what Congress included in section 176(c) of the Clean Air Act and discussed in its report language referenced above pertain only to transportation conformity requirements, not to DOT's transportation planning requirements. DOT and EPA agree that planning requirements still must be met during the lapse grace period in order for DOT to fund or approve a project as discussed further in C. of this section.

Finally, EPA believes that today's proposal would be consistent with the Clean Air Act's general goals to ensure that the air quality impacts of projects are considered prior to meeting conformity requirements. These goals are accomplished by ensuring that the regional and localized emissions impacts of projects have been considered prior to meeting conformity requirements. Again, in order for a project to meet conformity requirements during the lapse grace period, the project's regional emissions impacts would have already been considered in the conformity determination for the current or most recent transportation plan and TIP. Project-level conformity requirements—including any applicable hot-spot requirements—must also be met during the lapse grace period.

### *C. How Does the Grace Period Work in Practice?*

The one-year conformity lapse grace period begins when the conformity determination required for a transportation plan or TIP is not made by the applicable deadline. As described above, during the grace period, a project may meet conformity requirements as

<sup>4</sup> Joint Explanatory Statement of the Committee of Conference, “Section 6011, Transportation Conformity,” p. 1060.

long as it was included in either the currently conforming transportation plan and TIP or the most recent conforming transportation plan and TIP and other project-level conformity requirements are met.

An FHWA/FTA project must also meet DOT's planning requirements to receive federal funding or approval. Specifically, 23 U.S.C. 134(j)(3) and 49 U.S.C. 5303(j)(3) require a TIP to be in place and 23 U.S.C. 135(g)(4) and 49 U.S.C. 5304(g)(4) require a statewide TIP (STIP) to be in place for DOT to authorize transportation projects. The STIP contains all of the metropolitan area TIPs in the state.

Three specific scenarios are presented below to show how expiration of the transportation plan and/or STIP/TIP at the time of the missed deadline affects the ability to advance FHWA/FTA projects during the lapse grace period. These scenarios are consistent with those highlighted in EPA and DOT's joint February 14, 2006, guidance entitled, "Interim Guidance for Implementing the Transportation Conformity Provisions in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)."

*Scenario 1:* If the transportation plan has expired, but the STIP/TIP are still in effect, FHWA/FTA can continue to authorize and take action on projects in the STIP/TIP throughout the duration of the grace period or the duration of the STIP/TIP, whichever is shorter. The TIP and affected portion of the STIP cannot be amended once the transportation plan expires. Prior to transportation plan expiration, an MPO and state should ensure that the STIP/TIP include the desired projects from the transportation plan to continue to operate during the conformity lapse grace period.<sup>5</sup>

*Scenario 2:* If the transportation plan is still in effect, but the STIP/TIP have expired, FHWA/FTA cannot authorize FHWA/FTA projects. In order to advance projects, a new STIP/TIP would have to be developed that contains only projects that are consistent with the transportation plan. A conformity determination would have to be made for the new TIP unless it includes only exempt projects, traffic signal synchronization projects, or TCMs in an approved SIP. For example, if a new TIP included a non-exempt project from later years of the transportation plan, the new TIP would require a conformity determination. (However, the determination could rely on the previous regional emissions analysis as long as the requirements of 40 CFR 93.122(g) are met.)

<sup>5</sup> For example, an MPO may want to amend its TIP before the transportation plan expires to allow projects from the fifth year of the transportation plan to proceed during the lapse grace period. The conformity determination for such an amended TIP would have to be made before the lapse grace period begins, but the determination could rely on the previous regional emissions analysis as long as the requirements of 40 CFR 93.122(g) are met.

*Scenario 3:* If both the transportation plan and the STIP/TIP have expired, FHWA/FTA will not authorize projects under the planning regulations.

Regardless of the scenario, in addition to transportation planning requirements, project-level conformity requirements must also be met during the lapse grace period including any required hot-spot analysis. Refer to the Table 1 in 40 CFR 93.109 for the conformity criteria and procedures that apply to projects.

#### *D. Newly Designated Nonattainment Areas*

The new lapse grace period provision in Clean Air Act section 176(c)(9) does not apply to the deadline for newly designated nonattainment areas to make the initial transportation plan/TIP conformity determination within 12 months of the effective date of the nonattainment designation. The new grace period in Clean Air Act section 176(c)(9) applies prior to when a lapse occurs, and Clean Air Act section 176(c)(10) and 40 CFR 93.101 define the term lapse to mean that the conformity determination for a transportation plan or TIP has expired. Therefore, the lapse grace period does not apply unless an area has already had a conforming transportation plan and TIP that has expired; it does not apply to a newly designated area that has not yet made its initial conformity determination for a transportation plan and TIP for a new pollutant or air quality standard.

Although the lapse grace period does not apply to newly designated areas, these areas already have similar existing flexibility because Clean Air Act section 176(c)(6) and 40 CFR 93.102(d) give newly designated areas one year before conformity applies, starting from the effective date of final nonattainment designation.<sup>6</sup>

Although the statutory and regulatory definitions of lapse do not apply to newly designated areas, once conformity applies, the identical restrictions of a conformity lapse will exist for any newly designated nonattainment area that does not have a conforming transportation plan and TIP in place one year after the effective date of EPA's designation. EPA and DOT will continue to use the term "lapse" informally to describe these situations.

#### *E. Conformity Freezes*

EPA also notes in the preamble to today's proposal the interaction of conformity lapse grace periods and

<sup>6</sup> This one-year grace period for newly designated areas most recently applied to the areas designated for the 8-hour ozone and PM<sub>2.5</sub> standards. All of these metropolitan areas have at this point determined transportation plan/TIP conformity.

conformity freezes. A conformity freeze occurs if EPA disapproves a control strategy SIP without a protective finding for the budgets in that SIP (see § 93.120(a)(2)).<sup>7</sup> During a freeze, some projects can be advanced, but the area cannot adopt a new transportation plan or TIP until a new SIP is submitted with budgets that EPA approves or finds adequate. If conformity of a transportation plan and TIP has not been determined using a new control strategy SIP with budgets that EPA approves or finds adequate within two years of EPA's SIP disapproval, highway sanctions apply (under Clean Air Act section 179(b)(1)) and the freeze becomes a lapse.

Under today's proposal, the lapse grace period would apply during a freeze only if the transportation plan/TIP expire before highway sanctions apply. The lapse grace period would apply in this case because the grace period applies when an area misses an applicable deadline to determine conformity for the transportation plan and TIP. The transportation plan and TIP would remain in a freeze even once the lapse grace period begins, and would remain frozen until either a conformity determination is made to new adequate or approved SIP budgets as described above, or highway sanctions apply.

An area that is in a conformity freeze and subsequently enters the lapse grace period would lapse at the end of the grace period (one year after the missed deadline), or when highway sanctions apply, whichever comes first. As described above, however, a project must also meet DOT's planning requirements to receive federal funding or approval during the lapse grace period.

If a freeze becomes a lapse because two years transpired from the effective date of EPA's disapproval of the SIP (when highway sanctions are applied), the area cannot use the lapse grace period. A lapse that occurs because two years have transpired since EPA's disapproval of a SIP is not a lapse that results from missing an applicable deadline to determine conformity. Thus, the lapse grace period would not apply by its own terms in this circumstance.

## **VI. Timeframes for Conformity Determinations**

### *A. Overview*

One of the changes Congress made via SAFETEA-LU was to add a new

<sup>7</sup> Such disapprovals occur infrequently; EPA has only disapproved SIPs without a protective finding in three instances since the 1997 conformity rule was promulgated.

paragraph (7) to Clean Air Act section 176(c), which provides MPOs the option to elect to shorten the period of time addressed by their transportation plan/TIP conformity determinations, or "timeframe." Prior to this change, every conformity determination for a transportation plan and TIP has had to cover the entire timeframe covered by the transportation plan. Transportation plans cover a period of 20 years or longer. Because of the requirement to determine conformity of the entire transportation plan, the last year of the transportation plan has had to be analyzed in all transportation plan or TIP conformity determinations, as well as other earlier years in the timeframe of the transportation plan.

Under the amended Clean Air Act, an MPO demonstrates conformity for the entire timeframe of the transportation plan unless the MPO elects to shorten the conformity timeframe. An election to shorten the conformity timeframe could be made only after consulting with the state and local air quality agencies<sup>8</sup> and soliciting public comment and considering such comments. If an MPO makes this election, the conformity determination does not have to cover the entire length of the transportation plan, but in some cases an informational analysis is also required.

This provision giving areas the option to shorten their conformity timeframe took effect on August 10, 2005, when SAFETEA-LU became law. Note, however, that transportation plan/TIP conformity determinations must cover the entire length of the transportation plan unless an election is made to shorten the timeframe.

We are proposing to make several changes in the regulatory language. For some aspects of this provision, we have proposed more than one alternative. EPA's proposals for implementing this

<sup>8</sup> The amendment to the Clean Air Act that allows areas to shorten the timeframe of conformity determinations, Clean Air Act section 176(c)(7), requires the MPO to consult with "the air pollution control agency" and defines this term in paragraph (E) to mean "an air pollution control agency (as defined in section 302(b)) that is responsible for developing plans or controlling air pollution within the area covered by a transportation plan." Clean Air Act section 302(b) states, "The term 'air pollution control agency' means any of the following" and lists several kinds of agencies. Because the statute says the term means "any" of the listed agencies rather than all of them, EPA believes the term refers to the relevant state and local air quality agencies. In the transportation conformity process, the relevant agencies are the state and local air quality agencies that have always participated in the consultation process, pursuant to Clean Air Act section 176(c)(4)(D)(i). Therefore, EPA is using the term "state and local air agencies" in this preamble and proposed rule, consistent with CAA 176(c)(4)(D)(i) and 40 CFR 93.105.

new Clean Air Act provision are organized as follows:

<bullet> Proposal for MPOs in areas that do not have an adequate or approved second maintenance plan (Section VI.B.).

<bullet> Proposal for MPOs in areas with adequate or approved second maintenance plans (Section VI.C.).

<bullet> Proposal for how elections are made to either shorten the conformity timeframe, or revert to the original conformity timeframe once the timeframe has been shortened (Section VI.D.).

<bullet> Proposal for isolated rural areas (Section VI.E.).

<bullet> Proposal for conformity implementation under a shortened conformity timeframe, including which years must be analyzed (Section VI.F.).

EPA solicits comments for all of these proposals as well as other information that would improve the implementation of the final rule.

#### *B. Timeframe Covered by Conformity Determinations in Areas Without Second Maintenance Plans*

##### 1. Proposal for Metropolitan Areas

EPA is proposing that transportation plan and TIP conformity determinations would cover the timeframe of the transportation plan, unless an MPO elects to shorten the timeframe. In areas without an adequate or approved second maintenance plan (i.e., a maintenance plan addressing Clean Air Act section 175A(b)), a shortened conformity determination would address the longest of the following timeframes:

<bullet> The first 10-year period of the transportation plan;

<bullet> The latest year in the SIP (or FIP) applicable to the area that contains a motor vehicle emission budget; or

<bullet> The year after the completion date of a regionally significant project if the project is included in the TIP, or the project requires approval before the subsequent conformity determination.

EPA is proposing in § 93.106 that a conformity determination must cover the longest of these three timeframes.

Under this proposal, the MPO would not be able to choose which of these three timeframes it prefers to examine in the conformity determination; it would have to examine the longest of them. The MPO would have to determine which timeframe is the longest for each conformity determination, as the longest timeframe could change from determination to determination, because for example new budgets have been established or new regionally significant projects have been added to the TIP

since the previous conformity determination.

##### 2. Rationale

The proposed changes to allow MPOs to shorten the timeframe covered by a conformity determination are necessary to make the conformity regulation consistent with the law. In SAFETEA-LU, Congress amended the Clean Air Act by adding section 176(c)(7), which allows MPOs to elect to shorten the timeframe of conformity determinations. EPA is proposing that conformity determinations cover the timeframe of the transportation plan unless the MPO makes an election because Clean Air Act section 176(c)(7)(A) specifically states, "Each conformity determination \* \* \* shall require a demonstration of conformity for the period ending on either the final year of the transportation plan, or at the election of the metropolitan planning organization, \* \* \* a shorter timeframe. EPA's proposal that a shortened timeframe must cover the longest of the three periods specified also comes directly from the Clean Air Act. Specifically, section 176(c)(7)(A) states that a shortened conformity determination must cover:

The longest of the following periods: (i) The first 10-year period of any such transportation plan. (ii) The latest year in the implementation plan applicable to the area that contains a motor vehicle emissions budget. (iii) The year after the completion date of a regionally significant project if the project is included in the transportation improvement program or the project requires approval before the subsequent conformity determination.

EPA has followed this statutory language in the proposed regulatory language in § 93.106.

#### *C. Timeframe of Conformity Determinations in Areas With Second Maintenance Plans*

##### 1. Proposal for Metropolitan Areas

EPA is proposing that in areas that have an adequate or approved maintenance plan under Clean Air Act section 175A(b), transportation plan and TIP conformity determinations would cover the timeframe of the transportation plan unless an MPO elects to shorten the timeframe. Section 175A(b) of the Clean Air Act is the provision that describes the submission of a maintenance plan that covers the second ten years of the maintenance period. If the MPO elects to shorten the timeframe, transportation plan and TIP conformity determinations would cover the period of time through the end of the maintenance period, that is, the period of time covered through the

second maintenance plan. This period of time is in contrast to the longest of the three periods proposed in Section VI.B. for areas that do not have an adequate or approved second maintenance plan. EPA has proposed regulatory language for shortening the timeframe in areas with second maintenance plans in § 93.106 as well.

## 2. Rationale

Our proposal for a shortened timeframe for metropolitan areas with an adequate or approved second maintenance plan results directly from the Clean Air Act as amended by SAFETEA-LU. Clean Air Act section 176(c)(7)(C) states that conformity determinations can be made for a shorter timeframe “at the election of the metropolitan planning organization \* \* \*”. Therefore, in these areas EPA proposes that conformity determinations must cover the timeframe of the transportation plan unless an election is made. The proposal that the shortened timeframe would cover through the end of the second maintenance plan also results directly from Clean Air Act section 176(c)(7)(c). This section specifically says that in areas with a second maintenance plan, a shortened conformity timeframe is “required to extend only through the last year of the implementation plan required under section 175(A)(b)” [sic] rather than the longest of the three periods established in Clean Air Act section 176(c)(7)(A).

### D. Process for Elections

#### 1. Proposal for Metropolitan Areas

First, before an MPO elects to shorten the conformity timeframe, EPA proposes that it would have to consult with state and local air quality planning agencies, solicit public comment, and consider those comments. EPA is proposing that consultation with the state and local air agencies would occur early in the decision-making process.

Second, EPA is also proposing that once an MPO makes an election to shorten the period of time addressed in its transportation plan/TIP conformity determinations, the election would remain in effect until the MPO elects otherwise. An MPO would make its election only once for a pollutant or pollutants and any relevant precursors, unless it chooses to elect otherwise in the future.

Third, EPA is proposing two options for how an MPO would change a previous election.

• Option A: Require MPOs to consult with the state and local air quality agencies, solicit public

comments and consider such comments when an MPO that has elected to shorten the timeframe wants to revert back to determining conformity for the entire transportation plan length.

• Option B: Allow the MPO to elect to revert to covering the entire length of the transportation plan without any additional consultation or public comment.

EPA has proposed regulatory text for Option A but could finalize either option.

Finally, EPA is proposing to place the requirements to consult the state and local air quality agencies, solicit public comments, and consider these comments when electing to shorten the conformity timeframe in § 93.106, with the rest of the regulatory language for shortening the timeframe.

## 2. Rationale

*General process.* Clean Air Act section 176(c)(7)(A) and (C) are the sections of the statute that allow elections to shorten the conformity timeframe. Both of these sections allow such elections to be made only “after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments.” The Clean Air Act specifies consultation with the air agency and does not require concurrence.

A definition of “air pollution control agency” has been added at Clean Air Act section 176(c)(7)(E), which states that this term “means an air pollution control agency (as defined in Section 302(b)) that is responsible for developing plans or controlling pollution within the area covered by the transportation plan.” Clean Air Act section 302(b) states, “the term ‘air pollution control agency’ means any of the following” and lists several kinds of agencies. Because the statute says the term means “any” of the listed agencies rather than all of them, EPA believes the term refers to the relevant air quality agencies. In the transportation conformity process, the relevant agencies are the state and local air quality agencies that have regularly participated in the consultation process, pursuant to Clean Air Act section 176(c)(4)(D)(i). Therefore, EPA is using the term “state and local air agencies” in this preamble and in our proposal for § 93.106, consistent with the statute and 40 CFR 93.105.

EPA believes that consultation with the state and local air quality agencies on shortening the timeframe would occur in the context of the normal interagency consultation process. EPA believes that for this consultation to be meaningful, it needs to occur at an early

stage in the decision-making process. Therefore, we have proposed that consultation occur when the MPO begins to consider shortening the timeframe. For example, it may be appropriate to discuss an election to shorten the conformity timeframe in the preliminary stages of developing the regional emissions analysis.

EPA is not proposing any new specific procedures for soliciting public comment. MPOs should follow their normal process for public participation regarding conformity actions for this election. MPOs are not required to revise their public participation/ involvement procedures required by SAFETEA-LU section 6001(a) to address public consultation on reducing the area’s conformity timeframe.

MPOs are encouraged to make their elections prior to the start of the public comment period for their subsequent conformity determination. Making the election prior to the start of the public comment period for the subsequent conformity determination ensures that the public will understand that future conformity determinations will address a shorter period of time. However, there may be instances when an MPO will want to take public comments on the election to shorten the conformity timeframe at the same time that it is taking public comment on a conformity determination. In those cases, the conformity information presented to the public should include both a regional emissions analysis reflecting the election of a shorter timeframe and a regional emissions analysis that reflects the full length of the transportation plan. EPA recommends that both a shortened and a full-length analysis be included so that the MPO can complete its conformity determination according to its desired schedule, even if it receives negative public comment about shortening the timeframe.

EPA is proposing that once an election to shorten the timeframe is made, it would remain in effect until the MPO elects otherwise, because that statement is specifically included in the statute. Clean Air Act section 176(c)(7)(D) states, “Any election by a metropolitan planning organization under this paragraph shall continue to be in effect until the metropolitan planning organization elects otherwise.”

*Changing previous elections.* EPA requests comment on the two options for the process that MPOs must follow if they have shortened the conformity timeframe and want to revert back to determining conformity for the full length of the transportation plan. EPA asks commenters to consider under what circumstances, if any, would

consultation with state and local agencies and solicitation of public comment be warranted when reverting back to a full-length conformity timeframe.

Option A would require MPOs to consult with the state and local air pollution control agencies, solicit public comment, and consider any comments received before reverting to a timeframe that covers the full length of the transportation plan. This approach is an option because Clean Air Act section 176(c)(7)(D) states that a shortened timeframe remains in effect unless an MPO "elects otherwise." In other instances in Clean Air Act section 176(c)(7), an "election" includes consultation with the state and local air quality agencies, solicitation of public comment and consideration of any comments received. Therefore, one interpretation is that an election to revert to determining conformity for the entire length of the transportation plan should also include consultation with the state and local air pollution control agencies, solicitation of public comment, and consideration of those comments.

On the other hand, one could argue that an MPO should be able to revert to the full timeframe without additional consultation with the state and local air quality agencies or solicitation and consideration of public comment, which is proposed under Option B. If an MPO wants to revert to the full timeframe, it is returning to the default requirement in Clean Air Act section 176(c)(7). One could argue that no additional consultation or public comment should be necessary to determine conformity for the full length of the transportation plan because that is the approach that has been used for conformity since 1993.

Furthermore, existing conformity requirements may be sufficient to cover the case when previous elections change. Consultation with the state and local air quality planning agencies must occur on the conformity determination anyway within the interagency consultation process. Similarly, the MPO must seek public comment on the conformity determination, according to the requirements in 40 CFR 93.105(e). By relying on these existing requirements, the MPO could be spared the additional resource costs associated with running another interagency consultation process or full public comment process for electing to revert to the full conformity timeframe.

*Placement in regulatory text.* Regarding the placement of requirements for state and local air quality agency consultation and public

comment, EPA is proposing to include them in § 93.106 because we are proposing most of the regulatory text for implementing the provision to shorten the timeframe in this section. The main advantage of including requirements for state and local air agency consultation and public comment in this section is that it would not require any amendments to state conformity SIPs. EPA believes that it is reasonable to include these process requirements along with other timeframe requirements, because this type of consultation would only occur when the MPO is considering electing to shorten the timeframe. The proposal would also streamline the rule and eliminate redundant text.

EPA is not proposing to include these consultation requirements in § 93.105 because such a change is not required by the Clean Air Act as amended by SAFETEA-LU. In addition, doing so would force states that already have submitted or approved conformity SIPs to amend them, which could require significant state and local resources. This result would be an unfortunate coincidence, given that SAFETEA-LU streamlined the conformity SIP requirements (see Section VII. of this preamble for this discussion).

#### *E. Isolated Rural Nonattainment and Maintenance Areas*

##### 1. Proposal

Isolated rural nonattainment and maintenance areas do not have MPOs and are not required to prepare transportation plans or TIPs. Projects in these areas are generally included in the long-range statewide transportation plan and the statewide TIP. Isolated rural areas are not "donut areas."<sup>9</sup>

EPA is proposing two options for comment:

<bullet> Option 1: Isolated rural areas would also have the option to shorten the timeframe covered by conformity determinations.

<bullet> Option 2: Isolated rural areas would not be given the option to shorten the timeframe covered by conformity determinations.

Under Option 1, EPA's proposals for isolated rural areas are parallel to the proposals for metropolitan areas in Sections VI.B. and C. That is, EPA is proposing that a conformity determination for a project in an isolated rural area would have to include a regional emissions analysis

that covers the entire timeframe of the statewide transportation plan (i.e., at least 20 years), unless the area elects to shorten the timeframe.

Before an isolated rural area has an adequate or approved second maintenance plan, a conformity determination for a project in an isolated rural area that has elected to shorten the timeframe would need to include a regional emissions analysis that covers the longest of the following three timeframes:

<bullet> The first 10-year period of the statewide transportation plan;

<bullet> The latest year in the SIP (or FIP) applicable to the area that contains a motor vehicle emission budget; or

<bullet> The year after the completion date of a regionally significant project if that project is included in the portion of the STIP covering the area, or the project requires approval before the subsequent conformity determination.

Once an isolated rural area has an adequate or approved second maintenance plan, a conformity determination for a project in an isolated rural area that has elected to shorten the timeframe would cover the period of time through the end of the second maintenance plan.

EPA is including regulatory text for Option 1 in § 93.109(l)(2)(i) by including a reference to § 93.106(d). To finalize Option 2, EPA would simply delete this reference. EPA could finalize either option under this proposed rule.

Given that isolated rural areas do not have an MPO, EPA is proposing two options for which agency would make the election to shorten the timeframe in an isolated rural area:

<bullet> State DOT option: The state DOT would make the election to shorten the conformity timeframe in an isolated rural area.

<bullet> Project sponsor option: The project sponsor would make the election.

EPA requests comment on these two options, and asks whether there are other alternatives that would also be viable in isolated rural areas. We are including regulatory text for the state DOT option in § 93.109(l)(2)(i), however EPA could finalize either option or an alternative suggested during the comment period under this proposed rule.

EPA's proposed process requirements for isolated rural areas are exactly the same as the proposed requirements for metropolitan areas. This result is achieved because EPA is proposing in § 93.109(l)(2)(i), which addresses isolated rural areas, that references to the MPO in § 93.106(d) should be taken to mean the state DOT.

<sup>9</sup> Donut areas are defined as "geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or maintenance area that contains any part of a metropolitan area(s) \* \* \*" (40 CFR 93.101).

## 2. Rationale

EPA believes it is appropriate to extend this flexibility to isolated rural areas to be consistent with how the conformity rule has been implemented in isolated rural areas. The Clean Air Act amendment made by SAFETEA-LU allowing areas to shorten their conformity timeframes does not prohibit its use in isolated rural areas.

In general, most aspects of the conformity regulation apply consistently to metropolitan and isolated rural areas. Where there are differences, the differences have given isolated rural areas additional flexibility. For example, in the 1997 conformity rule, EPA provided isolated rural areas the flexibility to choose among several tests for demonstrating conformity for years after the time period addressed by the SIP (see 40 CFR 93.109(l)(2)(ii)).

Our rationale in giving isolated rural areas the flexibility to choose among several tests for years after the time period addressed by the SIP is especially relevant to today's proposal to give these areas the ability to shorten their conformity timeframes. In the July 9, 1996, proposed rule, we stated, "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" (61 FR 36121). Today's proposal to allow isolated rural areas to shorten their timeframe would also help to alleviate that concern. EPA believes that giving isolated rural areas the ability to shorten their timeframe would still ensure that projects conform.

In the 1996 proposal we also said, "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" (61 FR 36121). Again, allowing isolated rural areas to shorten their timeframe could alleviate the concern that long-term planning rests on only a few or even one project, while still ensuring that a project conforms, because the timeframe must be at least as long as the year after the completion date of a regionally significant project.

Finally, an election to shorten the timeframe could not be made without consultation with the state (and where appropriate, local) air quality agency, and solicitation of public comment (as discussed above in section V.D.). Therefore, if in a particular isolated rural area there is some specific reason

that a conformity determination should cover the entire length of the statewide transportation plan (i.e., at least 20 years), the state and local air quality agencies and the public has the opportunity to go on record with their concerns. For these reasons, EPA believes that it is appropriate to propose and take comment on extending the option to shorten the conformity timeframe to isolated rural areas.

*Agency that makes elections.* As Clean Air Act section 176(c)(7) does not specifically address isolated rural areas, EPA does not have a specific statutory provision to rely on for which entity should make an election to shorten the conformity timeframe in isolated rural areas. However, there are several reasons why EPA believes that assigning the ability to elect to shorten the conformity timeframe to the state DOT makes the most sense. First, although the state DOT is not always the project sponsor, the state DOT prepares the statewide transportation plan and the statewide TIP and therefore in this regard, the state DOT serves a function in an isolated rural area that is similar to an MPO. Second, the state DOT may be better able to coordinate the consultation necessary to make an election with the state and local air quality planning agencies and with the public than any other entity in an isolated rural area.

Assigning the ability to elect to shorten the conformity timeframe to the project sponsor may not be as workable. EPA is concerned about the possibility that in an isolated rural area, there may be more than one project sponsor, and thus it would be unclear which entity would have the ability to elect to shorten the timeframe. Other issues could also arise, such as multiple project sponsors electing to shorten the timeframe or reverting back to a longer timeframe at any given time. Such a situation could be confusing to project sponsors, air agencies, the public, and other agencies typically involved in project-level conformity determinations.

We are requesting comment on both the state DOT and project sponsor options, and soliciting input as to whether there are any other alternatives for consideration. Though commenters can simply express a preference, providing rationale for a preference is especially useful to EPA.

### *F. Specific Analysis Requirements Under a Shortened Timeframe*

#### 1. Proposal

EPA is proposing to include most of the necessary regulatory language for shortening the conformity timeframe

within § 93.106, and is also proposing changes in §§ 93.118 and 93.119.<sup>10</sup>

<bullet> First, today's proposal would rename § 93.106, which is currently labeled "Content of transportation plans," as "Content of transportation plans and timeframe of conformity determination."

<bullet> Second, EPA proposes to amend § 93.106(a)(1) to update the horizon years that apply when an area shortens the conformity timeframe. (Section 93.106(a)(1) only applies to serious, severe or extreme ozone and serious CO nonattainment areas with urbanized populations greater than 200,000.)

<bullet> Third, EPA is proposing changes to §§ 93.118 and 93.119 to indicate that particular years must be analyzed only if they are in the conformity timeframe and to include the requirements for any needed informational analyses.

*Areas that use the budget test.* In areas that have budgets that choose to shorten the timeframe, the requirements for demonstrating consistency with budgets, and analyzing specific years, would be similar to the existing conformity rule at 40 CFR 93.118(b) and (d). Under a shortened timeframe, EPA is proposing that consistency with, and an analysis for, the attainment year would be necessary only if the attainment year is both within the timeframe of the transportation plan and conformity determination. In addition, under a shortened timeframe, EPA is proposing that instead of analyzing the last year of the transportation plan for the conformity determination, the analysis would be done for the last year of the shortened timeframe.

EPA is also proposing an additional requirement for areas that do not have an adequate or approved second maintenance plan budget. In these areas, EPA is proposing that the conformity determination must be accompanied by a regional emissions analysis for the last year of the transportation plan, as well as for any year where the budgets were exceeded in a previous regional emissions analysis if that year is later than the shortened conformity timeframe. EPA proposes that these regional emissions analyses would be done in manner consistent with all relevant requirements of the transportation conformity regulation (e.g., 40 CFR 93.110, 93.111, and 93.122). However, these analyses would be for informational purposes only, and emissions would not have to meet the

<sup>10</sup> Note that the proposals in V.F. would apply to isolated rural areas as well as metropolitan areas if EPA finalizes Option 1 to allow isolated rural areas to shorten the timeframe of conformity determinations.

budgets in these years. (EPA is not proposing these information-only analysis requirements for areas with an adequate or approved second maintenance plan, for the reasons described below.)

*Areas that use the interim emissions tests.* In areas that do not have budgets and use the interim emissions tests, EPA is proposing that the requirements for analysis years would be similar to the existing requirements in § 93.119 that apply under a full transportation plan-length conformity determination. Under a shortened timeframe, EPA is proposing that instead of analyzing the last year of the transportation plan, the analysis would be done for the last year of the shortened timeframe.

As in our proposal for areas that use the budget test, EPA is also proposing that the conformity determination must be accompanied by a regional emissions analysis for the last year of the transportation plan in areas that use the interim emissions tests. EPA proposes that this regional emissions analysis would be for informational purposes only. There are three proposed options for what this informational regional analysis would consist of in areas that use the interim emissions tests:

• Option X: Emissions for the last year of the transportation plan would be estimated and be compared to the interim emissions test(s) that is used in the conformity determination (e.g., a baseline year test, or the build/no-build test), but emissions would not have to pass the test.

• Option Y: Emissions for the last year of the transportation plan would be estimated and compared to either interim emissions test, regardless of which interim emission test(s) are used for the conformity determination. Emissions would not have to pass the test.

• Option Z: Emissions for the last year of the transportation plan would be estimated, but no comparison to emissions from the baseline year or the “no-build” scenario would be required.

EPA’s proposed regulatory language in § 93.119 could be finalized under any of these options, and other alternatives can be submitted during the comment period. EPA also requests information regarding whether the proposed options would result in useful information about future emissions for consideration by state and local agencies and the public. EPA also proposes that this regional emissions analysis would be done in manner consistent with all relevant requirements of the transportation conformity regulation (e.g., 40 CFR

93.110, 93.111, and 93.122). Note that there is no proposal for an informational regional emissions analysis for years where the interim tests were not met in a previous regional analysis, as there is for areas that use the budget test that do not have adequate or approved second maintenance plans.

## 2. Rationale

*General.* EPA is proposing these changes to the conformity regulation because SAFETEA-LU has amended the Clean Air Act to allow MPOs to shorten their conformity timeframes. EPA is following the specific requirements of the new Clean Air Act provision in today’s proposal.

EPA’s proposed regulatory text for required analysis years for conformity determinations with shortened timeframes is generally consistent with current practice. Given that the statute did not specify the years that must be analyzed in a conformity determination with a shortened timeframe, EPA assumes the existing conformity requirements should apply. Therefore, in areas that use the budget test, a shortened conformity determination would have to include the attainment year if it is in the timeframe of the conformity determination, similar to the existing requirement to include the attainment year if it is in the timeframe of the transportation plan. In areas that use the interim emissions test, a shortened conformity determination would include an analysis year no more than five years into the future, just as full-length conformity determinations do.

In addition, regardless of the test used under a shortened timeframe, the last year of the conformity determination would need to be analyzed. This requirement is similar to the existing one to analyze the last year of the transportation plan. Likewise, under a shortened timeframe analysis years would be no more than ten years apart, just as under a full-length conformity determination.

*Areas without second maintenance plans that shorten their conformity timeframe.* If the conformity timeframe is shortened in an area that does not have an adequate or approved second maintenance plan, EPA proposes that the conformity determination be accompanied by an informational analysis. EPA’s proposals for the regional emissions analysis for the last year of the transportation plan, and for any year where the budgets were exceeded in a previous regional emissions analysis if that year is later than the shortened conformity timeframe, are also based in the

statutory language. Clean Air Act section 176(c)(7)(B) requires that the conformity determination “be accompanied by a regional emissions analysis” for these years. Absent a definition for “regional emissions analysis” in the statute, EPA assumes that the phrase has its usual meaning in the context of transportation conformity. Therefore, EPA believes that these analyses need to be done in a manner consistent with all the relevant requirements of the conformity regulations.

This same statutory language is the reason EPA proposes that these analyses do not need to meet the required tests. The statutory language makes it clear that these emissions analyses “accompany” the conformity determination, and thus are not part of the conformity determination.

EPA is proposing that areas that use the interim emissions tests would only have to run an informational analysis for the last year of the transportation plan, rather than for any years where they did not pass the tests in previous conformity determination that extend beyond the shortened timeframe, as would areas that use the budget test. This result is because Clean Air Act section 176(c)(7)(B) states that these information-only regional emissions analyses are to be done “for the last year of the transportation plan and for any year shown to exceed emissions budgets by a prior analysis, if such year extends beyond” the end of the shortened timeframe. Areas subject to the interim emissions tests for a given pollutant or precursor do not have budgets for that pollutant or precursor. Therefore, there is no statutory requirement for these areas to perform an informational regional emissions analysis for any year other than the last year of the transportation plan.

EPA requests comment on the three options for what an information-only regional emissions analysis would consist of in an area that uses the interim emissions test. EPA believes that any of the options could be finalized under the proposed regulatory language because the statute is ambiguous regarding this requirement prior to SIP budgets being established. The statutory language states that the regional emissions analysis that accompanies the conformity determination must be performed for the last year of the transportation plan, but does not specify that the interim emissions tests be conducted. The Congressional report language for this section states, “Generating this information will be helpful in ensuring

that conformity is maintained,”<sup>11</sup> but does not include any direction on how this goal should be met in those areas that use the interim emissions tests.

EPA believes Option X could meet this goal because using the same test or tests as the conformity determination, whether it is the baseline year test, the build/no-build test, or both, would reveal whether or not the emissions from the last year of the transportation plan would meet that test or tests. Although the conformity test would not be required to be met, using the same test as in the conformity determination for the informational analysis provides similar information as in the conformity determination and is a format that is familiar to reviewers. The additional information—emissions in the baseline year and/or emissions from the no-build scenario—may be helpful to inform state and local agencies and the public about emissions trends beyond the conformity determination’s timeframe. In addition, Option X is similar to the requirement Congress included for the informational analysis in areas that have a budget, in that the area would use the same test(s) used for the conformity determination as a comparison.

Option Y, estimating emissions from planned and existing projects in the last year of the transportation plan and comparing them to the interim emissions test chosen by the MPO or state DOT/project sponsor, could also meet the statute’s requirement. For example, under this option, an area could choose to compare emissions in the last year of the transportation plan to baseline year emissions, even if that area is using the build/no-build test to determine conformity. Option Y gives MPOs and state DOTs/project sponsors flexibility, while still informing state and local agencies and the public.

Option Z, estimating emissions from planned and existing projects in the last year of the transportation plan, without documenting whether the baseline year test is passed or performing the no-build scenario, could also meet the statute’s requirement. Having future emissions projections, without performing an interim emissions test, may alone provide meaningful information for state and local agencies on future emissions trends.

EPA could finalize any of these options and will consider all comments received on these and alternate options, as well as other information and factors that could inform the final rulemaking.

*Areas with second maintenance plans that shorten their conformity timeframe.* EPA is not proposing any information-only analyses in areas with an adequate or approved second maintenance plan, given Clean Air Act section 176(c)(7)(C). The statute labels this section, which applies to areas that have an adequate or approved second maintenance plan, as “Exception.” EPA interprets section 176(c)(7)(C) to mean that areas with adequate or approved second maintenance plans that shorten their conformity timeframe do not have to comply with the requirements of Clean Air Act section 176(c)(7)(A) or (B), and (C) does not require any informational analyses. Therefore, EPA believes that areas with a second maintenance plan that shorten their conformity timeframe do not have to perform a regional emissions analysis for the last year of their transportation plans, or for a year shown to exceed budgets by a prior analysis, as required by Clean Air Act section 176(c)(7)(B) for other areas that have shortened their timeframe.

## VII. Conformity SIPs

### A. Proposal

Today’s proposal would modify 40 CFR 51.390 to streamline the requirements for state conformity SIPs. A conformity SIP is different from a control strategy SIP or maintenance plan, as a conformity SIP only includes state conformity procedures and not motor vehicle emissions budgets or air quality demonstrations.

EPA is proposing to require states to submit conformity SIPs that address only the following sections of the federal rule that need to be tailored to a state’s individual circumstances:

• 40 CFR 93.105, which addresses consultation procedures;

• 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in an MPO’s transportation plan and TIP, and that such commitments be fulfilled; and

• 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Prior to SAFETEA-LU, states were required to address these provisions as well as all other federal conformity rule provisions in their conformity SIPs. Most of the sections of the federal rule were required to be copied verbatim from the federal rule into a state’s

conformity SIP, as previously required under 40 CFR 51.390(d).

In addition, EPA is proposing to delete the requirement for states to submit conformity SIPs to DOT. States would continue to submit conformity SIPs to EPA, as required under the existing rule. EPA is also proposing to reorganize the existing conformity SIP regulatory language to improve clarity and readability. The proposed regulatory language is re-ordered to more naturally fall into three topics: Purpose and applicability, conformity implementation plan content, and timing and approvals. The proposed language retains existing requirements with appropriate modifications based on the new Clean Air Act amendment from SAFETEA-LU.

### B. Rationale

EPA is primarily proposing these changes to § 51.390 to make the transportation conformity regulation consistent with the law, which has been in effect since August 10, 2005. In SAFETEA-LU, Congress amended the Clean Air Act so that states are no longer required to copy much of the federal transportation conformity rule into their SIPs. Instead, Clean Air Act section 176(c)(4)(e) now requires states to include in their conformity SIPs:

criteria and procedures for consultation required by subparagraph (D)(i), and enforcement and enforceability (pursuant to section 93.125(c) and 93.122(a)(4)(ii) of title 40, Code of Federal Regulations) in accordance with the Administrator’s criteria and procedures for consultation, enforcement, and enforceability.

Subparagraph (D)(i) in Clean Air Act section 176(c)(4) requires EPA to write regulations that address consultation procedures to be undertaken by MPOs and DOT with state and local air quality agencies and state DOTs before making conformity determinations. EPA’s regulations governing consultation are found at 40 CFR 93.105. Therefore, in effect the statute now requires states to address and tailor only the three sections of the conformity rule noted above in their conformity SIPs.

In general, states are no longer required to submit conformity SIP revisions that address the other sections of the conformity rule, except for limited cases that are described below. EPA believes that the new conformity SIP requirements will reduce the administrative burden for state and local agencies significantly, because the new requirements will result in fewer required conformity SIP revisions in most areas.

EPA is proposing to delete the requirement for states to submit

<sup>11</sup> Joint Explanatory Statement of the Committee of Conference, “Section 6011, Transportation Conformity,” p. 1059.

conformity SIPs to DOT to be consistent with SAFETEA-LU's changes. In revising the Clean Air Act's previous conformity SIP requirements, Congress did not retain the previous requirement that "each State shall submit to the Administrator and the Secretary of Transportation \* \* \* a revision to its implementation plan \* \* \*." The new statutory language in Clean Air Act section 176(c)(4)(E) does not include this previous requirement, and therefore, we are removing this requirement to reduce state and local air agency processing of their conformity SIPs. However, EPA does not believe that this proposal will substantively change DOT's involvement in conformity SIP development. The proposal does not change the existing conformity rule's requirement that EPA provide DOT with a 30-day comment period on conformity SIP revisions.

The reorganizational changes to § 51.390 that are proposed are for clarity and readability and not related to changes in the law. EPA is proposing these changes to make this section more user-friendly.

#### *C. How Would This Proposal Impact States?*

##### 1. Areas That Never Submitted a Conformity SIP

States that never submitted a conformity SIP would only address the three provisions noted above in their conformity SIPs according to any existing conformity SIP deadline (see D. of this section below).

##### 2. Areas That Submitted a Conformity SIP That Was Never Approved

In some cases, states have submitted conformity SIPs to EPA for approval, but EPA has not yet acted on them. These states could write their EPA Regional Office and request that EPA approve only the three provisions that are required to be included in their SIPs and that EPA take no action on the remainder of the submission. States could also leave the full conformity SIP pending before EPA for rulemaking action. However, if EPA approves the full SIP, states could not apply any subsequent changes that EPA makes to the federal rule without first revising their state conformity SIP and obtaining EPA's approval.

##### 3. Areas With Approved Conformity SIPs

States with EPA-approved conformity SIPs that decide to eliminate the provisions that are no longer mandatory would need to revise the SIP to eliminate those provisions. EPA would

have to approve the changes to a state's conformity SIP through the **Federal Register** rulemaking process. Such a SIP revision should not be controversial because the provisions are no longer required by the Clean Air Act as amended by SAFETEA-LU. In addition their elimination from a state's conformity SIP should not change conformity's implementation in practice since the federal conformity rule would apply for any provision not addressed in a state SIP. States are encouraged to work with their EPA Regional Office as early in the process as possible to ensure the SIP submittal meets all requirements and is fully approvable.

##### 4. Areas That Submit a Partial Conformity SIP

A state may choose to submit a conformity SIP that addresses only one or two of the three required sections of the federal rule. In this situation, EPA can approve the submitted sections. However, the Clean Air Act as amended by SAFETEA-LU requires states to address all three sections in their conformity SIP, so a state that addresses only one or two of the requirements would still have an outstanding requirement.

#### *D. When Are Conformity SIPs Due?*

SAFETEA-LU did not create any new deadlines for conformity SIPs. Any nonattainment or maintenance area that has missed earlier deadlines to submit conformity SIP revisions (e.g., after previous conformity rulemakings, or new nonattainment designations) continues to be subject to these previous deadlines, but only in regard to the three provisions now required by the Clean Air Act. Two scenarios are described below.

##### 1. Areas With Conformity SIPs That Address Only the Three Required Provisions

Once a state has an approved conformity SIP that addresses only the three sections that the Clean Air Act now requires, the state would need to revise its conformity SIP only if EPA revises one of these sections of the conformity rule, or the state chooses to revise one of these three provisions. Any future changes to the federal conformity rules beyond these three provisions would apply in all states that have only these three provisions in their approved conformity SIP.

##### 2. Areas That Choose to Either Retain or Submit Additional Sections of the Conformity Rule

A state with a previously approved conformity SIP may decide to retain all

or some of the federal rule in its SIP or a state without an approved conformity SIP could choose to submit for EPA approval all or some of the other sections of the federal rule. In such a case, the state should be aware that the conformity determinations in the state continue to be governed by the state's approved conformity SIP. Such a state would need to revise its conformity SIP when EPA makes changes to the federal rule in order to have those changes apply in the state. For more information, please refer to EPA's November 2004 Conformity SIP Guidance, which is found at: <http://www.epa.gov/otaq/stateresources/transconf/policy.htm>.

#### **VIII. Transportation Control Measure Substitutions and Additions**

SAFETEA-LU section 6011(d) amended the Clean Air Act by adding a new section 176(c)(8) that establishes specific criteria and procedures for replacing TCMs in an existing approved SIP with new TCMs and adding TCMs to an approved SIP. SAFETEA-LU section 6011(g) directs EPA to "promulgate revised regulations to implement the changes made by this section." EPA is proposing to revise the definition of a TCM in 40 CFR 93.101 to clarify that TCMs as defined for conformity purposes also include any TCMs that are incorporated into the SIP through this new TCM substitution and addition process. However, EPA is not proposing regulatory text to implement this Clean Air Act amendment. EPA has determined that revising the transportation conformity regulations is not necessary to implement the TCM substitution and addition provision.

EPA based its determination that implementing regulations are not necessary on three factors. First, Clean Air Act section 176(c)(8) contains sufficient detail to allow the provision to be implemented without further regulation. This section specifies the requirements for TCM substitutions and additions. It establishes the procedures for ensuring that substitute TCMs provide equal or greater emissions reductions than the TCMs that are being replaced. It also establishes the process for concurrence on the substitution or addition by the state air agency and EPA. Finally, it ensures that the state and EPA maintain up-to-date information on the TCMs in approved SIPs so that the public is aware of the TCMs that are to be implemented. Regulatory language to implement this provision would merely duplicate the language already included in the Clean Air Act.

Second, regulatory changes are needed to address the other Clean Air

Act amendments made by SAFETEA-LU (e.g., the frequency of conformity determinations and the lapse grace period) because the existing transportation conformity regulation is inconsistent with the revised Clean Air Act. However, no such inconsistency exists for the TCM substitution and addition provision because the transportation conformity regulation has never addressed the substitution or addition of TCMs to approved SIPs. Therefore, the detailed criteria and procedures for TCM substitutions and additions contained in Clean Air Act section 176(c)(8) can be relied on without any conflict with the regulation.

Third, if EPA were to establish regulations to implement the Clean Air Act amendment addressing TCM substitution and addition, those provisions would not be incorporated into the transportation conformity regulations in 40 CFR part 93. While the TCM substitution and addition provision appears in Clean Air Act section 176(c) which establishes conformity requirements, the provision actually establishes a process by which an area can revise its approved SIP. Therefore, if regulations were written to implement this provision, they would appear in either 40 CFR part 51 or 52, which govern SIP actions. However, EPA typically issues guidance rather than regulations for statutory requirements related to SIPs where the agency concludes that statutory language can be implemented without regulations. EPA's decision not to propose regulatory text to implement the TCM substitution and addition provision is consistent with EPA's past practice for SIP requirements.

EPA and DOT issued joint guidance on February 14, 2006, on the implementation of all of the Clean Air Act amendments made by SAFETEA-LU. This guidance clarified EPA and DOT expectations for how TCM substitutions and additions are to be carried out by state and local agencies. State and local agencies considering TCM substitutions or additions should review this guidance and consult with their local EPA, FHWA and FTA offices. The guidance is available at: <http://www.epa.gov/otaq/stateresources/transconf/420b06901.pdf>.

Clean Air Act section 176(c)(8) requires that the EPA Administrator consult and concur on TCM substitutions and additions. However, as has been done with most other responsibilities related to the approval of SIP revisions, EPA believes that this authority may be delegated from the Administrator to the Regional Administrators and in some cases to

other levels of management in the EPA Regional Offices. In the February 2006 joint guidance described above we indicated that EPA intended to prepare a delegation of authority for these responsibilities that, when finalized, would enable EPA Regional Administrators to consult and concur on TCM substitutions and additions. On September 29, 2006, the EPA Administrator signed the subject delegation of authority (Delegation of Authority 7-158: Transportation Control Measure Substitutions and Additions). As of that date, EPA Regional Administrators have the authority to consult and concur on TCM substitutions and additions. The delegation of authority allows the Regional Administrators to further delegate these responsibilities to the regional air division directors, but no further.

## **IX. Categorical Hot-spot Findings for Projects in Carbon Monoxide Nonattainment and Maintenance Areas**

### *A. Background*

The conformity rule currently requires a hot-spot analysis to be completed for all project-level conformity determinations in CO nonattainment and maintenance areas (40 CFR 93.116 and 93.123(a)). A CO hot-spot analysis is an estimation of likely future localized pollutant concentrations and a comparison of those concentrations to the CO national ambient air quality standards ("standards") (40 CFR 93.101). A hot-spot analysis assesses air quality impacts on a scale smaller than the entire nonattainment or maintenance area, such as a congested roadway intersection.

The current conformity rule requires that a CO hot-spot analysis shows that a non-exempt FHWA/FTA project does not cause any new violations of the CO standards or increase the frequency or severity of existing violations (40 CFR 93.116(a)). Until a CO attainment demonstration or maintenance plan is approved, non-exempt FHWA/FTA projects must also meet the 40 CFR 93.116(b) requirement to eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project. Today's proposal would not amend these existing requirements.

The type of CO hot-spot analysis varies depending on the type of project involved. Section 93.123(a)(1) currently requires quantitative hot-spot analyses for projects of most concern; section 93.123(a)(2) requires either a quantitative or qualitative hot-spot

analysis for all other projects. Today's proposal would not amend what projects are covered by these existing requirements.

Hot-spot analyses are also required for certain projects in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas. The current conformity rule allows DOT, in consultation with EPA, to make a "categorical hot-spot finding" in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas if there is appropriate modeling that shows that a particular category of highway or transit projects will meet applicable Clean Air Act conformity requirements without further analysis (40 CFR 93.123(b)(3)). If DOT makes such a finding, then no further hot-spot analysis to meet 40 CFR 93.116(a) is needed for any project that fits the category addressed by the finding. A project sponsor would simply reference a categorical hot-spot finding in the project-level conformity determination to meet hot-spot analysis requirements. See EPA's March 10, 2006, final rule for further information (71 FR 12502-12506) on categorical hot-spot findings in PM<sub>2.5</sub> or PM<sub>10</sub> areas.

### *B. Proposal*

Today's proposal would extend this current PM provision for categorical hot-spot findings to CO nonattainment and maintenance areas. The proposal would allow DOT, in consultation with EPA, to make categorical hot-spot findings for appropriate cases in CO nonattainment and maintenance areas if appropriate modeling shows that a type of highway or transit project does not cause or contribute to a new or worsened local air quality violation of the CO standards, as required under 40 CFR 93.116(a).<sup>12</sup> The regulatory text for today's proposal can be found in § 93.123(a)(3).

Any DOT categorical hot-spot finding would have to be supported by a credible quantitative modeling demonstration showing that all potential projects in a category satisfy statutory requirements without further hot-spot analysis. Such modeling would need to be derived in consultation with EPA, and consistent with EPA's existing CO quantitative hot-spot modeling requirements, as described in 40 CFR 93.123(a). Modeling used to support a categorical hot-spot finding could consider the emissions produced from a category of projects based on potential project sizes, configurations, and levels of service. Under the proposed

<sup>12</sup> As discussed further below, categorical hot-spot findings under the proposal could not be used to meet 40 CFR 93.116(b) requirements in the limited number of CO areas without approved attainment demonstrations or maintenance plans.

regulatory language, modeling could also consider the emissions produced by a category of projects and the resulting impact on air quality under different circumstances.

The proposal would not affect the requirement for conformity determinations to be completed for all non-exempt projects in CO areas. The modeling on which a categorical finding is based would serve to fulfill the hot-spot analysis requirements for qualifying projects. The modeled scenarios used by DOT to make categorical hot-spot findings would be derived through consultation and participation by EPA.

Existing interagency consultation procedures for project-level conformity determinations would also be followed (40 CFR 93.105). Any project-level conformity determination that relied on a categorical hot-spot finding would also be subject to existing public involvement requirements, during which commenters could address all appropriate issues relating to the categorical findings used in the conformity determination. See D. of this section for further information on how EPA and DOT would implement the proposal.

#### C. Rationale

EPA believes it is both appropriate and in compliance with the Clean Air Act to propose that DOT make categorical hot-spot findings where modeling shows that such projects will not cause or contribute to new or worsened air quality violations. As long as modeling shows that all potential projects in a category meet the current conformity rule's hot-spot requirements (40 CFR 93.116(a))—either through an analysis of a category of projects or a hot-spot analysis for a single project—then certain Clean Air Act conformity requirements are met.

Clean Air Act section 176(c)(1)(B) is the statutory criterion that must be met by all projects in CO nonattainment and maintenance areas that are subject to transportation conformity. Section 176(c)(1)(B) states that federally-supported transportation projects must not “cause or contribute to any new violation of any standard in any area; 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.”

EPA is not proposing to amend the existing CO hot-spot requirements in 40 CFR 93.116(a) that ensure areas meet Clean Air Act section 176(c)(1)(B) requirements. Categorical hot-spot findings would simply allow future

information to be taken into account in an expedited manner, so that further CO hot-spot analyses are not performed on an individual basis for projects where it is determined to be unnecessary to meet certain statutory requirements. Making hot-spot findings for projects on a category basis would reduce the resource burden for state, regional and local agencies, and provide greater certainty and stability to the transportation planning process, while still ensuring that all projects meet Clean Air Act requirements.

As noted above, CO categorical hot-spot findings under today's proposal could not be used to meet an additional hot-spot requirement for CO areas without approved attainment demonstrations or maintenance plans. Clean Air Act section 176(c)(3)(B)(ii) requires projects in these CO areas to also “eliminate or reduce the severity and number of violations of the carbon monoxide standards in the area substantially affected by the project.” This criterion is stipulated by 40 CFR 93.109(f)(1) and 93.116(b) for FHWA/FTA projects in these CO areas. EPA believes that this criterion is more appropriately met by evaluating the unique circumstances of an individual project, rather than based on a broader analysis of a category of projects. Since most CO areas already have approved attainment demonstrations or maintenance plans, there should be limited practical impact of this aspect of today's proposal.

Whatever the case, EPA believes that the proposal would provide an opportunity to streamline hot-spot analyses in all CO areas. Those areas that are required to meet the additional hot-spot criterion would be able to take advantage of any categorical finding that applies for meeting 40 CFR 93.116(a) requirements.

Finally, today's proposal also addresses a comment that EPA received during a previous rulemaking. In the March 10, 2006, final rule, one commenter believed that the flexibility for FHWA and FTA to make PM<sub>2.5</sub> and PM<sub>10</sub> categorical hot-spot findings should be extended to CO nonattainment and maintenance areas (71 FR 12504). EPA could not take final action on such an expansion in that rulemaking since no proposal had been provided for public comment.

#### D. General Implementation for Categorical Hot-spot Findings

If finalized, EPA would implement a CO categorical hot-spot finding provision similar to the implementation of PM<sub>2.5</sub> and PM<sub>10</sub> categorical hot-spot findings, as described in the March 10, 2006, final rule. A project-level

conformity determination would continue to be required for all non-exempt FHWA/FTA projects in CO areas. Modeling used to support a categorical hot-spot finding would be based on appropriate motor vehicle emissions factor models, dispersion models, and EPA's existing requirements for quantitative CO hot-spot modeling as specified in 40 CFR 93.123(a)(1) (40 CFR part 51, Appendix W (Guideline on Air Quality Models)).

In the March 2006 final rule (71 FR 12505), EPA and DOT described the general process for categorical hot-spot findings to be as follows:

<bullet≤ FHWA and/or FTA, as applicable, would develop modeling, analyses, and documentation to support the categorical hot-spot finding. This would be done with early and comprehensive consultation and participation with EPA.

<bullet≤ FHWA and/or FTA would provide EPA an opportunity to review and comment on the complete categorical hot-spot finding documentation. Any comments would need to be resolved in a manner acceptable to EPA prior to issuance of the categorical hot-spot finding. Consultation with EPA on issue resolution would be documented.

<bullet≤ FHWA and/or FTA would make the final categorical hot-spot finding in a memorandum or letter, which would be posted on EPA's and DOT's respective conformity websites.

Subsequently, transportation projects that meet the criteria set forth in the categorical hot-spot finding would reference that finding in their project-level conformity determination, which would be subject to interagency consultation and the public involvement requirements of the National Environmental Policy Act (NEPA) process and the conformity rule (40 CFR 93.105(e)). The existing consultation and public involvement processes would be used to consider the categorical hot-spot finding for a particular project.

#### X. Deletion of Regulation 40 CFR 93.109(e)(2)(v)

EPA is proposing to eliminate a provision of the transportation conformity rule that was vacated by the U.S. Court of Appeals for the District of Columbia Circuit (*Environmental Defense v. EPA, et al.*, D.C. Cir. No. 04–1291) on October 20, 2006. This provision, 40 CFR 93.109(e)(2)(v), allowed 8-hour ozone areas to use the interim emissions test(s) for conformity instead of 1-hour budgets where the interim emissions test(s) was

determined to be more appropriate to meet Clean Air Act requirements. The court vacated this provision and remanded it to EPA.

As discussed in the July 1, 2004 preamble (69 FR 40025), EPA anticipated that this provision would be used infrequently but that there would be some cases where using the interim emissions test(s) would be more appropriate to meet Clean Air Act requirements. Because of the court's decision on this provision, areas can no longer rely on § 93.109(e)(2)(v) to use an interim emissions test(s) instead of using 1-hour ozone budget(s). Such areas must now use all relevant existing 1-hour ozone budgets in future conformity determinations until 8-hour ozone emissions budgets are found adequate or are approved for a given analysis year.

EPA anticipates minimal impact from the court's decision since most 8-hour ozone areas are already either using their 1-hour or 8-hour ozone SIP budgets. EPA, in cooperation with DOT, is currently providing assistance to the limited number of areas affected by the recent court decision. For additional assistance, please contact your EPA Regional Office.

## XI. Miscellaneous Revisions

### A. Minor Revision to § 93.102(b)(4)

EPA is proposing a minor revision to § 93.102(b)(4), which addresses the period of time that transportation conformity applies in maintenance areas. This is the period of time during which the requirements of the conformity rule apply in an area, and not the timeframe any one conformity determination examines, as discussed in Section VI., "Timeframes for Conformity Determinations."

Section 93.102(b)(4) currently states that conformity applies in "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." We are proposing to clarify this section to ensure that conformity would apply in maintenance areas through the last year of their approved Clean Air Act section 175A(b) maintenance plan, unless the applicable implementation plan specifies that conformity would continue to apply beyond the end of the area's approved second 10-year maintenance plan.

EPA is only proposing to clarify § 93.102(b)(4) because the current regulation may be read to not account for the situation where a maintenance

area submits a second maintenance plan that establishes a budget for a year more than 20 years beyond the date of EPA's approval of the area's redesignation request and first maintenance plan.

For example, suppose an area's redesignation request and first maintenance plan are approved in 2006 and the maintenance plan establishes budgets for 2016. This area submits a second maintenance plan that establishes budgets for 2030. Under the current regulatory language, conformity applies in this area "for 20 years from the date EPA approves" the area's redesignation to maintenance, i.e., until 2026, despite the fact that the area would have budgets for 2030. This result would not be consistent with the Clean Air Act, which requires that transportation activities conform to the SIP. EPA's proposed change to clarify that conformity applies through the last year of the approved second maintenance plan would ensure that conformity applies throughout the time period covered by the SIP budgets. In this example, conformity would apply until 2030.

This proposed revision should not change the implementation of conformity requirements in maintenance areas. The Clean Air Act requires that maintenance plans cover a period of 20 years from the year that EPA approves the area's redesignation request. With this proposed change, conformity would continue to apply in maintenance areas for at least 20 years beyond the date of EPA's redesignation of an area to maintenance. This clarification is consistent with EPA's intention as expressed in the preamble to the 1993 final transportation conformity rule, which stated, "If the maintenance plan establishes emissions budgets for more than twenty years, the area would be required to show conformity to that maintenance plan for more than twenty years" (58 FR 62206).

### B. Technical Corrections to §§ 93.102(b)(2)(v) and 93.119(f)(10)

EPA is proposing corrections to §§ 93.102(b)(2)(v) and 93.119(f)(10) to change "sulfur oxides" to "sulfur dioxide" and "SO<sub>x</sub>" to "SO<sub>2</sub>." In the May 6, 2005, transportation conformity final rule (70 FR 24279), EPA finalized requirements for PM<sub>2.5</sub> precursors. In that final rulemaking, we included "sulfur oxides" as one of the precursors and referred to sulfur oxides as SO<sub>x</sub>. Since that rulemaking was finalized, EPA has proposed the PM<sub>2.5</sub> implementation rule (70 FR 65984) and indicated that sulfur dioxide (SO<sub>2</sub>) would be regulated as a PM<sub>2.5</sub> precursor rather than all sulfur oxides. We are proposing these corrections to the

transportation conformity rule in order to make it consistent with EPA's broader PM<sub>2.5</sub> implementation strategy. This proposed change would not impact current conformity practice.

### C. Revisions to "Table 2—Exempt Projects" in § 93.126

EPA is proposing several minor clarifications to "Table 2—Exempt Projects" in § 93.126, under the category of "Safety." Specifically, EPA is proposing to update the following terms:

<bullet> "Hazard elimination program" would become "Projects that correct, improve, or eliminate a hazardous location or feature;"

<bullet> "Safety improvement program" would become "Highway Safety Improvement Program implementation;" and

<bullet> "Pavement marking demonstration" would become "Pavement marking."

EPA is proposing to update these terms to make them consistent with the terms in 23 U.S.C. 148, which has been amended by SAFETEA-LU section 1401. The revisions EPA is proposing today in Table 2 of the conformity regulation would not change the types of safety projects that are exempt from transportation conformity requirements. These revisions would only update the terminology to be consistent with the changes made by SAFETEA-LU to 23 U.S.C. 148.

In section 1401, SAFETEA-LU removed the hazard elimination program as a stand-alone program previously under 23 U.S.C. 152. Projects that were covered by the hazard elimination program are now covered under the phrase, "Projects that correct, improve, or eliminate a hazardous road location or feature," as included in 23 U.S.C. 148. Therefore, EPA proposes to update this term in Table 2 of the conformity rule.

SAFETEA-LU also established the "Highway Safety Improvement Program" in title 23 U.S.C. 148, which includes the types of projects that were previously covered in the "Safety Improvement Program." Therefore, EPA is proposing to change this term within Table 2 as well. SAFETEA-LU defines "Highway Safety Improvement Project" as "a project described in the State strategic highway safety plan that—(i) Corrects or improves a hazardous road location or feature; or (ii) addresses a highway safety problem." Given that the Highway Safety Improvement Program is substantively the same as the prior Safety Improvement Program, EPA proposes that projects defined in 23

U.S.C. 148 under the Highway Safety Improvement Program would be exempt from transportation conformity.

Finally, "pavement marking demonstration" is no longer a demonstration program and the reference is out of date. However, those types of projects will continue to be exempt under the updated phrase, "Pavement marking." Therefore, EPA proposes changing this term in Table 2 to be consistent with SAFETEA-LU's term.

#### D. Definitions

EPA is proposing revisions to the definitions of "metropolitan planning organization (MPO)" and "transportation improvement program (TIP)" to reflect the definitions in SAFETEA-LU sections 3005(a) and 6001(a). Pursuant to SAFETEA-LU, the term "MPO" now refers to the policy board for the organization that is designated under 23 U.S.C. 134(d) and 49 U.S.C. 5303(d). EPA is proposing to revise the definitions of these terms in § 93.101 to be consistent with the new statutory definitions. These proposed changes would have no practical impact in conformity implementation.

#### E. Minor Clarifications for Hot-Spot Analyses

EPA is proposing two minor clarifications to the conformity rule's hot-spot analysis provisions. Both of these proposed changes are intended to improve conformity rule implementation in light of new statutory requirements. The proposed changes would not substantively change current requirements.

First, EPA is proposing to make minor changes to §§ 93.109(l)(2)(i) and 93.116(a) to ensure that CO, PM<sub>10</sub>, and PM<sub>2.5</sub> hot-spot analyses will continue to consider a project's air quality impact over the entire timeframe of the transportation plan or long-range statewide transportation plan, as appropriate. EPA's minor change to § 93.116(a) will ensure that hot-spot analyses cover the timeframe of the transportation plan in metropolitan and donut nonattainment and maintenance areas. And the proposed addition in § 93.109(l)(2)(i) will ensure that hot-spot analyses in isolated rural areas will also examine a project's air quality impact over the timeframe of the long-range statewide transportation plan.

As discussed in Section VI., EPA is proposing several options for shortening the timeframe addressed by transportation plan and TIP conformity determinations, and in some cases, regional emissions analyses. These changes are proposed in accordance

with new Clean Air Act provisions from SAFETEA-LU. The proposed changes to §§ 93.116(a) and 93.109(l)(2)(i) will ensure that project-level hot-spot analyses examine the appropriate time period, even if the timeframe of the long-range transportation plan or TIP conformity determination or regional emissions analysis is shortened. The SAFETEA-LU amendments allowing an election to shorten the timeframe covered by conformity determinations apply only to transportation plan and TIP conformity determinations, not project-level conformity determinations.

Second, EPA is proposing a technical clarification to § 93.123(b)(1)(i) to address some confusion in the field since our March 10, 2006, final rule (71 FR 12468). Section 93.123(b)(1)(i) of the current rule requires PM<sub>2.5</sub> or PM<sub>10</sub> hot-spot analyses to be completed for "New or expanded highway projects that have a significant number of or significant increase in diesel vehicles; \* \* \*" EPA is proposing to clarify this provision as "New highway projects that have a significant number of diesel vehicles, and expanded projects that have a significant increase in the number of diesel vehicles."

Since the March 2006 final rule was promulgated, EPA has received several questions regarding what types of new and expanded highway projects are covered by § 93.123(b)(1)(i). For example, some state and local transportation agencies have asked how the current rule's reference to a "significant increase in diesel vehicles" applies to new highway projects. Although DOT and EPA have answered these and other questions,<sup>13</sup> clarifying this provision of the conformity rule will assist planners as they implement the rule in the future. Again, today's proposal does not change the type of new or expanded highway projects that would require PM<sub>2.5</sub> or PM<sub>10</sub> hot-spot analyses for transportation conformity purposes; we are simply clarifying the current provision through a grammatical change.

#### F. Minor Revision for Terms Used to Describe Transportation Plan Revisions

EPA is also proposing a minor revision to how §§ 93.104(b)(2) and 93.105(c)(1)(v) describe transportation plan changes that require conformity determinations, but are not comprehensive transportation plan updates. EPA is proposing to change references for transportation plan

"revision(s)" to be transportation plan "amendment(s)," in order to be consistent with the proposed planning definitions in DOT's February 14, 2007, final transportation planning regulations (72 FR 7224). Today's proposed changes would also provide consistency between how mid-cycle transportation plan and TIP changes are currently described in the conformity rule. Section 93.104(c)(2) currently requires conformity determinations for a TIP "amendment," rather than a "revision." The proposal would not change the substantive requirements for when a conformity determination is required for transportation plan changes. In addition, the minor wording change to § 93.105(c)(1)(v) would not require a conformity SIP revision.

#### G. Minor Revision to Reference for Public Consultation Provision

EPA is proposing to update one of the references in § 93.105(e) of the conformity rule to be consistent with DOT's transportation planning regulations. Section 93.105(e) describes the procedures for consulting with the general public on conformity determinations. This provision currently refers to 23 CFR 450.316(b) of DOT's transportation planning regulations, which describes how public involvement occurs during the development of transportation plans and TIPs.

EPA is proposing to change the reference in § 93.105(e) to be 23 CFR 450.316(a), so that the conformity rule is consistent with DOT's planning regulations. In its February 14, 2007, final rule (72 FR 7224), DOT reorganized 23 CFR 450.316 to reflect the new SAFETEA-LU statute. DOT moved the public consultation procedures that EPA has historically relied upon in the conformity rule from 23 CFR 450.316(b) to 23 CFR 450.316(a). Today's proposal would simply update the conformity rule to reflect this change in the planning regulations.

Today's proposal would not change the substantive requirements for the public consultation requirements for conformity determinations. In addition, the proposal would not require a state to revise its conformity SIP, since the proposal involves an administrative change to one reference in DOT's regulations. EPA has not required conformity SIP revisions for similar reference changes in the past; the public participation requirements in existing approved conformity SIPs can be implemented as intended even if they do not reflect the most current citation in DOT's regulations.

<sup>13</sup> Questions and answers for PM<sub>2.5</sub> and PM<sub>10</sub> hot-spot analysis requirements can be found at FHWA's Web site: <http://www.fhwa.dot.gov/environment/conformity/pm25faqs.htm>.

## XII. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735; October 4, 1993), this action is a “significant regulatory action” because it raises novel legal and policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### B. Paperwork Reduction Act

Transportation conformity determinations are required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with (“conform to”) the purpose of the SIP. Conformity to the purpose of the SIP means that transportation activities will not cause or contribute to new air quality violations, worsen existing violations, or delay timely attainment of the relevant air quality standards. Transportation conformity applies under EPA’s conformity regulations at 40 CFR 51.390 and part 93 to areas that are designated nonattainment and those redesignated to attainment after 1990 (“maintenance areas” with SIPs developed under Clean Air Act section 175A) for transportation-source criteria pollutants. The Clean Air Act gives EPA the statutory authority to establish the criteria and procedures for determining whether transportation activities conform to the SIP.

This action does not impose any new information collection burden or any new information collection requirements. However, the Office of Management and Budget has previously approved the information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements of EPA’s existing transportation conformity rule and the proposed revisions in today’s action are addressed by two information collection requests (ICRs). Requirements for carbon monoxide, PM<sub>10</sub>, nitrogen dioxide, and 1-hour ozone nonattainment and maintenance areas are covered under the DOT ICR entitled, “Metropolitan and Statewide Transportation Planning,” with the OMB control number of 2132–0529. Requirements related to PM<sub>2.5</sub> and 8-hour ozone nonattainment and maintenance areas are covered by the EPA ICR entitled, “Transportation Conformity Determinations for Federally Funded

and Approved Transportation Plans, Programs and Projects Under the New 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards,” with OMB control number 2060–0561, EPA ICR number 2130.02.

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

An agency may not collect information, and a person is not required to respond to an agency’s request for information unless it has a currently valid OMB control number. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an Agency to prepare a regulatory flexibility analysis of rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit organizations and small government jurisdictions.

For purposes of assessing the impacts of today’s proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration’s (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today’s proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This regulation directly affects federal agencies and metropolitan planning organizations that, by

definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities within the meaning of the Regulatory Flexibility Act. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “federal mandates” that may result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposal itself does not contain a federal mandate that may result in expenditures of \$100 million or more by state, local, and tribal governments, in the aggregate, or the private sector in any one year. The primary purpose of this proposal is to amend the conformity rule to be

consistent with Clean Air Act section 176(c) as amended by SAFETEA-LU. The Clean Air Act amendments made by SAFETEA-LU were intended to reduce the burden of demonstrating conformity in designated nonattainment and maintenance areas subject to conformity requirements. Thus, although this proposal explains how to implement these Clean Air Act amendments, it merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of \$100 million or more in any year. Thus, today's proposal is not subject to the requirements of sections 202 and 205 of the UMLRA and EPA has not prepared a statement with respect to budgetary impacts.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This rule will not significantly or uniquely impact small governments because it directly affects federal agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000. Additionally, this proposal explains how to implement Clean Air Act requirements, as such it merely implements already established law that imposes conformity requirements and does not itself impose requirements.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It will not have substantial direct effects on states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in certain nonattainment and maintenance areas as a matter of law, and this proposed action merely proposes to

establish and revise procedures for transportation planning entities in subject areas to follow in meeting their existing statutory obligations. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communication between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

#### *F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

Executive Order 13175: "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the federal government and the Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes."

Today's proposed amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments, as the Clean Air Act requires transportation conformity to apply in any area that is designated nonattainment or maintenance by EPA. This proposal would amend the conformity rule to be consistent with Clean Air Act section 176(c) as amended by SAFETEA-LU. The Clean Air Act amendments made by SAFETEA-LU affect nonattainment and maintenance areas subject to conformity requirements. This proposed rule does not have tribal implications, as specified in Executive Order 13175. Accordingly, Executive Order 13175 does not apply to this rule.

#### *G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks*

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997,) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria,

the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045 because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

#### *H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use*

This proposal is not subject to Executive Order 13211, "Action Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355; May 22, 2001) because it will not have a significant adverse effect on the supply, distribution, or use of energy. Further, we have determined that this proposal is not likely to have any significant adverse effects on energy supply.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., material specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposal does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### **List of Subjects in 40 CFR Parts 51 and 93**

Administrative practice and procedure, Air pollution control, Carbon monoxide, Clean Air Act, Environmental protection, Highways and roads, Intergovernmental relations, Mass transportation, Nitrogen Dioxide, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: April 18, 2007.

**Stephen L. Johnson,**  
*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. An authority citation for subpart T of part 51 is added to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

**Subpart T—[Amended]**

2. Section 51.390 is revised to read as follows:

**§ 51.390 Implementation plan revision.**

(a) *Purpose and applicability.* The federal conformity rules under part 93, subpart A, of this chapter, in addition to any existing applicable state requirements, establish the conformity criteria and procedures necessary to meet the requirements of Clean Air Act section 176(c) until such time as EPA approves the conformity implementation plan revision required by this subpart. A state with an area subject to this subpart and part 93, subpart A, of this chapter must submit to EPA a revision to its implementation plan which contains criteria and procedures for DOT, MPOs and other state or local agencies to assess the conformity of transportation plans, programs, and projects, consistent with this subpart and part 93, subpart A, of this chapter. The federal conformity regulations contained in part 93, subpart A, of this chapter would continue to apply for the portion of the requirements that the state did not include in its conformity implementation plan and the portion, if any, of the state's conformity provisions that is not approved by EPA. In addition, any previously applicable implementation plan conformity requirements remain enforceable until the state submits a revision to its applicable implementation plan to specifically remove them and that revision is approved by EPA.

(b) *Conformity implementation plan content.* To satisfy the requirements of Clean Air Act section 176(c)(4)(E), the implementation plan revision required by this section must include the following three requirements of part 93, subpart A, of this chapter: §§ 93.105, 93.122(a)(4)(ii), and 93.125(c). A state may elect to include any other provisions of part 93, subpart A. If the provisions of the following sections of part 93, subpart A, of this chapter are included, such provisions must be included 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 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. A state's conformity provisions may contain criteria and procedures more stringent than the requirements described in this subpart and part 93, subpart A, of this chapter only if the state's conformity provisions apply equally to non-federal as well as federal entities.

(c) *Timing and approval.* A state must submit this revision to EPA 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. The state must also revise its conformity implementation plan within 12 months of the date of publication of any final amendments to § 93.105, 93.122(a)(4)(ii), and 93.125(c) of this chapter, as appropriate. Any other portions of part 93, subpart A, of this chapter that the state has included in its conformity implementation plan and EPA has approved must be revised in the state's implementation plan and submitted to EPA within 12 months of the date of publication of any final amendments to such sections. EPA will provide DOT with a 30-day comment period before taking action to approve or disapprove the submission. In order for EPA to approve the implementation plan revision submitted to EPA under this subpart, the plan revision must address and give full legal effect to the following three requirements of part 93, subpart A: §§ 93.105, 93.122(a)(4)(ii), and 93.125(c) of this chapter. Any other provisions that are incorporated into the conformity implementation plan must also be done in a manner that gives them full legal effect. Following EPA approval of the state conformity provisions (or a portion thereof) in a revision to the state's conformity implementation plan, conformity determinations will be governed by the approved (or approved portion of the) state criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the approved conformity SIP.

**PART 93—[AMENDED]**

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

**Authority:** 42 U.S.C. 7401–7671q.

4. Section 93.101 is amended by:

a. Revising the definitions for “Metropolitan planning organization

(MPO)” and “Transportation improvement program (TIP)”;

b. Revising the first sentence of the definition for “Transportation control measure (TCM)”.

The revisions read as follows:

**§ 93.101 Definitions.**

\* \* \* \* \*

*Metropolitan planning organization (MPO)* means the policy board of an organization created as a result of the designation process in 23 U.S.C. 134(d).

\* \* \* \* \*

*Transportation control measure (TCM)* is any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA section 176(c)(8), that is either one of the types listed in CAA section 108, 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. \* \* \*

*Transportation improvement program (TIP)* means a transportation improvement program developed by a metropolitan planning organization under 23 U.S.C. 134(j).

\* \* \* \* \*

**§ 93.102 [Amended]**

5. Section 93.102 is amended as follows:

a. In paragraph (b)(2)(v), revising “sulfur oxides (SO<sub>x</sub>)” to read “sulfur dioxide (SO<sub>2</sub>)”; and

b. In paragraph (b)(4), revising “for 20 years from the date EPA approves the area's request under section 107(d) of the CAA for redesignation to attainment” to read “through the last year of a maintenance area's approved CAA section 175A(b) maintenance plan”.

6. Section 93.104 is amended as follows:

a. By revising paragraphs (b)(2), (b)(3), and (c)(3);

b. By revising paragraph (e) introductory text; and

c. By adding paragraph (f).

**§ 93.104 Frequency of conformity determinations.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(2) All transportation plan amendments must be found to conform before the transportation plan amendments are approved by the MPO or accepted by DOT, unless the amendment 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 amendment taken as a whole.

(3) The MPO and DOT must determine the conformity of the transportation plan (including a new regional emissions analysis) no less frequently than every four years. If more than four years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the transportation plan, a 12-month grace period will be implemented as described in paragraph (f) of this section. At the end of this 12-month grace period, the existing conformity determination will lapse.

(c) \* \* \*

(3) The MPO and DOT must determine the conformity of the TIP (including a new regional emissions analysis) no less frequently than every four years. If more than four years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the TIP, a 12-month grace period will be implemented as described in paragraph (f) of this section. At the end of this 12-month grace period, the existing conformity determination will lapse.

\* \* \* \* \*

(e) *Triggers for transportation plan and TIP conformity determinations.* Conformity of existing transportation plans and TIPs must be redetermined within two years of the following, or after a 12-month grace period (as described in paragraph (f) of this section) 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:

\* \* \* \* \*

(f) *Lapse grace period.* During the 12-month grace period referenced in paragraphs (b)(3), (c)(3), and (e) of this section, a project may be found to conform according to the requirements of this part if:

(1) The project is included in the currently conforming transportation plan and TIP (or regional emissions analysis); or

(2) The project is included in the most recent conforming transportation plan and TIP (or regional emissions analysis).

#### § 93.105 [Amended]

7. Section 93.105 is amended by removing "revisions or" in paragraph (c)(1)(v), and by revising the reference "23 CFR 450.316(b)" in paragraph (e) to read as "23 CFR 450.316(a)".

8. Section 93.106 is amended as follows:

- a. By revising the section heading;
- b. By revising paragraphs (a)(1)(iii) and (iv);
- c. By adding new paragraph (a)(v);
- d. By redesignating paragraph (d) as paragraph (e); and
- e. By adding new paragraph (d).

#### § 93.106 Content of transportation plans and timeframe of conformity determinations.

(a) \* \* \*

(1) \* \* \*

(iii) The attainment year must be a horizon year if it is in the timeframe of the transportation plan and conformity determination;

(iv) The last year of the transportation plan's forecast period must be a horizon year; and

(v) If the timeframe of the conformity determination has been shortened under paragraph (d) of this section, the last year of the timeframe of the conformity determination must be a horizon year.

\* \* \* \* \*

(d) *Timeframe of conformity determination.* (1) Unless an election is made under paragraph (d)(2) or (d)(3) of this section, the timeframe of the conformity determination must be through the last year of the transportation plan's forecast period.

(2) For areas that do not have an adequate or approved CAA section 175A(b) maintenance plan, the MPO may elect to shorten the timeframe of the transportation plan and TIP conformity determination, after consultation with state and local air quality agencies, solicitation of public comments, and consideration of such comments.

(i) The shortened timeframe of the conformity determination must be the longest of the following:

(A) The tenth year of the transportation plan;

(B) The latest year in the submitted or applicable implementation plan that contains an adequate or approved motor vehicle emissions budget(s); or

(C) The year after the completion date of a regionally significant project if the project is included in the TIP or the project requires approval before the subsequent conformity determination.

(ii) The conformity determination must be accompanied by a regional emissions analysis (for informational purposes only) for the last year of the transportation plan and for any year shown to exceed motor vehicle emissions budgets in a prior regional emissions analysis, if such a year extends beyond the timeframe of the conformity determination.

(3) For areas that have an adequate or approved CAA section 175A(b) maintenance plan, the MPO may elect to shorten the timeframe of the conformity determination to extend through the last year of such maintenance plan after consultation with state and local air quality agencies, solicitation of public comments, and consideration of such comments.

(4) Any election made by an MPO under paragraphs (d)(2) or (d)(3) of this section shall continue in effect until the MPO elects otherwise, after consultation with state and local air quality agencies, solicitation of public comments, and consideration of such comments.

\* \* \* \* \*

#### § 93.109 [Amended]

9. Section 93.109 is amended as follows:

a. By removing " , subject to the exception in paragraph (e)(2)(v)" in the introductory text of paragraph (e)(2);

b. By removing paragraph (e)(2)(v); and

c. By revising in paragraph (l)(2)(i) "§ § 93.118 and 93.119" to read "§ § 93.106(d), 93.116, 93.118, and 93.119" and by adding to the end of this same paragraph, "When the requirements of § 93.106(d) apply to isolated rural nonattainment and maintenance areas, references to "MPO" should be taken to mean the state department of transportation."

10. Section 93.114 is amended by revising the introductory text to read as follows:

#### § 93.114 Criteria and procedures: Currently conforming transportation plan and TIP.

There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval, or a project must meet the requirements in § 93.104(f) during the 12-month lapse grace period.

\* \* \* \* \*

11. Section 93.115 is amended by revising the section heading and adding a new paragraph (e) to read as follows:

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

\* \* \* \* \*

(e) Notwithstanding the requirements of paragraphs (a), (b), and (c) of this section, a project must meet the requirements of § 93.104(f) during the 12-month lapse grace period.

#### § 93.116 [Amended]

12. Section 93.116 is amended by removing in paragraph (a) "(or regional emissions analysis)".

13. Section 93.118 is amended as follows:

- a. By revising paragraph (b) introductory text;
- b. By revising the first sentence in paragraph (d)(2); and
- c. By adding new paragraph (d)(3) to read as follows:

**§ 93.118 Criteria and procedures: Motor vehicle emissions budget.**

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 attainment year (if it is within the timeframe of the transportation plan and conformity determination), for the last year of the timeframe of the conformity determination (as described under § 93.106(d)), and for any intermediate years within the timeframe of the conformity determination as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

- (d) \* \* \*

(2) The regional emissions analysis may be performed for any years in the timeframe of the conformity determination (as described under § 93.106(d)) 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 conformity determination) and the last year of the timeframe of the conformity determination. \* \* \*

(3) When the timeframe of the conformity determination is shortened under § 93.106(d)(2), the conformity determination must be accompanied by a regional emissions analysis (for informational purposes only) for the last year of the transportation plan, and for any year shown to exceed motor vehicle emissions budgets in a prior regional emissions analysis (if such a year extends beyond the timeframe of the conformity determination).

\* \* \* \* \*

14. Section 93.119 is amended to read as follows:

- a. In paragraph (f)(10), by revising "SO<sub>x</sub>" to read "SO<sub>2</sub>";
- b. By revising the last sentence in paragraph (g)(1); and
- c. By adding new paragraph (g)(3).

**§ 93.119 Criteria and procedures: Interim emissions in areas without motor vehicle emissions budgets.**

\* \* \* \* \*

(g) \* \* \*  
 (1) \* \* \* The last year of the timeframe of the conformity determination (as described under § 93.106(d)) must also be an analysis year.

\* \* \* \* \*

(3) When the timeframe of the conformity determination is shortened under § 93.106(d)(2), the conformity determination must be accompanied by a regional emissions analysis (for informational purposes only) for the last year of the transportation plan.

\* \* \* \* \*

15. Section 93.120 is amended by revising paragraph (a)(2) to read as follows:

**§ 93.120 Consequences of control strategy implementation plan failures.**

(a) \* \* \*

(1) \* \* \*

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, only projects in the currently conforming TIP or that meet the requirements of § 93.104(f) during the 12-month lapse grace period may be found to conform. This means that beginning on the effective date of a disapproval without a protective finding, no transportation plan, TIP, or project not in the currently conforming TIP or that meets the requirements of § 93.104(f) during the 12-month lapse grace period may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted, EPA finds its motor vehicle emissions budget(s) adequate pursuant to § 93.118 or approves the submission, and conformity to the implementation plan revision is determined.

16. Section 93.121 is amended by revising paragraphs (a)(1) and (2) to read as follows:

**§ 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) \* \* \*

(1) The project comes from the currently conforming transportation plan and TIP (or meets the requirements of § 93.104(f) during the 12-month lapse grace period), and the project's design concept and scope have not changed

significantly from those that were included in the regional emissions analysis for that transportation plan and TIP;

(2) The project is included in the regional emissions analysis for the currently conforming transportation plan and TIP conformity determination (or meets the requirements of § 93.104(f) during the 12-month lapse grace period), even if the project is not strictly included in the transportation plan or TIP for the purpose of MPO project selection or endorsement, and the project's design concept and scope have not changed significantly from those that were included in the regional emissions analysis; or

\* \* \* \* \*

17. Section 93.123 is amended by adding paragraph (a)(3) and revising paragraph (b)(1)(i) to read as follows:

**§ 93.123 Procedures for determining localized CO, PM<sub>10</sub>, and PM<sub>2.5</sub> concentrations (hot-spot analysis).**

(a) \* \* \*

(3) DOT, in consultation with EPA, may also choose to make a categorical hot-spot finding that § 93.116(a) is met without further hot-spot analysis for any project described in paragraphs (a)(1) and (a)(2) of this section based on appropriate modeling. DOT, in consultation with EPA, may also consider the current air quality circumstances of a given CO nonattainment or maintenance area in categorical hot-spot findings for applicable FHWA or FTA projects.

(b) \* \* \*

(1) \* \* \*

(i) New highway projects that have a significant number of diesel vehicles, and expanded highway projects that have a significant increase in the number of diesel vehicles;

\* \* \* \* \*

**§ 93.126 [Amended]**

18. Section 93.126, Table 2 is amended by revising "Hazard elimination program" to read "Projects that correct, improve, or eliminate a hazardous location or feature", "Safety improvement program" to read "Highway Safety Improvement Program implementation", and "Pavement marking demonstration" to read "Pavement marking".

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