

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 93

[FRL-7513-5]

RIN 2060-A156

### Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes

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

**ACTION:** Proposed rule.

**SUMMARY:** Today we (EPA) are proposing to amend the transportation conformity rule to address a March 2, 1999, ruling by the U.S. Court of Appeals for the District of Columbia Circuit (*Environmental Defense Fund v. EPA, et al.*, 167 F. 3d 641, DC Cir. 1999; hereinafter referred to as the "court decision"). Our proposal would incorporate into the transportation conformity rule the EPA and Department of Transportation (DOT) guidance that has been used in place of certain regulatory provisions of the rule since the March 1999 court decision. EPA consulted with DOT on the development of our implementation strategy to address the court's decision and DOT concurs with this proposal.

Consistent with the court's ruling and existing federal guidance on transportation conformity, we are proposing that certain federal and non-federal highway and transit projects cannot be advanced in areas without a currently conforming transportation plan and transportation improvement program (TIP), unless they have previously received appropriate approvals and funding commitments. As directed by the court, our proposal also would modify the process for deciding whether the motor vehicle emissions budgets in newly submitted state air quality plans are adequate for use in the conformity process. Other provisions affected by the court decision and included in our proposal are the timing of conformity consequences following the disapproval of certain types of SIPs, and the use of submitted safety margins for transportation conformity in areas that have approved SIPs that were submitted prior to November 24, 1993.

The proposal also includes several additional amendments to provisions of the rule that the court decision did not directly affect. These amendments are being proposed to improve the rule and/or to provide clarification of existing requirements.

**DATES:** Written comments on this proposal must be received on or before July 30, 2003.

**ADDRESSES:** Comments may be submitted by mail to: Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OAR-2003-0063. Comments may also be submitted electronically, by facsimile, or through hand delivery/courier. Follow the detailed instructions as provided in section I.C. of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Angela Spickard, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, [spickard.angela@epa.gov](mailto:spickard.angela@epa.gov), (734) 214-4283; or, Meg Patulski, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, [patulski.meg@epa.gov](mailto:patulski.meg@epa.gov), (734) 214-4842.

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## I. General Information

### A. Regulated Entities

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).
State government .....	State transportation and air quality agencies.
Federal government .....	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 rule. This table lists the types of entities of which EPA is aware that potentially could be regulated by the conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in 40 CFR 93.102 of the transportation conformity rule. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

#### *B. How Can I Get Copies of This Document?*

##### 1. Docket

EPA has established an official public docket for this action under Docket ID No. OAR-2003-0063. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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. This Docket Facility is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The Docket telephone number is 202-566-1742.

##### 2. Electronic Access

You may access this **Federal Register** document electronically through EPA's transportation conformity website at: <http://www.epa.gov/otaq/transp/traqconf.htm>. You may also access this document electronically under the

“**Federal Register**” listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> 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 EPA Dockets. Information claimed as CBI and other information for which disclosure is restricted by statute is not included in the official public docket and will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's 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 EPA's 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 EPA's 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 to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information for which disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The

entire printed comment, including the copyrighted material, will be available in the public docket.

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

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

#### *C. How and to Whom Do I Submit Comments?*

You may submit comments electronically, by mail, by facsimile, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked “late.” EPA is not required to consider these late comments.

##### 1. Electronically

If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

*i. EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. OAR-2003-0063. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

*ii. E-mail.* Comments may be sent by electronic mail (e-mail) to [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov), Attention Air Docket ID No. OAR-2003-0063. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

*iii. Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in section I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

*2. By Mail.* Send two copies of your comments to: Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW, Washington, DC, 20460, Attention Docket ID No. OAR-2003-0063.

*3. By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC., Attention Air Docket ID No. OAR-2003-0063. Such deliveries are only accepted during the Docket's normal hours of operation as identified in section I.B.1.

*4. By Facsimile.* Fax your comments to: (202) 566-1741, Attention Docket ID. No. OAR-2003-0063.

#### *D. How Should I Submit CBI to the Agency?*

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the following address: Attention: Angela Spickard, U.S. EPA, National Vehicle and Fuel Emissions Laboratory, Transportation and Regional Programs Division, 2000 Traverwood Drive, Ann Arbor, MI 48105, Docket ID No. OAR-2003-0063. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

In addition to one complete version of the comment that includes any 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 and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

#### *E. What Should I Consider as I Prepare My Comments for EPA?*

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line

on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

## **II. Background on the Transportation Conformity Rule**

Transportation conformity is required under section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with ("conform to") the purpose of a state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the state air quality plan.

EPA first published the transportation conformity rule on November 24, 1993 (58 FR 62188). Minor revisions were made to the rule in 1995 (60 FR 40098, August 7, 1995, and 60 FR 57179, November 14, 1995), and more recently in the spring of 2000 (65 FR 18911, April 10, 2000) and on August 6, 2002 (67 FR 50808).

On August 15, 1997, EPA published a comprehensive set of amendments that clarified and streamlined language from the 1993 transportation conformity rule (62 FR 43780) and subsequent 1995 amendments. However, a decision made on March 2, 1999, by the U.S. Court of Appeals for the District of Columbia Circuit affected several provisions of the 1997 rulemaking (*Environmental Defense Fund v. EPA, et al.*, 167 F. 3d 641, DC Cir. 1999; hereinafter referred to as the "court decision"). Specifically, the court's ruling affected provisions that pertain to five aspects of the conformity rule, including:

- (1) Federal approval and funding of transportation projects in areas without a currently conforming transportation plan and transportation improvement program (TIP);
- (2) Provisions allowing motor vehicle emissions budgets from submitted SIPs to be used in transportation conformity determinations before the SIP has been approved;
- (3) the adoption and approval of non-federal transportation projects in areas without a currently conforming transportation plan and TIP;
- (4) the timing of conformity consequences following an EPA disapproval of a control strategy SIP (e.g., reasonable further progress SIPs

and attainment demonstrations) without a protective finding; and,

(5) the use of submitted safety margins in areas with approved SIPs that were submitted prior to November 24, 1993.

In response to the court decision, the EPA and U.S. Department of Transportation (DOT) issued guidance<sup>1</sup> to address the provisions directly affected by the court decision. DOT subsequently modified its June 18, 1999, guidance and replaced it with revised guidance issued on January 2, 2002, and announced in the **Federal Register** on February 7, 2002, (67 FR 5882).<sup>2</sup> DOT issued supplemental guidance<sup>3</sup> in May 2003 to clarify the conformity requirements as they relate to FHWA/FTA's approval of a final environmental impact statement and the National Environmental Policy Act (NEPA) process completion. In addition, FTA issued guidance on April 9, 2003, that further clarified which approvals are necessary for transit projects to proceed during a lapse.<sup>4</sup> The EPA and DOT memoranda serve as the basis for today's proposed amendments to the transportation conformity rule. EPA and DOT consulted with each other on the development of all guidance documents implementing the March 2, 1999, court decision. See EPA's transportation conformity web site listed in section

<sup>1</sup> May 14, 1999, Memorandum from Gay MacGregor, then-Director of the Regional and State Programs Division of EPA's Office of Transportation and Air Quality, to Regional Air Division Directors, "Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision"; and, June 18, 1999, Memorandum from Kenneth R. Wykle, then-Administrator, Federal Highway Administration (FHWA), and Gordon J. Linton, then-Administrator, Federal Transit Administration (FTA), to FHWA Division Administrators, Federal Lands Highway Division Engineers, and FTA Regional Administrators, "Additional Supplemental Guidance for the Implementation of the Circuit Court Decision Affecting Transportation Conformity."

<sup>2</sup> January 2, 2002, Memorandum from Mary E. Peters, Administrator, Federal Highway Administration (FHWA), and Jennifer L. Dorn, Administrator, Federal Transit Administration (FTA), to FHWA Division Administrators, Federal Lands Highway Division Engineers, and FTA Regional Administrators, "Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity"; February 7, 2002, Notice, Issuance of Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity, **Federal Register**, 67 FR 5882.

<sup>3</sup> May 2003, Memorandum from Federal Highway Administration and Federal Transit Administration, "INFORMATION: Clarification of Transportation Conformity Requirements for FHWA/FTA Projects Requiring Environmental Impact Statements."

<sup>4</sup> April 9, 2003, Memorandum from Jennifer L. Dorn, Administrator, Federal Transit Administration, to Regional Administrators, Regions 1-10, "INFORMATION: Revised FTA Procedures for a Conformity Lapse."

I.B.2. to download an electronic copy of these guidance documents.

In addition to addressing the impact of the court decision, today's proposal would also amend several other provisions of the conformity rule. These proposed rule amendments include: New definitions for "donut areas" and "isolated rural nonattainment and maintenance areas"; streamlining of the current requirements affecting frequency of conformity determinations; EPA's revised interpretation of the requirements for using the latest planning assumptions; clarification of the appropriate horizon years for hot-spot analyses; a minor update to the current list of exempt projects; and, several minor clarifications to § 93.118 of the conformity rule ("Criteria and procedures: Motor vehicle emissions budget.") that are aimed at improving the implementation of this section of the conformity regulation. Additional background information and rationale for these proposed rule changes are included in our discussion below.

### III. Federal Projects

#### A. What Are We Proposing?

Today's proposal would modify 40 CFR 93.102(c) so that no new federal approvals or funding commitments for non-exempt projects can occur during a transportation conformity lapse. A conformity lapse generally occurs if transportation plan and TIP conformity determinations are not made within specified time frames. During a conformity lapse no new conformity determinations for FHWA or FTA non-exempt projects may be made.

Section 93.102(c)(1) of the 1997 conformity rule (62 FR 43780) allowed a highway or transit project to receive additional federal approvals and funding commitments during a lapse if the project came from a previously conforming plan and TIP, a conformity determination for the project had been made and the NEPA process was completed before the lapse. Section 93.101 of the rule defines "NEPA process completion" as "the point at which there is a specific action to make a determination that a project is categorically excluded [CE], to make a Finding of No Significant Impact [FONSI], or to issue a record of decision on a Final Environmental Impact Statement [FEIS] \* \* \*" In its March 2, 1999, decision, the court held that § 93.102(c)(1) was unlawful and remanded this section to EPA for further rulemaking.

To address the court decision, EPA is eliminating the current § 93.102(c)(1) provision and proposing new regulatory

language under § 93.102(c). Under this proposed provision, non-exempt transportation project phases that have received all required FHWA or FTA approvals or funding commitments and that have met associated conformity requirements before a lapse could be implemented during the lapse; however, no new federal approvals or funding commitments for subsequent or new phases could be made during the lapse.

Today's proposal would also move § 93.102(c)(2) requirements to § 93.104(d) to limit redundancy and improve organization of the conformity rule. This proposed organizational change would not change the substantive requirements of § 93.102(c)(2). The conformity rule would continue to require a new conformity determination when a significant change in a project's design concept and scope has occurred, a supplemental environmental document for air quality purposes is initiated, or three years have elapsed since the most recent major step to advance a project. A major step is defined in the conformity rule as "\* \* \* NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of plans, specifications and estimates \* \* \*" (40 CFR 93.104(d)).

Today's proposed changes are consistent with the latest EPA and DOT guidance issued to implement the court decision. EPA and DOT consulted on the development of these guidance documents. On January 2, 2002, DOT revised its guidance on how most projects that receive federal approval or funding are affected during a lapse, and announced the release of the new guidance in the **Federal Register** on February 7, 2002 (67 FR 5882). DOT issued supplemental guidance in May 2003 to clarify the conformity requirements as they relate to FHWA/FTA's approval of a final environmental impact statement and the NEPA process completion. In addition, FTA issued guidance on April 9, 2003, that further clarified which approvals are necessary for transit projects to proceed during a lapse. DOT's revised guidance and memoranda supersede previous guidance issued on June 18, 1999. The revised guidance clarifies that only project phases that have met conformity requirements and received federal approval or funding commitments before a lapse can proceed during a lapse. See EPA's conformity website listed in section I.B.2. to download an electronic copy of these guidance documents.

### B. Why Are We Proposing These Changes?

Today's proposal is necessary to make the conformity regulation consistent with the March 1999 court decision. The court held that § 93.102(c)(1) of the 1997 conformity rule was inconsistent with the Clean Air Act since it allowed transportation projects that had previously been found to conform and had completed the NEPA process ("grandfathered" projects) to receive further federal approvals or funding commitments and advance towards construction during a lapse. In effect, this provision allowed project phases that weren't approved prior to a lapse to proceed during the lapse. The D.C. Circuit Court ruled that Clean Air Act section 176(c)(2)(C) prohibits FHWA and FTA from approving or funding new project phases in nonattainment and maintenance areas in the absence of a currently conforming transportation plan and TIP. Clean Air Act section 176(c)(2)(C)(i) states that project approvals can only occur if "such a project comes from a conforming plan and program."

EPA believes that its proposal to allow previously authorized project phases to be implemented during a lapse is a reasonable interpretation that is consistent with Clean Air Act section 176(c)(2)(C), since no federal approvals or funding commitments could be made for new project phases during a lapse. The court did not explicitly rule on the issue of how previously authorized right-of-way (ROW) acquisition, final design, or construction projects are affected during a lapse, but its decision leads EPA to the conclusion that a project phase that has previously received all federal approvals and funding commitments can be implemented during a conformity lapse.

Therefore, today's proposal provides consistency in implementing all federal authorizations, as described in DOT's **Federal Register** notice for its January 2, 2002, guidance. The proposal consistently applies the principle that to "fund" a project actually means the point at which DOT commits to funding a particular project phase (e.g., ROW acquisition).

This interpretation differs from what was outlined in DOT's June 18, 1999, guidance, which asserted that when the Clean Air Act states that DOT cannot "fund" a project unless it conforms, "fund" actually meant only the point at which DOT committed to fund a project for final construction. As a result, only projects that had received funding commitments for final construction prior to a conformity lapse could

proceed during a lapse. However, under the 1999 guidance, reimbursements for previously authorized ROW acquisition and final design activities could not proceed during a lapse, resulting in the federal government suspending its previously authorized commitments to these activities. As explained in DOT's January 2, 2002, revised guidance, EPA and DOT now believe that suspending such authorized commitments is not required by the Clean Air Act as interpreted in the court's decision, and therefore, this proposal does not incorporate the superseded June 1999 guidance.

### C. What Is the Practical Impact of the Proposal?

This proposal would only affect those areas that are unable to meet a conformity deadline and as a result enter into a conformity lapse. Although even short-term conformity lapses can affect transportation planning and project development processes, EPA anticipates that this proposal would primarily affect areas that are in a conformity lapse for a significant period of time. In contrast, this proposal would have no impact in areas where a lapse is short or in lapsed areas that have few transportation projects if no new FHWA/FTA non-exempt projects are pending in these cases.

When an area has a conformity lapse, no new FHWA/FTA approvals or funding commitments for subsequent or new project phases (i.e., NEPA, final design, ROW acquisition, or construction) could be made. The only projects that can receive further FHWA/FTA approvals or funding during a plan and TIP conformity lapse are: (1) Projects exempt from the conformity process; and (2) transportation control measures (TCMs) that are specifically included in an approved state implementation plan (SIP). Exempt projects are FHWA or FTA projects that are listed in § 93.126, § 93.127, or § 93.128 of the conformity rule. A conformity lapse ends when DOT makes a new transportation plan and TIP conformity determination.

For FHWA-funded non-exempt projects, project phases (i.e., final design, ROW acquisition, or construction) that received funding commitments or an equivalent approval or authorization prior to a conformity lapse may continue during the lapse. The execution of a project agreement (which includes Federal approval of the plans, specifications, and estimates) indicates funding commitment.

For FTA-funded non-exempt projects, the largest projects are handled with a full funding grant agreement (FFGA). If

an FFGA was executed prior to a conformity lapse, the project can continue to utilize all federal grant funds during the lapse. If the FFGA was not completed by the date of the lapse, the project sponsor may only complete the current phase of project development (e.g., final design or land acquisition). Transit projects not handled with FFGAs may proceed during a lapse if FTA approved a grant for construction or vehicle acquisition prior to the lapse. If a construction grant was not approved before the lapse, the project sponsor may only complete the current phase of project development.

Subsequent phases of a project for which FHWA or FTA has not taken an approval action or awarded a funding commitment may not proceed in the absence of a conforming plan and TIP. For federal transportation project phases not requiring a project specific project agreement/authorization approval, the State or local transportation agency should not take any action committing the State or local agency to proceed with the project phase during a lapse unless the project phase has already received full approval or authorization for funding before the lapse.

Highway projects using design-build contracting can proceed with all project phases that were included in the design-build contract if FHWA authorized the contract and determined conformity before the lapse (23 CFR 635.309). Similarly, transit projects using design-build contracting can proceed with design and construction if a grant for design and construction was made by FTA prior to the lapse.

Highway projects that require federal approval but no federal funding can proceed during a lapse if all necessary approvals occurred before the lapse. For example, consider a proposed regionally significant state toll road that connects to a federal interstate highway. The proposed road has received a conformity determination, federal NEPA approval, FHWA approval of the new interstate access point, and the project does not require FHWA approvals or funding commitments for subsequent project phases. In this case where no further FHWA actions are required, the project could proceed to construction during a conformity lapse, as long as no additional approvals by recipients of federal funds are needed. As always, the project would continue to be considered in the regional emissions analysis for the nonattainment or maintenance area. See Section IV. "Non-Federal Projects" of today's proposal for more information on how non-federal project approvals are affected during a conformity lapse.

Preliminary engineering for project development activities that are necessary to assess social, economic, and environmental effects of the proposed action or alternatives as part of the NEPA process for a non-exempt project may continue during a lapse, since such activities are exempt according to 40 CFR 93.126. However, FHWA or FTA cannot approve a categorical exclusion (CE), finding of no significant impact (FONSI), or a record of decision (ROD) for a non-exempt project during a conformity lapse. The NEPA process for new projects can be completed only for exempt projects and TCMs in an approved SIP during a conformity lapse.

When an area is facing a lapse within six months, FHWA, FTA, and EPA will meet and jointly evaluate the potential consequences of the lapse and assess any concerns. FHWA, FTA, and EPA established consultation procedures to be used prior to a lapse in the April 19, 2000, National Memorandum of Understanding (MOU). The MOU can be found on EPA's conformity website as listed in section I.B.2. of this notice. As described in the MOU, the FHWA, FTA, and EPA will meet at least 90 days before a lapse to determine which projects could receive approvals or funding commitments before the lapse, which projects could potentially be delayed, and which actions would be necessary to correct the lapse.

#### IV. Using Motor Vehicle Emissions Budgets From Submitted SIPs for Transportation Conformity Determinations

##### A. Background

Control strategy SIPs and maintenance plans in ozone, CO, PM-10, and NO<sub>2</sub> areas create motor vehicle emission budgets for criteria pollutants and/or their precursors. Control strategy SIPs include reasonable further progress SIPs and attainment demonstrations. The budget is the portion of the total allowable emissions that is allocated to highway and transit vehicle use and emissions (40 CFR 93.101). In a conformity determination, the budget serves as a ceiling on emissions from an area's planned transportation system.

If an area does not have a budget that applies to a particular pollutant and standard it uses one or two of the emission reduction tests, depending on its classification (see 40 CFR 93.119). Prior to the 1997 conformity rule, if an area did not have a budget from an approved SIP to use for conformity, it had to use the emission reduction test(s). In 1995 and 1996, we consulted with conformity implementers and

determined that a budget in a submitted SIP is a more relevant basis for determining conformity than the "build/no-build" test, one of the emission reduction tests. (See 62 FR 43781—4 for this discussion.) In response to this input, we changed the rule in 1997 to allow the budget test to be used when an area had a submitted, but not yet approved, SIP. This change eliminated the use of the emission reduction test(s) sooner for many areas, since they could use the budget for conformity before the SIP is approved. Under the 1997 rule, if EPA had not yet made an adequacy finding within 45 days of receiving a SIP, the SIP's budgets automatically applied for conformity. The 1997 conformity rule also included provisions for EPA to review a budget(s) from a submitted SIP for adequacy.

##### B. What Are We Proposing?

Today's proposal would continue to allow budgets to be used before the SIP is approved, but would modify several provisions under 40 CFR 93.109 and 93.118, which are the sections of the conformity rule that address the use of SIP budgets for conformity purposes.

First, the proposal would eliminate those provisions in §§ 93.109 and 93.118(e) that require areas to use a budget from a submitted SIP in 45 days if EPA has not yet made an adequacy finding. Instead, we are proposing that before a budget from a submitted SIP can be used for conformity, EPA must find it adequate using the criteria in § 93.118(e)(4). The budget could not be used until the effective date of the **Federal Register** notice that announces that EPA has found the budget adequate, which we propose would be 15 days from the date of notice publication.

Second, today's proposal would incorporate into § 93.118 of the conformity rule the basic framework of the adequacy process described in EPA's May 14, 1999, guidance. A description of the adequacy process and the SIPs that are affected are found in section III.D and sections III.F. and G. of this preamble, respectively.

EPA is also adding a minor clarification to a sentence in § 93.118(e)(1). In paragraph (e), the rule explains that a submitted SIP cannot override an approved SIP until the submitted SIP is approved. Today's change more fully describes this point: Budgets from a submitted SIP cannot be used for conformity if an area already has an approved SIP that addresses the same pollutant and Clean Air Act requirement (e.g., rate-of-progress or attainment) and has budgets established for the same year. However, budgets from a submitted SIP are used for

conformity (once they are adequate) if the submitted SIP's budgets address either a different Clean Air Act requirement or are for a different year than budgets in an approved SIP, *i.e.*, the budgets are from an "initial SIP submission." Section III.F. includes further explanation. Discussion of initial SIP submissions can also be found at 66 FR 50956—50957, the preamble of the proposed rule titled, "Transportation Conformity Rule Amendments: Minor Revision of 18-Month Requirement for Initial SIP Submissions and Addition of Grace Period for Newly Designated Nonattainment Areas."

Today's proposed changes to these sections are consistent with procedures already in place as a result of EPA's May 14, 1999, guidance issued to implement the court's decision. The guidance notified stakeholders that budgets in submitted SIPs could be used for conformity only after EPA has found them adequate. The guidance also outlined a process for determining adequacy of budgets that includes an opportunity for public comment. Today's proposal is consistent with that guidance. Therefore, under this proposed rule existing adequacy procedures would remain the same as they have been for the past several years.

We are not proposing any changes to the adequacy criteria in today's proposal; the existing criteria are being retained as described by the 1997 rule. The adequacy criteria were not affected by the court decision. These criteria include consideration of the technical details of the SIP, such as whether the budget is consistent with the SIP's purpose and the area's emissions inventory for all sources, and whether a clear relationship among the budget, control measures, and emissions inventory is shown. The adequacy criteria also include procedural criteria such as whether the SIP has been endorsed by the State governor or designee, whether the SIP was subject to a public hearing, and whether interagency consultation has occurred.

In addition to the adequacy criteria, the rule continues to provide that reliance on a submitted budget for determining conformity is deemed to be a statement by the MPO and DOT that they are not aware of any information that would indicate that emissions consistent with such a budget would cause or contribute to any new violation, increase the frequency or severity of an existing violation, or delay timely attainment of the relevant standards (§ 93.118(e)(6)). This provision provides another important check that helps to ensure that plans

and TIPs that conform to a submitted budget are consistent with the Clean Air Act requirements, and reinforces EPA's position which has been endorsed by a court that using an adequate budget for conformity prior to full approval of a SIP is consistent with the Clean Air Act. See *1000 Friends of Maryland v. Carol Browner, et al.*, 265 F.3d 216 (4th Cir. 2001).

Though today's proposal amends the rule language in § 93.118(e)(3) to remove the reference that a budget must be used after 45 days if EPA has not made a finding, the main point of § 93.118(e)(3) is retained. That is, a conformity determination based on budgets that were found adequate remains valid even if EPA later, upon further analysis, finds the budgets inadequate. The fact that new information subsequently became available that changed the finding of adequacy for the future does not affect the validity of a prior conformity determination; a subsequent conformity determination would have to take the new information into account in that only new, adequate budgets could be used.

### C. Why Are We Proposing These Changes?

In its ruling, the court remanded 40 CFR 93.118(e)(1) to EPA for further rulemaking consistent with the opinion. This section of the conformity rule, among other things, had allowed submitted budgets to be used in conformity determinations after 45 days even if EPA had not made an adequacy finding on the submitted budgets. However, the court stated that a budget could only be used for conformity purposes if EPA had found it adequate.

The court stated specifically that "where EPA fails to determine the adequacy of motor vehicle emissions budgets in a SIP revision within 45 days of submission, \* \* \* there is no reason to believe that transportation plans and programs conforming to the submitted budgets "will not—(i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard \* \* \*" 42 U.S.C. 7506(c)(1)(B)." Therefore, the court remanded section 93.118(e)(1) to EPA so we could harmonize it with these Clean Air Act requirements.

In response to the court decision, EPA established the current process for determining the adequacy of submitted SIPs in its May 14, 1999, guidance. This guidance has been fully operational since it was issued and serves as the basis for this proposal. Under the

current guidance and proposed rule (§ 93.118(e)(1)), budgets from submitted SIPs cannot be used in a conformity determination until EPA has found them adequate.

We believe that the court's direction on the use of submitted budgets was strictly confined to a need to make an affirmative finding on the adequacy of a submitted SIP's budgets before they can be used for conformity purposes. The court remanded only the aspect of EPA's regulations that allows the use of a budget from a submitted SIP which EPA has not yet found adequate. The court did not remand EPA's regulations at 40 CFR 93.118(e)(4) establishing criteria for finding a budget adequate, 93.118(e)(6) requiring additional findings by Federal agencies and MPOs where a conformity determination is made using a budget from a submitted SIP, or any other parts of § 93.118(e).

Therefore, EPA believes that conformity determinations consistent with the proposed provisions and the adequacy process are consistent with the Act's requirements in 42 U.S.C. 7506(c)(1)(B) and the court's opinion. Further, as noted above, a second court of appeals recently concluded that showing conformity to submitted SIPs in these circumstances was not in violation of the Clean Air Act (*1000 Friends of Maryland v. Browner, supra*). EPA continues to believe the adequacy criteria in the conformity rule provide a sound basis for preliminarily reviewing submitted motor vehicle emissions budgets for conformity purposes prior to EPA's full approval action.

EPA's adequacy review of budgets from submitted SIPs is separate from EPA's completeness review for purposes of SIP processing, and EPA uses different criteria for each of these reviews. Similarly, EPA's SIP approval process requires a more detailed examination of the SIP's control measures and technical analyses than the conformity adequacy process. Although the adequacy criteria allow EPA to review submitted budgets for conformity purposes, EPA recognizes that other elements must also be in the SIP for it ultimately to be approved. EPA's adequacy review should not be used to prejudge EPA's approval or disapproval of the SIP, since additional information may be submitted and more extensive review may change some conclusions. As we have stated previously (62 FR 43782), EPA cannot fully ensure that a submitted SIP is consistent with reasonable further progress, attainment or maintenance until EPA has completed its formal review process and the SIP has been approved or disapproved through

notice-and-comment rulemaking. Therefore, a budget that is found adequate in our adequacy review could later be disapproved based on further analysis when reviewed with the entire SIP submission.

### D. EPA's Adequacy Process

#### 1. What Is the General Process EPA Would Use To Examine Adequacy of Budgets in a SIP?

Today's proposal is based on EPA's existing adequacy process described in the May 14, 1999, guidance, and consists of three basic steps: Public notification of SIP submission, a public comment period, and EPA's adequacy finding. These three steps are described below. EPA generally intends to review the adequacy of a newly submitted budget through this process within 90 days of EPA's receipt of a full SIP submission, however the adequacy review could take longer particularly when EPA receives significant public comments.

*Notification of SIP submissions:* After a State officially submits a control strategy SIP or maintenance plan to EPA, we would notify the public by posting a notice on EPA's adequacy Web site and would attempt to do so within 10 days of submission. EPA's adequacy Web site is the central location for adequacy information for the entire U.S. Currently, the Web site is found at <http://www.epa.gov/otaq/traq/traqconf/adequacy.htm>. We would consider a SIP submission to be formally submitted on the date that the EPA regional office receives it in full. If a member of the public would like to be notified when we receive a relevant SIP submission for a particular State or area, he or she should contact the EPA regional employee listed on the Web site for that particular State. EPA's Web site provides EPA regional contact information so that interested parties can arrange or discuss notification processes. For example, EPA could use postcards, letters, email or phone calls to notify requesters, as agreed on by the interested party and EPA. The adequacy Web site also includes information on how to obtain a copy of a SIP submission under adequacy review.

*Public comment:* A 30-day public comment period would start immediately upon the posting of the notice on the EPA adequacy Web site in either of the following cases: (1) If the State has made the entire SIP submission electronically available to the public via a Web site, electronic bulletin board, etc.; or (2) if no one has requested copies of the SIP within 15 days after the date of EPA posting

notification. If the SIP submission is available via the internet (electronically), EPA would include a link to the State Web site. In the case where the SIP is not available via the internet or is only available in part, if someone requests a paper copy and EPA receives the request within the first 15 days, the 30-day public comment period would restart on the date that EPA mails the requested copy. EPA is not committing to make SIP submissions electronically available on our adequacy Web site. Our Web site will state when the public comment period begins and ends, and to whom to send comments. If someone requests a copy of the SIP, the Web site would be updated to reflect any extension of the public comment period.

*EPA's adequacy determination:* After a thorough review of all public comments received and evaluation of whether the adequacy criteria have been met, the appropriate EPA regional office would conclude that the submitted SIP's budgets are adequate or inadequate and send a letter indicating EPA's conclusions to the State or local air agency and other relevant agencies such as the MPO and State DOT. The EPA regional office would also mail or email a copy of the letter and response to comments to others who request it.

The EPA regional office would also subsequently announce the adequacy determination in the **Federal Register**. If EPA finds a budget adequate, it can be used for conformity on the effective date of the **Federal Register** notice, which would be 15 days after it is published. We would post EPA's adequacy letter, our response to any comments, and the **Federal Register** notice on the EPA adequacy Web site. Adequate budgets must be used in all future conformity determinations after the effective date of an adequacy finding; budgets cannot be used for conformity once EPA finds them inadequate.

## 2. Will EPA's Adequacy Finding Always Be Announced in the **Federal Register**?

Yes, EPA will always use the **Federal Register** to announce that budgets are adequate or inadequate. However, in cases where EPA is finding budgets adequate, we may use the proposed or final rulemaking notice for a control strategy or maintenance plan to announce our adequacy determination, instead of first sending a separate letter to the relevant agencies and following it with a **Federal Register** notice.

For example, if EPA is about to propose or finalize a rulemaking action on a control strategy or maintenance plan at the point when we are ready to announce our adequacy finding on this

SIP, EPA could announce its adequacy determination as part of the proposed or final rulemaking notice. In this case, EPA would not send a letter to the State or other agencies or publish a separate adequacy announcement in the **Federal Register**. Instead, EPA would announce our adequacy finding in the **Federal Register** through a proposed or final rulemaking for that same SIP. We would also update the adequacy Web site to reflect this finding.

EPA could also make an adequacy finding via a direct final approval of a SIP. When EPA promulgates a direct final approval of a SIP, a proposed approval and a direct final approval are published in the **Federal Register** on the same date. The public has at least 30 days to comment on EPA's action, and if EPA receives no adverse comments and no other information or analysis changes EPA's position in that time period, the approval becomes final 60 days after publication according to the date indicated in the **Federal Register** notice. However, if adverse comments are received or EPA's position changes as a result of further information or analysis, the direct final approval is withdrawn prior to its effective date. EPA would then consider the submitted comments and address them in a final action just as we would for any proposal.

In cases where EPA would use a direct final rulemaking to make an adequacy finding, the adequacy process would be substantively the same as that which we have outlined in section III.D.1. EPA would indicate that we are using the direct final rulemaking to announce our adequacy finding in the **Federal Register** notices, and would also announce the beginning of the public comment period on the adequacy Web site. The public would have 30 days to comment on adequacy as well as on the approvability of the SIP. If EPA received adverse comments, we would withdraw the direct final rule and would address these comments in a later final action on the SIP. We would also use the adequacy Web site to inform the public when we have found the budgets adequate or if we received comments that resulted in withdrawal of our direct final approval.

When EPA employs a direct final rule that receives no adverse comments, the budgets are found adequate and the SIP is approved on the date indicated in the direct final **Federal Register** notices. That is, the budgets in a SIP approved via a direct final approval can only be used on or after the effective date of the direct final rule. This is in contrast to the "typical" proposal and final rulemaking process, where approved

budgets can be used for conformity immediately upon publication of the final rule. Direct final rules typically include a 30-day comment period followed by an additional 30-day period for EPA to consider any comments received and withdraw the rule if necessary before it takes effect. Thus, budgets in a direct final rule can not be used upon publication of the final action but may be used only after the final rule becomes effective, because, in essence, EPA has not taken the final action to approve these budgets until the effective date.

## 3. Could EPA Parallel Process Its Adequacy Review?

Yes, EPA could parallel process the adequacy review if requested to do so by a State. Under parallel processing, a State would submit its proposed SIP to EPA, and the State and EPA would then request public comment on the proposed SIP and the adequacy of the budgets included in the SIP at the same time. If no significant adverse comments are received at either the State or Federal levels, EPA could then make an adequacy finding as soon as the State formally adopts the SIP and submits it to EPA, as long as no substantive changes to the SIP have occurred.

If there are any adverse comments sent either to the State or to EPA, EPA would consider them in our adequacy decision, as described in § 93.118(e)(5) of the rule, and today's proposed § 93.118(f). Section 93.118(e)(5) states that EPA will review the State's compilation of public comments and response to comments as part of its adequacy decision. Today's proposed § 93.118(f) includes a provision for the public to comment directly to EPA on the adequacy of a budget.

In cases where we parallel process the adequacy of a SIP, we would post a notice on the adequacy website that we are starting the adequacy review process and taking comment on the adequacy of a budget or budgets from a proposed SIP that a State is preparing to take to public hearing. The website would include information on how to obtain a copy of a SIP under adequacy review. Although the State would not have formally submitted the SIP for our approval, we would begin to evaluate the budgets in the proposed SIP for their adequacy. If the State adopts and formally submits that SIP to us for approval and there have been no changes that would affect the adequacy of the budgets, we could complete the adequacy process quickly because we would have already finished the public review portion of the process. However, if the formal submission has changed significantly from the proposed

SIP in a way that affects the adequacy of a budget, the adequacy review process would start over: EPA would announce that we have a submitted SIP under adequacy review and reopen the comment period through notification on the adequacy website.

#### 4. Can EPA Change an Adequacy Finding?

Yes, EPA can change an adequacy finding from adequate to inadequate or from inadequate to adequate. EPA would do so for a specific reason such as receiving new information that affects our previous adequacy finding. For example, EPA might change a finding if a State submits more information after we've found a budget in a SIP submission to be inadequate. If the State submits additional materials to clarify or support the adequacy of the budget, we will treat this additional information as a supplement to the SIP submission. In this situation, we would post a notice that we have received new information on the adequacy website and begin a new 30-day public comment period. After reviewing any comments received, we would make a new finding, as appropriate.

In the case where we find the budgets in a submitted SIP adequate but later discover based on additional information or further review that they do not meet the criteria for adequacy, we could change our finding to inadequate. In these cases where EPA reverses its finding of adequate to inadequate, EPA is proposing for the reasons explained below to make our subsequent inadequacy finding apply immediately upon EPA's written notification to the State and other relevant agencies, such as the MPO and State DOT. In EPA's letter to the State we would indicate that the finding of inadequacy applies as of the date of our letter and we would explain why our finding has changed. We would also begin another 30-day comment period to allow the public to consider the new information that has caused EPA to reverse its finding to inadequate. If, after consideration of any comments received, EPA still believes that the submitted SIP is inadequate we would issue a second **Federal Register** notice and update the adequacy website as appropriate.

EPA is seeking comment on whether the public should be provided an opportunity to comment on any new information before EPA can reverse an adequacy determination to a finding of inadequacy, or after. In cases where we change a finding from adequate to inadequate, we do not believe that it is in the best interest of public health to

delay our inadequacy finding until after the public comment period has ended. Rather, we believe that having our inadequacy finding apply immediately is necessary to ensure that no further conformity determinations are made using budgets that may not be protective of the air quality standards. We should note, however, that if conformity of a transportation plan or TIP had already been determined by DOT using a budget during the time that it was adequate, the conformity determination remains valid as provided by § 93.118(e)(3) of the current rule.

Finally, EPA notes that in certain circumstances it could be so obvious that a budget has become inadequate that it would be unnecessary to provide for the subsequent public comment at all. For instance, if a state has submitted a new SIP indicating that the prior SIP submission no longer provided for attainment, it would be clear that the prior submission is inadequate. Under such circumstances, EPA could proceed on a case by case basis to make a final inadequacy determination explaining these facts and publish a **Federal Register** notice of that determination.

#### *E. Why Is EPA Using the Website Instead of the Federal Register To Notify the Public in the Adequacy Process?*

Today's proposal would codify our adequacy process that has been in effect since May 14, 1999, when we published guidance in response to the court decision on this matter. In that guidance, one of the key components of our process for reviewing the adequacy of a submitted SIP budget is to notify the public when EPA regional offices receive a SIP, and provide the public with an opportunity to comment on the submitted SIP's budgets. In the guidance and in today's proposal we rely on our website, rather than the **Federal Register**, as the primary means for requesting public comment and updating the public on the status of our adequacy review of submitted SIP budgets.

EPA previously concluded that the notification and comment procedures of the Administrative Procedures Act (APA) do not apply to the adequacy review process because adequacy determinations are carried out on an informal case-by-case basis rather than through rulemaking.<sup>5</sup> The March 1999 court decision did not address this aspect of the adequacy process. Therefore, EPA is not reopening this legal conclusion in today's proposal. However, we believe that providing some opportunity for public

involvement adds value to our adequacy review. Specifically, we believe public comment can assist us in making more informed decisions regarding submitted budgets and their ability to ensure that new transportation activities will not cause or contribute to new violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. Our existing conformity regulations, at § 93.118(e)(5) of the current rule, already require us to review and consider all comments received by a State during its development of the SIP. The adequacy process provides additional opportunity for comment directly to EPA through the web process that focuses specifically on the question of whether the SIP submission meets our adequacy criteria.

The website gives EPA the ability to notify the public and solicit comment without undue delay. The intent of the adequacy process is to allow areas to use a budget from a SIP even before it is approved. Since an emissions budget is a more appropriate measure for achieving the air quality standards, we believe using it for a conformity determination is preferable to using the emission reduction test(s). Using the website allows EPA to meet the dual goals of offering the opportunity for public comment and completing the adequacy review in a timely way.

We are proposing to publish notice of our finding of adequacy or inadequacy in the **Federal Register**, as well as on the adequacy Web site, so that we can be sure the public is fully informed of our finding. We are also proposing to make an adequacy finding effective 15 days after it is announced in the **Federal Register** so that the public would be aware that a SIP budget has been found adequate before it is used in a conformity determination.

#### *F. What Typical SIP Submissions Will We Review for Adequacy?*

In general, EPA adequacy reviews are conducted for SIPs that contain motor vehicle emissions budgets, which include control strategy SIPs (e.g., reasonable further progress SIPs, attainment demonstrations) and maintenance plans. If there is no approved SIP that contains a budget for the same Clean Air Act requirement, pollutant, and year, a budget from a newly submitted SIP can be used for conformity as of the effective date of EPA's adequacy finding. Therefore, EPA will review the adequacy of a motor vehicle emissions budget from an initial submission of a control strategy SIP or maintenance plan. In addition, EPA will review the adequacy of a budget from a

<sup>5</sup> August 15, 1997, 62 FR 43782-43783.

control strategy SIP or maintenance plan that is submitted to revise a previously submitted, but not yet approved, SIP. The next few examples illustrate these principles.

First, an area submits a SIP for a different year and Clean Air Act requirement. The area has an approved attainment demonstration that contains budgets for 2005 and subsequently submits a maintenance plan for the same pollutant that contains budgets for 2015. Though the area already has an approved budget for the year 2005, the maintenance plan addresses a different Clean Air Act requirement and contains budgets for a different year. Therefore in this case, EPA would review the 2015 budgets in the submitted maintenance plan for adequacy.

In a second example, an area submits new budgets for the same year, but for a different Clean Air Act requirement. The area has an approved rate-of-progress (ROP) SIP with budgets for the years 1999, 2002, and 2005 and submits an attainment demonstration with budgets for the year 2005. EPA would review the 2005 attainment budgets for adequacy, because although ROP budgets already exist for the year 2005, the submitted attainment budgets address a different Clean Air Act requirement than the approved ROP budgets. Once the attainment budgets are adequate, both the 2005 ROP budgets and the 2005 attainment budgets must be met for the 2005 analysis year. For analysis years beyond the 2005 attainment year, however, only conformity to the 2005 attainment budgets is required (*i.e.*, conformity to the 2005 ROP budgets is not required in years after the attainment year, once attainment budgets are established).

In a third example, an area submits a revision to a previously submitted SIP, prior to EPA's approval of the first submission. The area submits an attainment demonstration and we find it adequate. Before it is approved however, the State decides that a revision is necessary and submits a revised attainment demonstration to EPA. Because the first attainment demonstration had not been approved, EPA would review the adequacy of the budget from the revised attainment demonstration. If the revised budget is then found to be adequate, the revised budget would replace the previous adequate budget for use in future conformity determinations on the effective date of the new adequacy finding.

One final example concerns an area with "outyear" budgets. EPA allows SIPs to establish budgets for conformity purposes for years beyond the

timeframe that the SIP normally addresses. In this example, an area has an approved attainment demonstration with budgets for its 2005 attainment year. The approved attainment SIP also contains outyear budgets for the year 2015. Subsequently, the area submits a maintenance plan with budgets for the year 2015. Since the maintenance plan addresses a different Clean Air Act provision than the attainment demonstration, EPA would review the 2015 budgets from the submitted maintenance plan for adequacy even though the area already has budgets for the year 2015 in its attainment SIP. If EPA finds the maintenance budgets adequate, then both the 2015 outyear budgets and the 2015 maintenance year budgets must be met for conformity. That is to say, the 2015 outyear budgets from the attainment demonstration would continue to exist and apply for conformity in years 2015 and beyond, unless the State revises the attainment demonstration SIP to remove them. The 2015 outyear budgets would continue to apply for conformity until EPA approved the SIP revision proposing to remove the outyear budgets.

EPA generally will not review the adequacy of a budget from a submitted SIP that revises an existing approved SIP with budgets for the same year and Clean Air Act requirement, because as a matter of law a submitted SIP may not supersede an approved SIP for the same Clean Air Act requirement, year, and pollutant. A budget from such a submitted SIP revision would not apply for conformity until EPA actually approves the revision.

Exceptions to this general rule are SIPs for which EPA specifically limits the duration of its approval of the motor vehicle emissions budgets until replacement budgets have been found adequate. One example where EPA limited the duration of our approval was the recently approved 1-hour ozone attainment demonstrations and maintenance plans that relied on interim MOBILE5-based estimates of Federal Tier 2 standards (65 FR 6698). In the proposed approvals for these SIPs, EPA proposed that because States could not accurately analyze emissions from these standards with the MOBILE5 model, EPA would require States to revise these SIPs with MOBILE6. EPA also proposed that our approval of the MOBILE5-based budgets would be limited such that when the MOBILE5-based budgets are revised using MOBILE6, the MOBILE6 budgets could be used for conformity on the effective date of our adequacy finding. MOBILE6 provides a more accurate estimate of the emission benefits of the Tier 2 vehicle

and fuel standards, and the revised budgets should be used as soon as they are adequate. Therefore, EPA will review the adequacy of the MOBILE6 budgets when these SIPs are submitted since they will become effective once they are found adequate under the terms of our limited approvals of the attainment demonstrations.<sup>6</sup> A second example of where EPA has limited the duration of our approval is in the case of certain SIPs in the State of California. See 67 FR 69139 for further details on EPA's action that limits our approval of these specific SIPs and allows submitted budgets that have been found adequate to supersede previously approved budgets for conformity.

#### *G. Does EPA Review Adequacy of SIPs That Do Not Establish Specific Budgets?*

In addition to SIPs that establish a specific motor vehicle emissions budget for a new year or Clean Air Act requirement, there are other situations when EPA will conduct an adequacy review. In these cases, we will use the same adequacy review process that we use for SIPs that include specific budgets.

First, EPA will review the adequacy of limited maintenance plans. Usually, a maintenance plan contains budgets for the last year of the maintenance plan. If a maintenance plan does not explicitly identify budgets, then EPA has said that the emissions projections for the last year of the maintenance plan serve as the budgets (see the discussion in the preamble to the November 24, 1993, conformity rule at 58 FR 62195). Limited maintenance plans, however, do not include budgets nor even future motor vehicle emissions projections that could be interpreted as budgets. Instead, a limited maintenance plan concludes that the area will continue to maintain regardless of the quantity of emissions from the on-road transportation sector; essentially, the budget is unlimited. For limited maintenance plan submissions, EPA's adequacy review will primarily focus on whether the area qualifies for the applicable limited maintenance policies for ozone, CO, and PM-10 areas. In this case, a finding of adequacy means that the area does in fact meet the criteria for submitting a limited maintenance plan. If so, the area will be considered to automatically meet the budget test for future conformity

<sup>6</sup> For more information, see EPA's January 18, 2002, memorandum titled, "Policy Guidance on the Use of MOBILE6 for SIP Development and Transportation Conformity," from John Seitz, Director, Office of Air Quality Planning and Standards, and Margo Tsigotis Oge, Director, Office of Transportation and Air Quality, to EPA Regional Air Division Directors.

determinations because the budget is essentially unlimited. For more discussion of limited maintenance plans, please refer to 61 FR 36118 (the preamble of the July 9, 1996, proposed conformity rule).

Second, we will also review the adequacy of control strategy SIPs and maintenance plans that do not establish budgets because they claim that motor vehicle emissions are not a significant contributor to the area's air quality problems. Areas submitting these plans are required to demonstrate the insignificance of motor vehicle emissions based on a number of factors. In these areas, our adequacy review will focus on whether the SIP or maintenance plan demonstrates the claim of insignificance. In this case, a finding of adequacy means that EPA agrees that the motor vehicle emissions are insignificant. Additional discussion of SIPs that explicitly demonstrate motor vehicles to be an insignificant contributor can be found at 58 FR 62194 (November 24, 1993, final rule) and 61 FR 36118 (July 9, 1996, proposed rule).

In contrast, EPA will not review for adequacy a SIP that addresses only a localized hot-spot nonattainment problem (for example, in a CO area). These SIPs do not establish budgets and are not used as a basis for a conformity test for regional emissions. These SIPs only address localized emissions in areas where there is no regional air quality problem.

## V. Non-Federal Projects

### A. What Are Non-Federal Projects?

Non-federal projects are projects that are funded or approved by a recipient of federal funds designated under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53) but that do not rely at all on any FHWA/FTA funding or approvals. A State DOT or public transit agency are examples of routine recipients of federal funds. The conformity rule only applies to non-federal projects that are considered regionally significant, in that these projects must be included in a conforming transportation plan and TIP and/or the regional emissions analysis supporting a conforming plan and TIP. Regionally significant, non-federal projects are not, however, subject to any of the requirements for project-level conformity, such as the requirements for hot-spot analysis found at § 93.116 and § 93.123 of the conformity rule.

We encourage areas to use the interagency consultation process to determine which entities are recipients of federal funds and whether a project is regionally significant. The terms

"recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws" and "regionally significant project" are defined under § 93.101 of the conformity rule.

### B. What Are We Proposing?

EPA is proposing to amend § 93.121(a) of the 1997 conformity rule so that regionally significant non-federal projects can no longer advance during a conformity lapse unless they have received all necessary State and local approvals prior to the lapse. Under this proposal, recipients of federal funds designated under title 23 U.S.C or the Federal Transit Laws can not adopt or approve a regionally significant, non-federal project unless it is included in a currently conforming plan and TIP or in the regional emissions analysis supporting a currently conforming plan and TIP.

By amending § 93.121(a) as proposed, the conformity rule will again be consistent with the previous requirements of our 1993 rule. Today's proposal is also consistent with our May 14, 1999, guidance implementing the court decision, and does not affect the current, general implementation of non-federal projects.

### C. Why Are We Proposing This Change?

In its ruling, the court found § 93.121(a)(1) of the 1997 conformity rule, that allowed State or local approval of transportation projects in the absence of a currently conforming plan/TIP, to be in violation of section 176(c)(2)(C) of the Clean Air Act. In its ruling the court asserted that all non-exempt projects subject to the conformity rule, including regionally significant non-federal projects, must come from a conforming plan and TIP (or their supporting regional emissions analysis). However, the court also noted that once a non-federal project receives all appropriate State or local approvals, it need not meet any further conformity requirements.

### D. At What Point Is a Regionally Significant Non-Federal Project "Approved"?

The definition of non-federal project "approval" is decided on an area-specific basis at the State and local level through the interagency consultation process, and should be formalized in the area's "conformity SIP." Conformity SIPs are required by 40 CFR 51.390, and include area-specific conformity procedures tailored to State and local agency needs and consistent with our federal requirements for conformity. Conformity SIPs do not contain motor vehicle emissions budgets. If EPA has

not yet approved a conformity SIP for an area, the interagency consultation process should be used to determine the point of approval for non-federal projects.

EPA discussed defining non-federal project "approval" as a national matter in the preamble to the November 24, 1993, transportation conformity rule: "EPA believes that adoption/approval is never later than the execution of a contract for site preparation or construction. Adoption/approval will often be earlier, for example, when an elected or appointed commission or administrator takes a final action allowing or directing lower-level personnel to proceed" (58 FR 62205, November 24, 1993). Some examples of definitions used by areas to identify the point of final adoption/approval for a regionally significant highway or transit project include, but are not limited to, one of the following actions:

(a) The final policy board action or resolution that is necessary for a regionally significant project to proceed;

(b) Administrative permits issued under the authority of the agency, policy board, or commission for a regionally significant project;

(c) The execution of a contract to construct, or any final action by an elected or appointed commission or administrator directing or authorizing the commencement of construction of a regionally significant project; or

(d) Providing the grants, loans or similar financial support, necessary for the construction of a regionally significant project.

EPA believes that it is appropriate to define the point at which project approval occurs through the interagency consultation process, because areas have varying State and local requirements for determining when projects are approved. Specific questions about how a particular area defines the point of adoption/approval for non-federal projects should be directed to the appropriate local or State air or transportation agency.

Finally, as stated above, a regionally significant non-federal project must be included in a currently conforming transportation plan and TIP, or be included in the supporting regional emissions analysis for a conforming plan and TIP, to be approved.

## VI. Conformity Consequences of SIP Disapprovals

### A. What Are the Conformity Consequences of EPA Disapproving a Control Strategy SIP Without a Protective Finding?

When EPA disapproves a control strategy SIP, we may issue a protective

finding for conformity purposes if the submitted SIP contains adopted control measures, or written commitments to adopt enforceable control measures, that fully satisfy the emission reduction requirements relevant to the statutory provision for which the SIP was submitted (see § 93.101 of the conformity rule for the definition of the term “protective finding”). A control strategy SIP that is disapproved with a protective finding generally possesses deficiencies such as a failure to include all control measures in a fully adopted, enforceable form. Such SIPs are not fully acceptable for SIP purposes, but are sufficient for conformity purposes since the State has adopted or committed to all measures necessary to meet all applicable SIP requirements.

In contrast, we will disapprove a submitted SIP without giving it a protective finding if it does not contain enough emission reduction measures, or commitments to these measures, to achieve its specific purpose of either demonstrating further progress or attainment.

In situations where EPA disapproves a control strategy SIP with a protective finding, the submitted motor vehicle emissions budgets can still be used in future conformity determinations. Conversely, if the EPA disapproves a SIP without giving it a protective finding the budgets cannot be used for conformity upon the effective date of EPA's disapproval action.

Control strategy SIPs include reasonable further progress SIPs and attainment demonstrations. The 1997 transportation conformity rule created a 120-day grace period following our disapproval of a control strategy SIP without a protective finding, after which conformity freezes. A conformity “freeze” means that only projects in the first three years of the transportation plan and TIP can proceed. No new plans, TIPs, or plan/TIP amendments can be found to conform during a conformity freeze. The transportation plan and TIP remain frozen until a new control strategy implementation plan fulfilling the same Clean Air Act requirement as that which EPA disapproved is submitted, and EPA finds the motor vehicle emissions budgets adequate for conformity. Failure to submit a new control strategy implementation plan within two years of the effective date of EPA's disapproval will result in the imposition of highway sanctions and a lapse of conformity. However, a conformity lapse could occur sooner, if during a freeze the transportation plan or TIP expires. We should also note that a conformity freeze does not result from

EPA's disapproval of a maintenance plan, as the Clean Air Act does not require nonattainment areas that have successfully demonstrated achievement of a given air quality standard to submit this type of air quality plan unless they request redesignation to attainment; *i.e.*, such submissions are discretionary. See the preamble to the 1997 conformity rule (62 FR 43796–43797) for more information about SIP disapprovals, protective findings, and conformity freezes.

#### *B. What Are We Proposing?*

We are proposing to change the point at which conformity consequences apply when EPA disapproves a control strategy SIP without a protective finding. Specifically, we are proposing to delete the 120-day grace period from § 93.120(a)(2) of the conformity rule, so that a conformity freeze would occur immediately upon the effective date of EPA's final disapproval.

Today's proposal, however, retains the 1997 conformity rule's flexibility that aligned conformity lapses with Clean Air Act highway sanctions. Like the 1997 rule, conformity of the plan/TIP would lapse when highway sanctions are imposed (usually two years after the effective date of EPA's final disapproval) as a result of a control strategy SIP disapproval, or when the applicable update of the plan and/or TIP was required under the transportation planning regulations, whichever comes first. See sections II. “Federal Projects” and IV. “Non-federal Projects” of this proposal for more details on what projects can advance during a conformity lapse.

Finally, this proposal does not impact the 1997 conformity rule's provisions for SIP disapprovals with a protective finding. Conformity consequences of control strategy SIP disapprovals with a protective finding would not occur unless highway sanctions are imposed; *i.e.*, conformity of an area's plan and TIP generally would not lapse until two years after the effective date of EPA's disapproval action with a protective finding.

#### *C. Why Are We Proposing This Change?*

In its ruling, the court found § 93.120(a)(2) of the 1997 conformity rule to be in violation of the Clean Air Act, section 176(c)(1), and remanded it to EPA for further rulemaking. Specifically, the court said that where EPA disapproves a SIP without a protective finding there is no basis to believe that conformity of transportation plans and TIPs to the submitted budgets in the disapproved SIP will not cause or contribute to new violations, increase

the frequency or severity of existing violations, or delay timely attainment of the air quality standards.

Under § 93.120(a)(2) of the current rule, if EPA disapproved a submitted SIP or SIP revision without a protective finding, areas could have used the 120-day grace period to complete a conformity determination that was already in progress, and therefore experience minimal disruption to the transportation planning process. The court felt that this grace period was not authorized by the statute because it would allow conformity to be demonstrated to a SIP that was deemed not protective of the air quality standards.

Therefore, after thorough consideration of the court's ruling, we are proposing to eliminate the 120-day grace period from the conformity rule; this change to the rule is consistent with our May 14, 1999, guidance implementing the court decision.

#### *D. What Is the Practical Impact of This Change?*

EPA anticipates minimal practical impacts from this proposed rule change. Since promulgating the 1997 conformity rule amendments, EPA has disapproved control strategy SIPs without a protective finding in only three instances and has no reason to believe that the future number of SIP disapprovals will significantly increase. Therefore, we believe this proposed rule will impact very few areas as did the guidance.

We also believe that the overall purpose of the 120-day grace period, that is, to minimize disruption to the transportation planning process, can still be achieved to an extent under this proposal. The notice-and-comment rulemaking process for disapproving SIPs provides transportation planners with advanced notice of when a SIP disapproval without a protective finding will occur. Prior to a conformity freeze, EPA proposes disapproval, provides for public comment, and then issues a final disapproval notice only after thorough consideration of any comments received has been completed. A proposed disapproval would address whether or not EPA plans to issue a protective finding for the SIP, so that transportation agencies would know well in advance if a conformity freeze is a possibility. This process generally provides sufficient notice for transportation agencies to prepare for the consequences of a disapproval without a protective finding by, for example, quickly completing any pending conformity determinations as appropriate.

In addition, EPA has administrative discretion, where appropriate, to make disapprovals of control strategy SIPs effective 60–90 days after the publication of the disapproval in the **Federal Register**. There may be some situations where delaying the effective date for a short period of time beyond the usual 30 days is appropriate, for example, when transportation agencies are very close to completing a conformity determination that was well underway before EPA completed a SIP disapproval. Transportation plan and TIP updates and amendments must meet transportation planning and conformity requirements and undergo public review and comment; these processes typically require a significant amount of time. A relatively short delayed effective date could assist in finalizing the remaining administrative requirements for a determination that is nearing completion at the time of EPA's published notice for disapproval.

Sufficient notice also occurs in the limited case where a conditional SIP approval converts to disapproval without a protective finding. Unlike other types of SIP actions, conditional approvals automatically convert to SIP disapprovals if the condition of EPA's approval is not met within a fixed period not to exceed one year. In these cases, a conformity freeze would begin immediately upon the effective date of EPA's **Federal Register** notice of the conversion of a conditional approval to a disapproval without a protective finding.

Therefore, conditional approvals, by their very nature, inform transportation agencies well in advance that future conformity consequences could result if the conditions of the approval are not met. Because transportation agencies would be aware of potential conformity impacts generally at least one year before they could occur, EPA believes that there will be minimal practical impact of not providing a delayed effective date in these cases.

## VII. Safety Margins

### A. What Is a Safety Margin?

A safety margin is the amount by which the total projected level of emissions from all sources identified in a SIP for a given pollutant are less than the total emissions that would, at a minimum, satisfy the applicable Clean Air Act requirements for reasonable further progress, attainment or maintenance. For example, if an area projects that it will emit a total of 300 tons per day (tpd) of carbon monoxide (CO) from all sources, but the SIP demonstrates that the area can emit up

to 350 tpd of CO and still attain the air quality standard, the area has a safety margin of 50 tpd. In this example, CO emissions are estimated from all sources, including: Large stationary sources, such as steel mills; area sources, such as wood-burning stoves; on-road mobile sources, such as cars and trucks; and off-road mobile sources, such as construction and farm equipment. This area could allocate, through a revision to its SIP, all or some portion of the 50 tpd safety margin to their motor vehicle emissions budget for future conformity determinations, if desired.

### B. What Are We Proposing?

We are proposing to delete § 93.124(b) of the conformity rule, that provided a narrowly targeted flexibility to areas with SIPs that had been submitted prior to the original publication date of the initial November 24, 1993 conformity rule. Under that provision, if the approved SIP had included a safety margin, but did not specify how the safety margin was to be used, an area could submit a revision to the SIP and specifically allocate all or a portion of the safety margin to the SIP's motor vehicle emissions budget(s). The 1997 rule allowed this SIP revision to become effective for conformity purposes before the revision had been approved by EPA. EPA is not aware of any nonattainment or maintenance areas that are currently affected by the elimination of this flexibility.

### C. Why Are We Proposing This Change?

The court decision found that § 93.124(b) violates the Clean Air Act because it allows a submitted but unapproved SIP revision to supersede an approved SIP. The court ruled that EPA must fully approve these safety margin allocations into the SIP before they can be used for conformity.

### D. Can Safety Margins Still Be Allocated to Motor Vehicle Emissions Budgets for Use in Conformity Determinations?

Yes. Although the court eliminated a narrowly targeted flexibility related to the use of safety margins in previously approved SIPs in § 93.124(b), the majority of areas that have allocated safety margins to their emissions budgets after November 24, 1993, are not affected by the court's ruling. For most of these areas, either EPA has already approved their safety margin allocations or they had no previously approved SIP. In general, areas that do not have approved SIPs can use submitted safety margins in conformity determinations once EPA finds the submitted SIP (and safety margin)

adequate. Areas with approved SIPs that want to reallocate their safety margin for conformity purposes can do so once EPA has approved a SIP revision that specifically allocates all or a portion of the safety margin to an emissions budget.

## VIII. Streamlining the Frequency of Conformity Determinations

In addition to those provisions directly affected by the U.S. Court of Appeals decision, EPA is also proposing several changes to other provisions of the conformity regulation in this rulemaking. One of these additional proposals would affect several provisions under 40 CFR 93.104, the section of the rule that describes when conformity determinations must be made for transportation plans, TIPs, and projects. In the first conformity rule proposal made in January 1993, we stated, "EPA believes conformity determinations should be made frequently enough to ensure that the conformity process is meaningful. At the same time, EPA believes it is important to limit the number of triggers for conformity determinations in order to preserve the stability of the transportation planning process" (58 FR 3775). EPA continues to have these dual goals. Today we are proposing to eliminate some of the frequency requirements found in § 93.104, and streamline others. EPA believes that our proposal would simplify the current conformity requirements without compromising the benefits of the conformity program.

Under today's proposal EPA concludes that conformity determinations will continue to be required frequently enough to ensure that the process is meaningful and consistent with the Clean Air Act. EPA is not proposing to change the requirements to determine conformity of new or revised plans, TIPs, and projects before they can be adopted, and the requirement to determine conformity of transportation plans and TIPs at least every three years remains, as required by section 176(c) of the Clean Air Act. EPA proposes to eliminate only those frequency requirements which are not required by the Clean Air Act and which now we believe are either outdated or redundant with other requirements.

### A. Eliminating the Requirement for Conformity of the TIP Within Six Months of the Transportation Plan

First, we propose to eliminate § 93.104(c)(4), which requires an MPO and DOT to determine conformity of the TIP within six months of the date that

DOT determined conformity of the transportation plan. We propose to remove the six-month conformity requirement for TIPs because we believe this requirement is not necessary for ensuring air quality goals given other existing transportation planning and conformity requirements, as described below. When we initially proposed this requirement, we anticipated that updating the TIP to match a revised plan would not otherwise occur. In the initial January 1993 transportation conformity proposal, we stated, "EPA's proposal allows a reasonable interval of six months after a plan is amended or a new plan is adopted during which the TIP could be revised and a new conformity determination made by the MPO and DOT" (58 FR 3775). Also, in the proposal to the 1997 conformity rule, we stated that "this requirement should be retained because of ISTEA's (and hence conformity's) expectation that the TIP will flow from, and be consistent with, the transportation plan" (July 9, 1996; 61 FR 36129).

However, EPA now believes that § 93.104(c)(4) is unnecessary given other requirements and actual experience in implementing conformity. The TIP must already be consistent with the plan according to 23 U.S.C. 134(h)(3)(C), so plans and TIPs should always include the same projects for years that are covered by both planning documents. This statutory provision is also found in DOT's metropolitan planning regulations at 23 CFR 450.324(f)(2). Because of this requirement, in practice areas typically revise and determine conformity of the plan and TIP at the same time. In addition, since the TIP is a subset of the plan, the regional emissions analysis for the plan includes all of the projects in the TIP. Therefore, the air quality impacts of the TIP are essentially assured when conformity of the plan is demonstrated.

Furthermore, the current conformity rule contains other frequency requirements under § 93.104 that ensure that new federally-funded or approved transportation activities are consistent with clean air goals before they are funded or approved. Such requirements include the requirement to determine conformity of new or revised plans, TIPs, and projects before they can be adopted, and the requirement to determine conformity of transportation plans and TIPs at least every three years. As a result of these existing transportation planning and conformity requirements, we believe that today's proposal to eliminate the specific provision that requires conformity of the TIP to be determined within six months of determining conformity of the plan

would work to simplify the existing conformity rule without compromising its benefits.

#### *B. Streamlining the 18-Month SIP Triggers for New Conformity Determinations*

EPA is also proposing to make several rule revisions to streamline § 93.104(e), which requires new conformity determinations to be made within 18 months of certain SIP actions, or "triggers." EPA believes that some of the current SIP triggers for conformity can be eliminated altogether, and some of them can be simplified to improve implementation of the conformity program without any adverse consequences in assuring that transportation activities conform to air quality plans.

Specifically, we propose to eliminate § 93.104(e)(1). This provision required all nonattainment and maintenance areas to determine conformity within 18 months of November 24, 1993, which was the date that EPA initially promulgated the conformity rule (58 FR 62188). At this point, this requirement is no longer relevant for any area and we propose to remove it from the rule for clarity.

EPA is not proposing any changes to § 93.104(e)(2), as this section was recently updated in a final rule published August 6, 2002 (67 FR 50808). The August 2002 rule realigned the 18-month conformity requirement for initial SIP submissions by requiring a conformity determination within 18 months of the effective date of EPA's adequacy finding on the motor vehicle emissions budgets in an initial SIP submission.

EPA proposes two changes to § 93.104(e)(3), the requirement to determine conformity within 18 months of EPA's approval of a SIP that establishes or revises a motor vehicle emissions budget. First, we propose that this 18-month clock would begin on the effective date of EPA's approval of the SIP. This proposed clarification will resolve an ambiguity in the current rule as to whether this 18-month clock begins on the date that the **Federal Register** publishes the approval notice or the effective date of that notice. This proposed change would also make § 93.104(e)(3) consistent with § 93.104(e)(2), which requires that conformity be determined within 18 months of the effective date of EPA's adequacy finding. Likewise, this change would be consistent with our proposed revision to § 93.120, which would require the consequences of a SIP disapproval to apply upon the effective date of EPA's disapproval. (See section

V. "Conformity Consequences of SIP Disapprovals" for the discussion of EPA's proposed change to § 93.120.) Having all of these requirements apply as of the effective date of the relevant EPA action would provide consistency, avoid confusion and thus benefit planners in implementing these specific requirements.

The second change we propose to § 93.104(e)(3) is to require a conformity determination within 18 months of EPA's approval of a SIP that affects a budget only when a conformity determination has not already been made using the budgets from the newly-approved SIP. That is, if an area determined conformity using adequate budgets from a submitted SIP, and those budgets had not changed when EPA subsequently approved the submitted SIP, then the area would not have to redetermine conformity within 18 months of EPA's approval of the SIP. EPA believes that if the approved budgets have already been used in a conformity determination, there is no added environmental benefit in requiring another conformity determination to be made within 18 months of EPA's approval of a SIP that contains these same budgets. EPA notes that budgets are unchanged if they are for the same pollutant or precursor, the same quantity of emissions, and the same year.

EPA also proposes to eliminate § 93.104(e)(4), which requires a conformity determination to be made within 18 months of EPA's approval of a SIP that adds, deletes, or changes a TCM. EPA believes that this requirement is redundant with the requirements in §§ 93.104(e)(2) and (3), and therefore, is unnecessary. That is, if a SIP adds, deletes, or changes a TCM and that addition, deletion, or change affects a budget in a SIP, then a new conformity determination would be triggered by either an adequacy finding on the budget in the submitted SIP (if it is an initial SIP) under § 93.104(e)(2), or EPA's approval of the SIP (if the budget has not already been used in a conformity determination) under § 93.104(e)(3). If the addition, deletion, or change to a TCM did not affect any applicable budget, then EPA concludes that a new conformity determination would not be needed, since such a SIP revision would not result in any new air quality information (*i.e.*, a new budget) necessary to include in the transportation planning and conformity processes.

Finally, EPA proposes two changes to § 93.104(e)(5), which requires a new conformity determination within 18 months of EPA's promulgation of a

federal implementation plan (FIP). First, we propose to start the clock for this requirement on the effective date of EPA's promulgation of a FIP, to be consistent with the start date of the other SIP triggers of conformity discussed above. Second, EPA proposes to delete the phrase "or adds, deletes, or changes TCMs," for the same reasons that we propose to delete § 93.104(e)(4) as described above. Again, EPA believes that the purpose of this provision will be adequately served by the requirement to show conformity after EPA promulgation of a FIP containing new budgets, or alternatively, the provision would be unnecessary if no budget changes are made.

## IX. Latest Planning Assumptions

### A. What Are We Proposing?

We are proposing to amend § 93.110(a) to change the point in the conformity process when the latest planning assumptions are determined. The proposal would allow conformity determinations to be based on the latest planning assumptions that are available at the time the conformity analysis begins. The current conformity rule requires that the determination rely on the latest assumptions available at the time of DOT's conformity determination for a transportation plan, TIP, or project. EPA and DOT have previously defined the "latest" assumptions as "the most current information that is available to State and local planners (e.g., the MPO or other agency can obtain the information from another agency, the information is appropriate for the current conformity determination, the information is readily transferable for use in the transportation and/or emissions modeling, etc.)."<sup>7</sup>

EPA intends for the start of the regional conformity analysis to be the point at which the MPO begins to model the impact of the proposed transportation plan/TIP on travel and/or emissions. The start of the conformity analysis should be a point after which significant work would be required to incorporate new data. EPA and DOT are asking for comment on how MPOs, State departments of transportation, transit agencies, and air quality agencies would define the "start of the conformity analysis" for transportation plan and TIP conformity determinations in individual areas.

Today's proposal would rely on the interagency consultation process required by § 93.105(c)(1)(i) to determine when a conformity analysis reasonably begins in a given area. Section 93.105(c)(1)(i) already requires the consultation process to be used to decide which planning assumptions and motor vehicle emissions model are available for use by the MPO or other designated agencies responsible for conducting conformity analyses.

Specific interagency consultation procedures are already required in nonattainment and maintenance areas to determine such things as which projects are regionally significant and to evaluate models and methods. During this existing process, the starting date of the conformity analysis should be well documented by the interagency consultation group and established so that there is sufficient time for the MPO to meet transportation planning and conformity requirements, including to complete the modeling analysis, prepare documents, conduct the public participation process and allow the MPO and DOT to complete conformity determinations by any required deadline. New information (e.g., population or fleet data) that becomes available after the start of the conformity analysis would not be required to be incorporated into the current analysis if the analysis is on schedule, although an area could voluntarily include the new information at any time as appropriate.

The interagency consultation process should also be used to determine whether significant delays in completing the conformity analysis would accommodate the inclusion of more recent planning assumptions that become available after the initially designated conformity analysis start date. If, for example, a substantial delay in the conformity process occurs and new planning assumptions become available, EPA believes that such assumptions should not be ignored if the conformity analysis is in its initial stages.

State and local transportation and air quality planners should align the updates of planning assumptions with the start of the conformity analysis whenever possible. The consultation process should continue to be used to determine what are the most recent assumptions available for SIP development, so that they can be incorporated into the conformity process expeditiously. For example, if EPA is expected to find a new SIP budget adequate before the MPO or DOT's conformity determination, conformity to the new SIP budget would be required for the current conformity

determination. In such a case, transportation planners should use the more recent SIP assumptions and consider them at the start of the current conformity analysis, since the more recent assumptions would have been available through the consultation process when the SIP was being developed. State and local air agencies should continue to inform their transportation counterparts of new assumptions as they become available.

The proposal would not change the requirement that DOT's conformity determination of the transportation plan and TIP be based on an analysis that is consistent with the proposed transportation system. For example, if a regionally significant project is significantly changed after the start of the conformity analysis, such a change must be reflected in the conformity analysis for the current determination. Likewise, a significant change in the design concept and scope of an emission reduction program would also have to be reflected before DOT makes its conformity determination.

Today's proposal does not change the requirements of § 93.122(a) which describes when emissions reduction credit can be taken in regional emissions analyses. Section 93.122(a)(2) continues to require that analyses reflect the latest information regarding the implementation of transportation control measures (TCMs) or other control measures in an approved SIP, even if a measure is cancelled or changed after the start of the conformity analysis. In addition, § 93.122(a)(3) continues to require that DOT's conformity determination only be made when regulatory control programs have been assured and will be implemented as described in the SIP. However, today's proposal would allow areas to rely upon the latest existing information as documented at the start of the conformity analysis regarding the effectiveness of SIP control programs that are being implemented as described in the SIP (§ 93.110(e)).

Finally, § 93.122(a)(6) is not amended by today's action. The conformity rule continues to require that the conformity analysis be based on the same ambient temperature and other factors used to establish the SIP's motor vehicle emissions budget.

### B. Why Are We Proposing This Change?

Today's proposal would make the conformity rule more workable for implementers while continuing to meet the basic Clean Air Act requirement that the latest planning assumptions be used in conformity determinations. EPA is

<sup>7</sup> For more information, see Question 2 in the January 18, 2001, EPA and DOT memorandum entitled, "Use of Latest Planning Assumptions in Conformity Determinations." See EPA's conformity web site listed in section I.B.2. of this proposal to download an electronic copy of this guidance document.

proposing this change for several reasons.

EPA believes that today's proposal is supported by section 176(c)(1) of the Clean Air Act which requires that "[t]he determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates." However, the Clean Air Act did not explicitly define the point in the conformity process when the "most recent estimates" should be determined. EPA believes that this ambiguity in the Clean Air Act allows for a procedural change in how the latest planning assumptions requirement is implemented.

When EPA originally wrote the conformity rule in 1993, we did not fully envision how the requirement for the use of latest planning assumptions would be implemented in practice. Under the current conformity rule, if an MPO has completed a regional emissions analysis for its plan and TIP conformity determinations, and new information becomes available as late as the day before DOT makes its conformity determination, DOT would not be able to complete its action, as the MPO would have to re-start the conformity process to incorporate the new data. In such a case, significant state and local resources may be required to incorporate new data, and the transportation planning process may be unnecessarily disrupted. EPA does not believe this is appropriate or consistent with the overall intent of the Clean Air Act.

The proposal would also be more consistent with how EPA applies the requirement for the use of the latest motor vehicle emissions model. The current conformity rule provides areas a grace period before a new emissions model must be used in the conformity process. Section 93.111(b) states that EPA, in consultation with DOT, will establish a grace period "no less than three months and no more than 24 months after notice of availability is published in the **Federal Register**." During the grace period, areas can use the previous emissions model for conformity. Section 93.111(c) of the conformity rule allows for the use of a previous emissions model in conformity analyses for a given length of time after a new model has been released. That is, as long as the analysis using the previous model has begun before or during the established grace period for a new version of the model, the analysis

is acceptable. Today's proposal for the use of latest planning assumptions is similar: Areas would use the latest planning assumptions available when they start the analysis, and would be able to complete the analysis even if new assumptions become available prior to completion. EPA's policy for incorporating the latest emissions models into the conformity process was most recently discussed in our January 18, 2002 guidance for the use of MOBILE6 in SIP development and conformity determinations. See EPA's conformity web site listed in section I.B.2. to download an electronic copy of this guidance document.

Finally, due to the iterative nature of the conformity process, new information that becomes available late in the planning process would still be incorporated in the conformity process in a timely manner, as the use of such information would be required in the next conformity determination.

EPA seeks comment on this proposal to incorporate new data into the conformity process and to determine latest planning assumptions at the start of the conformity analysis.

## X. Horizon Years for Hot-Spot Analyses

### A. What Are We Proposing?

EPA is clarifying § 93.116 so that future hot-spot analyses demonstrate that a project's emissions are not expected to worsen air quality during the entire time frame of the transportation plan. The current rule requires localized or "hot-spot" analyses to demonstrate that new projects will not cause or contribute to any new or existing violations in CO and PM-10 nonattainment and maintenance areas. However, the current rule does not specify what time frame should be covered by such analyses.

Today's proposal would clarify that project-level hot-spot analyses in metropolitan nonattainment and maintenance areas must consider the full time frame of an area's transportation plan at the time the analysis is conducted.<sup>8</sup> Alternatively, hot-spot analyses for new projects in isolated rural nonattainment and maintenance areas, as defined in today's proposal, should consider the full time frame of the area's regional emissions analysis since these areas are not required to develop a transportation plan and TIP under DOT's regulation.

<sup>8</sup> Under DOT's current planning regulation, transportation plans in metropolitan nonattainment and maintenance areas need to be updated every three years and cover at least a 20-year planning horizon (23 CFR 450.322(a)).

All areas should use the interagency consultation process to select the specific methods and assumptions for conducting both quantitative and qualitative hot-spot analyses in accordance with § 93.123 of the current rule (§ 93.105(c)(1)(i)).

EPA does not anticipate that today's clarification would significantly change how project-level analyses are being done in practice. To ensure that the requirement for hot-spot analysis is being satisfied for all relevant periods, areas should examine the year(s) within the transportation plan or regional emissions analysis, as appropriate, during which peak emissions from the project are expected and a violation would most likely occur due to the cumulative impacts of the project and background regional emissions in the project area. EPA believes that if areas demonstrate that no hot-spot impacts occur in the years of highest expected emissions, then they will have shown that no adverse impacts will occur in any years within the time frame of the plan (or regional emissions analysis).

Without this clarification, however, we believe that it is difficult for implementers to decide which year(s) to analyze to demonstrate that the conformity requirement for hot-spot analysis is satisfied. For example, some could read our existing requirement to mean that the demonstration regarding local violations must consider only the year of project completion, or alternatively, must consider every single future year.

In practice, many areas have examined trends from their regional emissions analysis and/or other factors to determine the year(s) expected to have the highest emissions. For example, some areas have reviewed trends in the future number of projects, changes in emissions factors and/or the economic and population growth. The specific methodology for selecting the most appropriate analysis year(s) to satisfy the hot-spot requirements for new transportation projects should be decided through interagency consultation.

Today's proposal would not change the procedural requirements for hot-spot analyses outlined in § 93.123, nor the flexibility for areas to decide how best to meet these requirements through interagency consultation. We believe our proposed clarification to § 93.116, in combination with the rule's existing consultation and modeling requirements, is sufficient to ensure that the years of peak emissions within the full term of the transportation plan are appropriately considered in hot-spot analyses for new transportation projects.

Finally, as background, in CO nonattainment and maintenance areas, the impact of new transportation projects on local emissions must be demonstrated through quantitative or qualitative analysis (40 CFR 93.123). In PM-10 nonattainment and maintenance areas, the localized emissions impact of new projects should be demonstrated through a qualitative analysis at this time. According to section § 93.123(b)(4) of the rule, quantitative PM-10 hot-spot analyses are not required until EPA releases modeling guidance on this subject; a project's impact on localized PM-10 violations must be qualitatively considered until this guidance is issued. On September 12, 2001, DOT issued "Guidance for Qualitative Project Level 'Hot Spot' Analysis in PM-10 Nonattainment and Maintenance Areas." DOT consulted with EPA on the development of this guidance; the guidance is available on EPA's conformity Web site listed in section I.B.2. of this proposal.

#### *B. Why Are We Proposing This Clarification?*

On May 26, 1994, Environmental Defense, Natural Resource Defense Council and Sierra Club collectively submitted to EPA a Petition for Reconsideration of the November 1993 conformity rule (58 FR 62188). In the preamble to an April 2000 conformity rule amendment (65 FR 18913, April 10, 2000), we addressed four remaining issues raised in this petition, one of which was the issue regarding horizon years for hot-spot analyses. Specifically, the petitioners requested that we alter the rule to ensure that areas examine the 20-year time frame of the transportation plan when conducting hot-spot analyses. The existing transportation conformity rule does not clearly specify a time frame to be considered for hot-spot analyses.

In the preamble to the 2000 amendment, we acknowledged that hot-spot analyses should address the full time frame of the transportation plan to ensure that new projects will not cause or worsen any new or existing hot-spot violations. In addition, we clarified that in some cases modeling the last year of the transportation plan or the year of project completion may not be sufficient to satisfy this requirement. EPA believes that the most effective means to meet this requirement would be to have the hot-spot analysis examine the year(s) during the time frame of the plan in which project emissions, in addition to background regional emissions in the project area, are expected to be the highest.

In our 2000 amendment, however, we were unable to make the described regulatory clarification to § 93.116 because we had not previously proposed this change to the rule. Instead, we committed to propose this clarification in today's action.

### **XI. Additional Changes and Clarifications to the Rule**

#### *A. Definitions*

EPA is proposing two new definitions for areas known as "donut areas" and "isolated rural nonattainment and maintenance areas" in § 93.101. In today's proposal, "donut areas" are defined as geographic areas outside a metropolitan planning area boundary as designated under 23 U.S.C. 134 and 49 U.S.C. 5303, but inside the boundary of a designated nonattainment/maintenance area that is dominated by a metropolitan area(s). In contrast, "isolated rural nonattainment and maintenance areas" are defined as any nonattainment or maintenance area that does not contain or is not part of any metropolitan planning area as designated under 23 U.S.C. 134 and 49 U.S.C. 5303. Isolated rural areas do not have metropolitan transportation plans or TIPs required under 23 U.S.C. 134 and 49 U.S.C. 5303 and 5304 and do not have projects that are part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. Projects in such areas are instead included only in statewide transportation improvement programs.

These proposed definitions would be used in conformity rule provisions that clarify how areas that are designated nonattainment or maintenance, but that are not within the planning boundary of any MPO's jurisdiction, should be considered with regard to the applicable conformity requirements. The conformity requirements for donut areas are generally the same as those for metropolitan areas. However, the transportation planning requirements in donut areas may differ. The conformity requirements for isolated rural nonattainment and maintenance areas are stated in § 93.109(g) of the current rule and generally exclude most conformity determination frequency requirements and triggers. Conformity determinations in these areas are required only when a new non-exempt FHWA/FTA project needs funding or approval. State approvals and funding for regionally significant non-federal projects would also require that such projects are included in a regional emissions analysis that conforms. The requirements for isolated rural areas also offer greater flexibility for

demonstrating conformity in years after the attainment year or after the last year of the maintenance plan. Given these differences in conformity requirements, EPA believes the proposed definitions will help to alleviate confusion over how metropolitan and rural areas are distinguished so that the conformity program can be more efficiently and practicably implemented in these different areas.

#### *B. Budget Test Requirements for the Attainment Year*

We are proposing a minor revision to clarify how § 93.118(b) and (d) should be implemented when a budget is established for a year prior to the attainment year. Specifically, we are proposing that once an area has any control strategy SIP budget available for conformity purposes, conformity must be demonstrated using the "budget test" for the attainment year if the attainment year is within the time frame of the transportation plan. Today's proposal would address questions raised by some State and local conformity implementers.

As background, the "budget test" is completed by comparing the regional emissions produced by a proposed transportation plan and TIP to the SIP's motor vehicle emissions budget(s) for a given year. If the emissions from the plan and TIP are equal to or less than the applicable SIP budget(s), the plan and TIP conform. Section § 93.118(d)(2) describes the years for which regional emissions from the plan and TIP must be estimated, and § 93.118(b) describes the years for which consistency with the budgets must be demonstrated, including which submitted or approved budget applies for a given year.

Section 93.118(d)(2) of the current rule requires a regional emissions analysis to be performed for the last year of the transportation plan, the attainment year (when it is in the time frame of the transportation plan), and any intermediate years so that analysis years are no more than 10 years apart. Section 93.118(b) requires that the budget test be performed for any year with a budget, for the last year of the transportation plan and any relevant intermediate years, but it does not explicitly require the budget test to be performed for the attainment year when it is in the time frame of the transportation plan but does not have a budget. In other words, the current rule could be interpreted, in limited cases, to require transportation planners to model emissions for the attainment year without comparing these estimated emissions to an existing budget from a prior year. EPA did not anticipate this

potential interpretation of the rule when it was drafted and does not believe it is appropriate. We believe that this inconsistency must be corrected to ensure that the budget test is performed for the attainment year whenever it is in the time frame of the transportation plan, regardless of whether or not budgets are established for the attainment year.

For example, suppose an ozone area has adequate rate-of-progress budgets for the year 2005, but has not yet established budgets for its 2007 attainment year. Under § 93.118(b) of the current rule, the area would demonstrate conformity to the 2005 budgets for 2005, for the last year of the transportation plan and any other intermediate years. Under today's proposal, the area would also demonstrate conformity for the 2007 attainment year, using the 2005 budgets, to ensure that emissions from motor vehicles are considered in the year in which the area must achieve the national ambient air quality standards. EPA believes analyzing the attainment year (provided it is within the time frame of the transportation plan) for conformity is critical in assuring that areas achieve their air quality goals on time.

EPA does not anticipate that the proposed change would have a practical impact on conformity determinations already underway. PM-10, CO, and ozone areas with lower classifications are not required by the Clean Air Act to submit reasonable further progress SIPs for years prior to the attainment year. Therefore, the case that the proposal addresses should not occur in these areas. For the limited number of affected areas, it is our understanding that conformity implementers are already completing the budget test for the attainment year, since a regional emissions analysis is also required for that year. The proposal would merely clarify that this should be done in all such cases. In addition, the majority of these areas already have adequate or approved budgets for the attainment year, so this would require no change from current practice.

This minor rule revision would not change existing requirements that the budget test only be performed for years that are within the time frame of the transportation plan under review; *i.e.*, retrospective analysis would not be required for years prior to those covered by the transportation plan even if a budget is established for such years. Areas should use the interagency consultation process to determine the appropriate years for which the budget test must be performed.

### *C. Budget Test Requirements Once a Maintenance Plan Is Submitted*

EPA is also making two minor changes to § 93.118(b)(2) to clarify which budgets apply when an area has both control strategy SIP and maintenance plan budgets. EPA has received questions regarding which budgets should be used in a conformity determination after a maintenance plan is submitted and EPA finds the submitted maintenance budgets adequate. While implementing the conformity regulation to date, questions have been raised regarding what budgets apply for analysis years prior to the first future year for which adequate or approved maintenance budgets have been established. EPA is proposing today's clarification to address this confusion regarding the current rule's requirements.

First, EPA is proposing to clarify § 93.118(b)(2)(iii) so that the budget test is completed for a submitted adequate control strategy SIP budget that is established for a year within the time frame of the transportation plan. The current conformity rule only requires areas with submitted maintenance plans to show consistency to approved control strategy SIPs. In contrast, before a maintenance plan is submitted, § 93.118(b)(1)(i) of the current rule requires consistency to be shown to any adequate or approved control strategy SIP budgets that are still relevant.

For example, suppose a nonattainment area submitted an attainment demonstration with budgets for 2007 that EPA has found adequate but not yet approved. The area then submits a maintenance plan with budgets for 2015, which EPA also determines are adequate. Under the current conformity rule, the budget test would be required for the 2015 budgets, but not for the 2007 adequate budgets (since they are not yet approved). Today's proposal would ensure that new transportation plans and TIPs conform to all adequate and approved budgets that are established for the years of the transportation plan.

Second, we are proposing to add § 93.118(b)(2)(iv) to clarify which budget(s) should be used for any analysis years that are selected prior to the last year of the maintenance plan to meet the requirements of § 93.118(d)(2). The current conformity rule does not explicitly cover the situation where an analysis year is selected for a year prior to the last year of the maintenance plan. The proposal would provide consistency between the budget test requirements for both control strategy SIPs and maintenance plans, since the

proposed § 93.118(b)(2) language would mirror language currently in § 93.118(b)(1).

Under the proposal, if an area analyzes a year for which no applicable budgets exist (*e.g.*, an intermediate year between an area's attainment year and the first maintenance budget year), the area should always use the most recent prior adequate or approved budget.

This rationale would also apply in areas that are submitting their second, required 10-year maintenance plan. For example, if an area selects an analysis year between the last year of the first maintenance plan and the first budget year of the second maintenance plan, the budget in the last year of the first maintenance plan would be used to demonstrate consistency for that analysis year.

Neither of these proposed changes would have a practical impact on the conformity process, since it is EPA's understanding that conformity practitioners are already implementing the budget test as described above. Therefore, the proposal should not impose any new requirements; it would simply clarify our current implementation of the existing conformity rule.

### *D. Relying on a Previous Regional Emissions Analysis*

EPA is proposing three changes to § 93.122(e), which describes when an area can rely on a previous regional emissions analysis for a new conformity determination. EPA articulated its intentions regarding when transportation planners could rely on a previous emissions analysis in the preamble to the November 24, 1993 conformity rule. A new regional analysis would not be required "if the MPO and DOT make a finding that the previous analysis is still valid. That is, if the only changes to the TIP involve either projects which are not regionally significant and which were not or could not be modeled in a regional emissions analysis, or changes to project design concept and scope which are not significant, the MPO or DOT could document this and use data from the previous regional emissions analysis to demonstrate satisfaction of the criteria which involve regional analysis" (58 FR 62202).

EPA's first proposed change would allow MPOs to rely on a previous emissions analysis for minor transportation plan revisions. Under the current rule, conformity determinations for minor TIP amendments can rely on a previous emissions analysis if no new regionally significant projects are added and significant changes in existing

projects do not occur. In addition, MPOs can rely on a previous emissions analysis for TIP updates that simply move a year of projects from the plan into the TIP (*i.e.*, there is no change in the project mix or project implementation schedule that would affect regional emissions).

EPA believes it is also appropriate to rely on a previous emissions analysis for minor plan revisions, since such revisions do not impact regional air quality and usually occur in tandem with minor TIP amendments. These minor revisions may include no addition of new regionally significant projects, no significant change in the design concept and scope of existing projects, and no change to the timeframe of the transportation plan. DOT's transportation planning regulations require that the TIP only include projects that are consistent with the transportation plan (23 CFR 450.324(f)(2)). As a result, when new projects are added to the TIP, they are also added to the plan. EPA believes it would not be practical to allow a minor TIP amendment to rely on a previous emissions analysis, but then require a new regional emissions analysis for making the same minor revision to the transportation plan.

Therefore, EPA's proposal provides consistency between the transportation planning and conformity processes so that new regional emissions analysis is only required for actions that involve significant air quality impacts.

EPA's second proposed change would add § 93.122(e)(3) to clarify that a conformity determination that relies on a previous analysis does not satisfy the frequency requirements for plans and TIPs (40 CFR 93.104). The conformity rule requires a new regional emissions analysis at least every three years for an updated transportation plan that incorporates the latest planning assumptions and emissions models.

EPA's third proposed change would add § 93.122(e)(1)(iv) and amend § 93.122(e)(2) to clarify that conformity determinations that rely on a previous regional emissions analysis must be based on all adequate and approved SIP budgets that apply at the time that DOT makes its conformity determination. This change would apply to conformity determinations for plans, TIPs, and projects not from a conforming plan and TIP. Like all conformity determinations, a determination that relies on a previous emissions analysis must satisfy the emissions test requirements of § 93.118 (or of § 93.119, if no applicable adequate or approved budgets exist), and must do so over the time frame of the transportation plan. Therefore, EPA

believes that pursuant to § 93.118(a) of the current rule, any conformity determination that relies on a previous emissions analysis must show consistency with all applicable adequate or approved budgets that are available for conformity purposes at the time the conformity determination is made, including those budgets that have become applicable since the previous conformity determination. For example, suppose an ozone area has an approved conformity determination based on reasonable further progress budgets and subsequently submits an attainment demonstration with budgets that EPA finds adequate. In its next determination, conformity would be demonstrated to the adequate attainment budgets (as well as to the reasonable further progress budgets if they are still applicable). The area could rely on the previous regional emissions analysis to satisfy the requirements of § 93.118 or § 93.119 if the plan and TIP had not changed significantly and the previous analysis was done to satisfy § 93.118 or § 93.118 requirements. If this is not possible, a new regional emissions analysis based on the latest assumptions and models is required.

EPA expects that most conformity implementers already consider new budgets when they rely on a previous emissions analysis. Today's proposal simply clarifies the rule and ensures that the conformity regulation continues to be correctly implemented in the future.

It is important to note that today's proposal would not change other factors in the implementation of § 93.122(e). MPOs can continue to rely on a previous emissions analysis if planning assumptions have changed, as long as the requirements of § 93.122(e) are met and no new regional emissions analysis is otherwise required (58 FR 3778). In addition, a new regional emissions analysis with the latest planning assumptions and models continues to be required at least every three years. As clarified in our proposed § 93.122(e)(3), conformity determinations that rely on a previous emissions analysis do not satisfy the frequency requirements for transportation plans and TIPs in § 93.104(b)(3) and (c)(3), and therefore, do not reset the three-year conformity clock.

#### *E. Exempt Projects*

Finally, we are proposing a minor revision to the list of exempt projects in § 93.126 of the conformity rule. On December 21, 1999, DOT published a rule revision to its right-of-way regulation (64 FR 71284) that changed the citation for emergency or hardship

advance land acquisitions (revised citation: 23 CFR 710.503)—projects that are currently exempt from the conformity process. Therefore, we are proposing a similar minor revision of § 93.126 to make the conformity rule fully consistent with DOT's December 1999 rulemaking that addresses these specific right-of-way acquisitions. This proposed revision in no way expands or reduces the type of land acquisitions that are exempt from transportation conformity; it merely updates the cross reference in the conformity rule to be consistent with the corresponding DOT regulation for these projects.

#### **XII. How Does Today's Proposal Affect Conformity SIPs?**

Clean Air Act section 176(c)(4)(C) requires states to submit revisions to their SIPs to reflect the criteria and procedures for determining conformity. States can choose to develop conformity SIPs as a memorandum of understanding (MOU), memorandum of agreement (MOA), or state rule. Section 51.390(b) of the conformity rule specifies that after EPA approves any conformity SIP revision, the federal conformity rule no longer governs conformity determinations (for the parts of the federal conformity rule that are covered by the approved conformity SIP).

In some areas, EPA has already approved conformity SIPs that include provisions from the 1997 transportation conformity rule (62 FR 43780) that EPA is proposing to revise through this rulemaking. In these areas, if EPA finalizes rule amendments in this proposal that are not a direct result of the March 1999 court decision (*e.g.*, streamlining the frequency of conformity determinations), these amendments will be effective only when the State includes them in a conformity SIP revision and EPA approves that SIP revision. EPA will work with states to approve such revisions as expeditiously as possible through flexible administrative techniques such as parallel processing or direct final rulemaking.

In contrast, those rule amendments in this proposal that address provisions directly impacted by the March 1999 court decision will apply immediately in all nonattainment and maintenance areas upon the effective date of EPA's final rule. Although some areas have conformity SIPs that were approved prior to March 1999, provisions included in these SIPs that the court subsequently remanded to EPA for further rulemaking are no longer enforceable by law. As a result, all areas, including those with a previously

approved conformity SIP, have been operating under EPA and DOT's guidance that implements the court decision and will be governed by the federal rules when they are finalized.

### XIII. Statutory and Executive Order Reviews

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

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

- (1) Have an annual effect on the economy of \$100 million or more, or otherwise adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposed rule is not a "significant regulatory action" under the terms of Executive Order 12866.

#### B. Paperwork Reduction Act

This proposal does not impose any new information collection requirements from EPA that require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* An agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number.

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

requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and, transmit or otherwise disclose the information.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires the Agency to conduct a regulatory flexibility analysis of any significant impact a rule will have on a substantial number of small entities. Small entities include small businesses, small not-for-profit organizations and small government jurisdictions.

EPA has determined that today's proposal will not have a significant impact on a substantial number of small entities. This regulation directly affects federal agencies and metropolitan planning organizations that, by definition, are designated only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities. The Regulatory Flexibility Act defines a "small governmental jurisdiction" as the government of a city, county, town, school district or special district with a population of less than 50,000.

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

#### 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 to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective

or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The primary purpose of this proposed rule is to formalize what the U.S. Court of Appeals for the District of Columbia Circuit has already decided as a legal matter, and that is currently being implemented in practice. Additional rule amendments also addressed in this proposal simply serve to improve the conformity regulation by implementing the rule in a more practicable manner and/or to clarify conformity requirements that already exist. None of these proposed amendments impose any additional burdens; thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA and EPA has not prepared a statement with respect to budgetary impacts.

#### E. Executive Order 13132: Federalism

Executive Order 13132, Federalism (64 FR 43255, August 10, 1999), revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism

implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the Agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This proposed rule, that amends a regulation that is required by statute, will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in nonattainment and maintenance areas, and the U.S. Court of Appeals for the District of Columbia Circuit has determined that projects requiring federal approval and funding are affected when a nonattainment or maintenance area is unable to demonstrate conformity; specifically, under Clean Air Act section 176(c) those phases (NEPA approval, right-of-way acquisition, final design, or construction) in a federal project's development that have not received federal approval or funding prior to a conformity lapse cannot be granted approval or funding, and thus proceed, during a conformity lapse. Furthermore, the court directed EPA to establish new procedures for determining the adequacy of motor vehicle emissions estimates before such estimates can be

used in conformity determinations. Similarly, other minor amendments included in today's proposal are the result of the court's order and other related administrative matters, or have been proposed simply to make the rule more workable and/or to clarify requirements that already exist under the current conformity regulation.

In summary, this proposed rule is required primarily by the court's interpretation of the Clean Air Act, and by itself will not have a substantial impact on States. Thus, the requirements of section 6 of the Executive Order do not apply to this proposed rule.

#### *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 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. Specifically, this proposed rule would incorporate into the conformity rule the court's interpretation of the Act, as well as several other clarifications and improvements, that would not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Accordingly, the requirements of Executive Order 13175 are not applicable to this proposal.

#### *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 it is not economically significant within the meaning of Executive Order 12866 and does not involve the consideration of relative environmental health or safety risks.

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

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

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

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

This proposed rulemaking does not involve technical standards. Therefore, the use of voluntary consensus standards does not apply to this proposed rule.

#### **List of Subjects in 40 CFR Part 93**

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide,

Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: June 11, 2003.

Christine Todd Whitman, Administrator.

For the reasons set out in the preamble, 40 CFR part 93 is proposed to be amended as follows:

PART 93—[AMENDED]

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

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

2. Section 93.101 is amended by adding, in alphabetical order, the definitions for "Donut areas" and "Isolated rural nonattainment and maintenance areas" to read as follows:

§ 93.101 Definitions.

\* \* \* \* \*

Donut areas are geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or Clean Air Act section 175(a) maintenance plan area that is dominated by a metropolitan area(s). These areas are not "isolated rural nonattainment or rural maintenance areas".

\* \* \* \* \*

Isolated rural nonattainment and maintenance areas are areas that do not contain or are not part of any metropolitan planning area as designated under the transportation planning regulations. Isolated rural areas do not have Federally required metropolitan transportation plans or TIPs and do not have projects that are part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. Projects in such areas are instead included in statewide transportation improvement programs. These areas are not donut areas.

\* \* \* \* \*

3. Section 93.102 is amended by revising paragraph (c) to read as follows:

§ 93.102 Applicability.

\* \* \* \* \*

(c) Limitations. In order to receive any FHWA/FTA approval or funding actions, including NEPA approvals, for a project phase subject to this subpart, the project must come from a currently conforming transportation plan and TIP.

\* \* \* \* \*

4. Section 93.104 is amended by: a. Removing paragraph (c)(4); b. revising paragraph (d); and c. removing paragraph (e)(1) and (e)(4) and redesignating paragraphs (e)(2), (e)(3) and (e)(5) as paragraphs (e)(1),

(e)(2) and (e)(3), respectively, and by revising newly designated paragraphs (e)(2) and (e)(3).

The revisions and additions read as follows:

§ 93.104 Frequency of conformity determinations.

\* \* \* \* \*

(d) Projects. FHWA/FTA projects must be found to conform before they are adopted, accepted, approved, or funded. Conformity must be redetermined for any FHWA/FTA project if one of the following occurs: A significant change in the project's design concept and scope; if three years elapse since the most recent major step to advance the project; or initiation of a supplemental environmental document for air quality purposes. Major steps include NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; and, construction (including Federal approval of plans, specifications and estimates).

(e) \* \* \*

(2) The effective date of EPA approval of a control strategy implementation plan revision or maintenance plan which establishes or revises a motor vehicle emissions budget if that budget has not yet been used in a conformity determination prior to approval; and (3) The effective date of EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget.

5. Section 93.109 is amended by:

- a. Revising paragraphs (c)(1) and (c)(2); b. revising paragraphs (d)(2) and (d)(3); c. revising paragraph (e)(2) and removing paragraphs (e)(3)(i) and (e)(3)(ii) and redesignating paragraph (e)(3)(iii) as (e)(3)(ii) and adding a new paragraph (e)(3)(i); and d. revising paragraphs (f)(1) and (f)(2).

The revisions and additions read as follows:

§ 93.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.

\* \* \* \* \*

(c) \* \* \*

(1) In ozone nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after the effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In ozone nonattainment areas that are required to submit a control strategy

implementation plan revision (usually moderate and above areas), the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made when there is no motor vehicle emissions budget from an applicable implementation plan and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan.

\* \* \* \* \*

(d) \* \* \*

(2) In CO nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after the effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) Except as provided in paragraph (d)(4) of this section, in CO nonattainment areas the emission reduction tests must be satisfied as required by § 93.119 for conformity determinations made when there is no motor vehicle emissions budget from an applicable implementation plan and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan.

\* \* \* \* \*

(e) \* \* \*

(2) In PM10 nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after the effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) \* \* \*

(i) If there is no motor vehicle emissions budget from an applicable implementation plan and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan; or

\* \* \* \* \*

(f) \* \* \*

(1) In NO2 nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after the effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In NO2 nonattainment areas the emission reduction tests must be

satisfied as required by § 93.119 for conformity determinations made when there is no motor vehicle emissions budget from an applicable implementation plan and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan.

\* \* \* \* \*

6. Section 93.110(a) is revised to read as follows:

**§ 93.110 Criteria and procedures: Latest planning assumptions.**

(a) The conformity determination, with respect to all other applicable criteria in §§ 93.111 through 93.119, must be based upon the most recent planning assumptions in force at the time the conformity analysis begins. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section using the planning assumptions available at the time the analysis begins as determined through the interagency consultation process required in § 93.105(c)(1)(i).

\* \* \* \* \*

7. Section 93.116 is revised to read as follows:

**§ 93.116 Criteria and procedures: Localized CO and PM<sub>10</sub> violations (hot spots).**

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO or PM<sub>10</sub> violations or increase the frequency or severity of any existing CO or PM<sub>10</sub> violations in CO and PM<sub>10</sub> nonattainment and maintenance areas. This criterion is satisfied if it is demonstrated that during the time frame of the transportation plan (or regional emissions analysis) no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

(b) This paragraph applies for CO nonattainment areas as described in § 93.109(d)(1). Each FHWA/FTA project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (in CO nonattainment areas). This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that during the time frame of the transportation plan (or regional emissions analysis) existing localized CO violations will be eliminated or reduced in severity and number as a result of the project. The demonstration must be performed according to the

consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

8. Section 93.118 is amended by:

a. Revising paragraphs (b) introductory text and (b)(2)(iii), and adding (b)(2)(iv);

b. revising paragraphs (e)(1), (e)(2) and (e)(3); and

c. adding new paragraph (f).

The revisions and additions read as follows:

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

\* \* \* \* \*

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes motor vehicle emissions budget(s), for the attainment year (if it is within the timeframe of the transportation plan), for the last year of the transportation plan's forecast period, and for any intermediate years as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

\* \* \* \* \*

(2) \* \* \*

(iii) If an approved and/or submitted control strategy implementation plan has established motor vehicle emissions budgets for years in the time frame of the transportation plan, emissions in these years must be less than or equal to the control strategy implementation plan's motor vehicle emissions budget(s) for these years; and

(iv) For any analysis years before the last year of the maintenance plan, emissions must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year.

\* \* \* \* \*

(e) \* \* \*

(1) Consistency with the motor vehicle emissions budgets in submitted control strategy implementation plan revisions or maintenance plans must be demonstrated if EPA has declared the motor vehicle emissions budget(s) adequate for transportation conformity purposes, and the adequacy finding is effective. However, motor vehicle emissions budgets in submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the same Clean Air Act requirement and the period of years addressed by the approved implementation plan, unless EPA specifies otherwise in its approval of a SIP.

(2) If EPA has not declared an implementation plan submission's

motor vehicle emissions budget(s) adequate for transportation conformity purposes, the budget(s) shall not be used to satisfy the requirements of this section. Consistency with the previously established motor vehicle emissions budget(s) must be demonstrated. If there are no previous approved implementation plans or implementation plan submissions with adequate motor vehicle emissions budgets, the emission reduction tests required by § 93.119 must be satisfied.

(3) If EPA declares an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes after EPA had previously found the budget(s) adequate, and conformity of a transportation plan or TIP has already been determined by DOT using the budget(s), the conformity determination will remain valid. Projects included in that transportation plan or TIP could still satisfy §§ 93.114 and 93.115, which require a currently conforming transportation plan and TIP to be in place at the time of a project's conformity determination and that projects come from a conforming transportation plan and TIP.

\* \* \* \* \*

(f) *Adequacy review process for implementation plan submissions.* EPA will use the procedure listed in paragraphs (f)(1) or (f)(2) of this section to review the adequacy of an implementation plan submission:

(1) When EPA reviews the adequacy of an implementation plan submission prior to EPA's final action on the implementation plan,

(i) EPA will notify the public through EPA's website when EPA receives an implementation plan submission that will be reviewed for adequacy.

(ii) The public will have a minimum of 30 days to comment on the adequacy of the implementation plan submission. If the complete implementation plan is not accessible electronically through the internet and a copy is requested within 15 days of the date of the website notice, the comment period will be extended for 30 days from the date that a copy of the implementation plan is mailed.

(iii) After the public comment period closes, the EPA Regional Office will inform the State in writing whether EPA has found the submission adequate or inadequate for use in transportation conformity, or EPA will include the determination of adequacy or inadequacy in a proposed or final action approving or disapproving the implementation plan under paragraph (f)(2)(iii) of this section.

(iv) EPA will publish a **Federal Register** notice to inform the public of

EPA's finding. If EPA finds the submission adequate, the effective date of this adequacy finding will be 15 days from the date the notice is published.

(v) EPA will announce whether the implementation plan submission is adequate or inadequate for use in transportation conformity on EPA's website. The website will also include EPA's response to comments if any comments were received during the public comment period.

(vi) If after EPA has found a submission adequate, EPA has cause to find that budget inadequate, EPA will repeat actions described in paragraphs (f)(1)(i) through (v) of this section, with one exception. EPA will first inform the State in writing of its interim inadequacy finding, effective immediately upon the date of EPA's letter. EPA will then repeat actions described in paragraphs (f)(1)(i) through (v) of this section unless EPA determines that there is no need for additional public comment given the deficiencies of the implementation plan submission.

(vii) If after EPA has found a submission inadequate, EPA has cause to reconsider the adequacy of that budget, EPA will repeat actions described in paragraphs (f)(1)(i) through (v) of this section.

(2) When EPA reviews the adequacy of an implementation plan submission simultaneously with EPA's approval of the implementation plan,

(i) EPA's **Federal Register** notice of proposed or direct final rulemaking will serve to notify the public that EPA will be reviewing the implementation plan submission for adequacy.

(ii) The publication of the notice of proposed rulemaking will start a public comment period of at least 30 days.

(iii) EPA will indicate whether the implementation plan submission is adequate and thus can be used for conformity either in EPA's final rulemaking or through the process described in paragraphs (f)(1)(iii) through (v) of this section. EPA will respond to comments received directly and to comments related to adequacy made through the state process and include the response to comments in the applicable docket.

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

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

(a) \* \* \*

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, only projects in the first three

years of the currently conforming transportation plan and TIP 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 first three years of the currently conforming transportation plan and TIP 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, and conformity to this submission is determined.

\* \* \* \* \*

10. Section 93.121 is amended by revising paragraph (a)(1) and redesignating paragraph (a)(2) as (a)(3), and by adding a new paragraph (a)(2) and revising newly designated (a)(3) 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, and the project's design concept and scope has not changed significantly from those which 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 (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 which were included in the regional emissions analysis; or

(3) A new regional emissions analysis including the project and the currently conforming transportation plan and TIP demonstrates that the transportation plan and TIP would still conform if the project were implemented (consistent with the requirements of §§ 93.118 and/or 93.119 for a project not from a conforming transportation plan and TIP).

\* \* \* \* \*

11. Section 93.122 is amended by revising paragraphs (e)(1) and (e)(2) and adding new paragraph (e)(3) to read as follows:

**§ 93.122 Procedures for determining regional transportation-related emissions.**

\* \* \* \* \*

(e) \* \* \*

(1) Conformity determinations for a new transportation plan and/or TIP may be demonstrated to satisfy the requirements of §§ 93.118 ("Motor vehicle emissions budget") or 93.119 ("Emission reductions in areas without motor vehicle emissions budgets") without new regional emissions analysis if the previous regional emissions analysis also applies to the new plan and/or TIP. This requires a demonstration that:

(i) The new plan and/or TIP contain all projects which must be started in the plan and TIP's timeframes in order to achieve the highway and transit system envisioned by the transportation plan;

(ii) All plan and TIP projects which are regionally significant are included in the transportation plan with design concept and scope adequate to determine their contribution to the transportation plan's and/or TIP's regional emissions at the time of the previous conformity determination; and

(iii) The design concept and scope of each regionally significant project in the new plan and/or TIP is not significantly different from that described in the previous transportation plan.

(iv) The previous regional emissions analysis is still consistent with the requirements of §§ 93.118 (including that conformity to all currently applicable budgets is demonstrated) and/or 93.119, as applicable.

(2) A project which is not from a conforming transportation plan and a conforming TIP may be demonstrated to satisfy the requirements of § 93.118 or § 93.119 without additional regional emissions analysis if allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the transportation plan, the previous regional emissions analysis is still consistent with the requirements of § 93.118 (including that conformity to all currently applicable budgets is demonstrated) and/or § 93.119, as applicable, and if the project is either:

(3) A conformity determination that relies on paragraph (e) of this section does not satisfy the frequency requirements of § 93.104(b) or (c).

**§ 93.124 [Amended]**

12. Section 93.124 is amended by removing paragraph (b) and redesignating paragraphs (c) through (e) as paragraphs (b) through (d).

**§ 93.126 [Amended]**

13. In § 93.126, Table 2 is amended under the heading "Other" by revising the entry for "Emergency or hardship

advance land acquisitions (23 CFR 712.204(d))” to read “Emergency or

hardship advance land acquisitions (23 CFR 710.503)”.

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