

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 93**

[FRL-7579-8]

RIN 2060-AL73

**Transportation Conformity Rule Amendments for the New 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas**

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

**ACTION:** Proposed rule.

**SUMMARY:** Today we (EPA) are proposing to amend the transportation conformity rule to include criteria and procedures for the new 8-hour ozone and fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standards (NAAQS or "standards"). Transportation conformity is required under Clean Air Act section 176(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). We are conducting this rulemaking to revise the conformity regulation in the context of EPA's broader strategies for implementing the new ozone and PM<sub>2.5</sub> standards.

The proposal provides guidance for when conformity will first apply in areas that are designated nonattainment for the 8-hour ozone and PM<sub>2.5</sub> standards. This portion of the proposal discusses the implementation of the statutory one-year conformity grace period and proposed revocation of the 1-hour ozone standard, although EPA is not seeking comment through today's proposal on the revocation options themselves. Today's proposal also describes when transportation conformity applies in areas that have approved 8-hour ozone Early Action Compacts (EACs).

The proposal also describes the general requirements for conducting conformity determinations for the new standards, such as the conformity test(s) that would apply before and after adequate or approved SIP motor vehicle emissions budgets are established. In addition, this rulemaking proposes to amend the conformity regulations to specifically include PM<sub>2.5</sub> as a criteria pollutant subject to transportation conformity and outlines the specific conformity requirements that would apply in newly designated PM<sub>2.5</sub> nonattainment areas. In particular, the proposal includes options for when

conformity would apply for various PM<sub>2.5</sub> precursors and fugitive dust, as well as options for PM<sub>2.5</sub> hot-spot requirements for project-level conformity determinations. EPA seeks comments and suggestions for future guidance on adjusting fugitive dust emissions for PM<sub>2.5</sub> conformity analyses.

In addition to issues related to the new ozone and PM<sub>2.5</sub> standards, EPA is proposing a few miscellaneous rule revisions to clarify the existing regulation and improve implementation.

The Department of Transportation (DOT) is EPA's Federal partner in implementing the transportation conformity regulation. We have consulted with DOT on the development of this rulemaking and DOT concurs with this proposal. EPA has also met with transportation and environmental organizations to discuss this rulemaking and the proposal reflects the comments that we received through these stakeholder discussions.

**DATES:** Written comments on this proposal must be received on or before December 22, 2003. EPA will conduct one public hearing on this proposal beginning at 9:30 a.m. on Thursday, December 4, 2003, in Washington, DC. As described in Section XVI. of this proposal, the hearing will continue throughout the day until all testimony has been presented or 5 p.m., whichever is earlier.

**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-2003-0049. Comments may also be submitted electronically, by facsimile, or through hand delivery/courier. Follow the detailed instructions for submission as provided in section I.C. of the **SUPPLEMENTARY INFORMATION** section.

The public hearing will be held in Washington, DC, at the Washington Marriott Hotel at 1221 22nd St., NW., Washington, DC 20037, (202) 872-1500.

**FOR FURTHER INFORMATION CONTACT:** 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; or, Rudy Kapichak, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, [kapichak.rudolph@epa.gov](mailto:kapichak.rudolph@epa.gov), (734) 214-4574.

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

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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 proposed 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 § 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-2003-0049. 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.

2. *Electronic Access.* You may access this **Federal Register** document electronically through EPA's Transportation Conformity Web site at <http://www.epa.gov/otaq/trans/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 in the future 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." Although EPA is not required to consider these late comments, we may do so as appropriate, considering time and volume constraints.

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. You should 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. However, if EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to further 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-2003-0049. 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*, Attention Air Docket ID No. OAR-2003-0049. 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 are thus 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 only in either WordPerfect or ASCII file format. Please avoid the use of special characters and any form of encryption, as this may adversely affect our ability to read these submissions.

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-2003-0049.

3. *By Hand Delivery or Courier.* Deliver two copies of your comments to: EPA Docket Center, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Air Docket ID No. OAR-2003-0049. Such deliveries can only be 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-2003-0049.

### 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: Meg Patulski, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, Docket ID No. OAR-2003-0049. 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 publicly 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 indicating 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**

**A. What Is Transportation Conformity?**

Transportation conformity is required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with (“conform to”) the purpose of the state air quality implementation plan (SIP). Conformity currently applies under EPA’s rules to areas that are designated nonattainment, and those redesignated to attainment after 1990 (“maintenance areas” with plans developed under Clean Air Act section 175A) for the criteria pollutants: ozone, coarse particulate matter (PM<sub>10</sub>), carbon monoxide (CO), and nitrogen dioxide (NO<sub>2</sub>). Today’s proposal would also apply the conformity rule provisions in fine particulate matter (PM<sub>2.5</sub>) areas. 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 relevant national ambient air quality standards (NAAQS or “standards”). EPA’s transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the SIP.

EPA first promulgated the transportation conformity rule on November 24, 1993 (58 FR 62188), and subsequently published a comprehensive set of amendments on August 15, 1997 (62 FR 43780) that clarified and streamlined language from the 1993 rule. EPA has made other smaller amendments to the rule both before and after the 1997 amendments.

On June 30, 2003, EPA published a proposal that would amend the current conformity rule to be consistent with a March 2, 1999, U.S. Court of Appeals decision (68 FR 38974). The “court proposal” also included several proposed amendments to regulatory provisions that did not directly result from the court decision. EPA has not yet taken a final action on this proposed rulemaking. We are reviewing the public comments on the court proposal and will promulgate a final rule in the future.

Today’s proposal should be considered a separate action from the June 30, 2003 court proposal. However, some sections and paragraphs of the conformity rule are addressed in both proposals. For those sections, EPA has repeated the court proposal’s regulatory language in today’s proposal along with the proposed revisions that address the conformity requirements in 8-hour ozone and PM<sub>2.5</sub> areas.

Other changes to the conformity program could occur through the reauthorization of the Surface Transportation Act, currently entitled the Transportation Equity Act for the 21st Century (TEA–21). However, EPA believes it is prudent to expeditiously pursue the regulatory changes proposed today to ensure that entities subject to conformity for the new air quality standards understand applicable requirements as close to area designations as possible. EPA will continue to monitor the proposed reauthorization proposals for their potential impact on the conformity regulation. If statutory amendments to the conformity program result from

TEA–21 reauthorization, EPA would take appropriate action to address such changes.

EPA has consulted with the Department of Transportation (DOT), our federal partners in implementing the transportation conformity regulation, in developing this rulemaking, and DOT concurs with this proposal. EPA has also met with state and local transportation and environmental organizations to discuss this rulemaking. The proposal reflects our consideration of the comments that we received through these stakeholder discussions. Documentation of these stakeholder meetings and specific comments are included in the docket for this rulemaking.

**B. Why Is EPA Conducting This Rulemaking?**

EPA has developed new 8-hour ozone and PM<sub>2.5</sub> air quality standards, and anticipates designating areas as nonattainment for these new standards in April and December 2004, respectively. EPA is conducting this rulemaking to provide clear guidance and rules for implementing conformity for these standards. Some of the proposed revisions to the current regulation would provide more options and flexibility in demonstrating conformity. Other proposed changes would also apply to existing 1-hour ozone, CO, PM<sub>10</sub> and NO<sub>2</sub> nonattainment and maintenance areas.

The following table provides a roadmap for determining whether a specific proposal included in this rulemaking would apply in your area.

Type of area	Issue being addressed in this proposal	Preamble section	Proposed regulatory section
8-hour ozone .....	Conformity grace period .....	III.A	§ 93.102(d).
	Revocation of 1-hour ozone standard .....	III.B	No proposed regulatory amendments.
	Early Action Compacts .....	III.C	No proposed regulatory amendments.
	Baseline year test .....	IV.B	§ 93.119(b).
	Build/no-build test (marginal and below classifications and subpart 1 areas) .....	IV.C	§ 93.119(b)(2). § 93.119(g)(2).
	Regional conformity tests (moderate and above classifications) .....	IV.D	§ 93.119(b)(1).
	Regional Conformity tests (areas without 1-hour ozone budgets) .....	V	§ 93.109(k).
	Regional conformity tests (areas with 1-hour ozone budgets) .....	VI	§ 93.109(e).
	Definitions .....	XIV.A.	§ 93.101.
	Insignificance .....	XIV.B	§ 93.109(d). § 93.121(c).
PM <sub>2.5</sub> .....	Transportation plan and modeling requirements (moderate and above classifications) .....	XIV.D	§ 93.106(b). § 93.122(c).
	Non-federal projects (for isolated rural areas only) .....	XIV.F	§ 93.121(b)(1).
	Applicability .....	III.A	§ 93.102(b)(1).
	Conformity grace period .....	III.A	§ 93.102(d)
	Baseline year test .....	IV.B	§ 93.119(e)
	Build/no-build test .....	IV.C	§ 93.119(e) § 93.119(g)(2)
	Regional conformity tests .....	VII	§ 93.109(i)

Type of area	Issue being addressed in this proposal	Preamble section	Proposed regulatory section
1-hour ozone	Precursors in regional analyses	VIII	§ 93.102(b)(2) § 93.119(f)
	Re-entrained road dust in regional analyses	IX	§ 93.102(b)(3) § 93.119(f)
	Construction-related fugitive dust in regional analyses	X	§ 93.122(f)
	Compliance with SIP control measures	XI	§ 93.117.
	Hot-spots	XII	No proposed regulatory amendments.
	Definitions	XIV.A	§ 93.101.
	Insignificance	XIV.B	§ 93.109(k). § 93.121(c).
	Non-federal projects (for isolated rural areas only)	XIV.F	§ 93.121(b)(1).
	Revocation of 1-hour ozone standard	III.B	No proposed regulatory amendments.
	PM <sub>10</sub>	Build/no-build test (marginal and below classifications)	IV.C
Regional conformity tests (moderate and above classifications)		IV.D	§ 93.101.
Definitions		XIV.A	§ 93.109(k)
Insignificance		XIV.B	§ 93.121(c).
Limited maintenance plans		XIV.C	§ 93.101. § 93.109(j).
Transportation plan and modeling requirements (moderate and above classifications).		XIV.D	§ 93.121(c). § 93.106(b). § 93.122(c).
Non-federal projects (for isolated rural areas only)		XIV.F	§ 93.121(b)(1).
Clarification to use of approved budgets in conformity		XIV.G	§ 93.109(c).
Build/no-build test		IV.C	§ 93.119(d). § 93.119(g)(2).
CO		Compliance with SIP control measures (Request for information only)	XI
	Hot-spots	XIII	No proposed regulatory amendments.
	Clarification to Precursors	XIV.E	§ 93.102(b)(2). § 93.119(f)(5).
	Definitions	XIV.A &	§ 93.101.
	Insignificance	XIV.B &	§ 93.109(k). § 93.121(c).
	Limited maintenance plans	XIV.C	§ 93.101. § 93.109(j).
	Non-federal projects (for isolated rural areas only)	XIV.F	§ 93.121(b)(1).
	Clarification to use of approved budgets in conformity	XIV.G	§ 93.109(g).
	Build/no-build test (lower CO classifications)	IV.C	§ 93.119(c). § 93.119(g)(2).
	NO <sub>2</sub>	Regional conformity tests (higher CO classifications)	IV.D
Definitions		XIV.A	§ 93.101.
Insignificance		XIV.B	§ 93.109(k). § 93.121(c).
Limited maintenance plans		XIV.C	§ 93.101. § 93.109(j).
Transportation plan and modeling requirements (moderate and serious classifications).		XIV.D	§ 93.121(c). § 93.106(b). § 93.122(c).
Non-federal projects (for isolated rural areas only)		XIV.F	§ 93.121(b)(1).
Clarification to use of approved budgets in conformity		XIV.G	§ 93.109(f).
Build/no-build test		IV.C	§ 93.119(d). § 93.119(g)(2).
Definitions		XIV.A	§ 93.101.
Insignificance		XIV.B	§ 93.109(k). § 93.121(c).
	Non-federal projects (for isolated rural areas only)	XIV.F	§ 93.121(b)(1).
	Clarification to use of approved budgets in conformity	XIV.G	§ 93.109(h).

This table illustrates which parts of the proposal are relevant for various pollutants and standards. Please note that Sections V.–VII. provide stand-alone descriptions of the proposed

emissions tests for PM<sub>2.5</sub> areas and 8-hour ozone areas with and without existing 1-hour ozone SIPs. For example, if your area expects only to be designated nonattainment under the

PM<sub>2.5</sub> standard, you should read section VII. but not sections V. and VI (for 8-hour ozone areas). EPA believes that any redundancy between these sections

is warranted to assist readers who may not need to read the entire proposal.

### *C. Does This Proposal Include the Entire Transportation Conformity Regulation?*

No. The proposed regulatory text is limited to proposed changes to affected portions of the conformity rule. However, a complete version of the conformity rule is available to the public on our transportation conformity website listed in Section I.B.2. of this proposal. The complete version is intended to help reviewers understand today's proposed changes in context with the June 30, 2003 conformity proposal and other existing rule sections that are not proposed to be changed.

### **III. Conformity Grace Period and Revocation of the 1-Hour Ozone Standard**

#### *A. When Will Conformity Apply for the 8-Hour Ozone and PM<sub>2.5</sub> Standards?*

Conformity applies one year after the effective date of EPA's initial nonattainment designation for a given pollutant and standard. This one-year conformity grace period is provided by Clean Air Act section 176(c)(6) and § 93.102(d) of the conformity regulation.

Section 93.102(d) currently addresses newly designated nonattainment areas for ozone, CO, PM<sub>10</sub> and NO<sub>2</sub>. This proposal would add PM<sub>2.5</sub> to § 93.102(d) of the conformity rule even though the grace period is already available to all newly designated nonattainment areas as a matter of law. Today's proposed change would simply reflect the statutory flexibility in the regulation.

Although the same pollutant, the 8-hour and 1-hour ozone standards are different NAAQS. Therefore, every area that is designated nonattainment for the 8-hour ozone standard will also have a 1-year grace period before conformity applies for that standard, even if the area was designated nonattainment for the 1-hour ozone standard. Areas currently subject to conformity for the 1-hour ozone standard would continue to be subject to such requirements during the 1-year grace period for the 8-hour ozone standard. EPA anticipates designating areas for the 8-hour ozone standard in April 2004. If, for example, designations have a 30-day delayed effective date, conformity for the 8-hour ozone standard would begin to apply in May 2005, since under EPA's regulations the one-year grace period begins upon the effective date of an area's designation. EPA is proposing to include new regulatory definitions for the 1-hour and 8-hour ozone standards in § 93.101. These proposed definitions are consistent with how the standards

are described in existing EPA regulations at 40 CFR 50.9 and 40 CFR 50.10, respectively.

Similarly, every area that is designated nonattainment for the PM<sub>2.5</sub> standard will have a one-year grace period before conformity applies for that standard. EPA plans to designate areas for PM<sub>2.5</sub> by December 2004. Under today's proposed § 93.102(b), the conformity rule would apply in areas designated nonattainment for PM<sub>2.5</sub>. Therefore, conformity for the PM<sub>2.5</sub> standard would apply beginning in January 2006, for example, if a 30-day effective date is provided in accordance with § 93.102(d). It is important to note that PM<sub>10</sub> is a different pollutant than PM<sub>2.5</sub>, and today's proposal does not affect the applicability and general implementation of conformity in PM<sub>10</sub> nonattainment and maintenance areas.

EPA anticipates that some areas will be designated as nonattainment for both the 8-hour ozone and PM<sub>2.5</sub> standards. In these areas, conformity for the 8-hour ozone standard will apply one year after the effective date of the area's 8-hour ozone designation, while conformity for PM<sub>2.5</sub> will apply one year after the effective date of the area's PM<sub>2.5</sub> designation.

The following discussion provides more details on the application of the one-year conformity grace period in specific types of newly designated nonattainment areas—metropolitan, donut, and isolated rural areas.

#### **1. Metropolitan Areas**

Metropolitan areas are urbanized areas that have a population greater than 50,000 and a designated metropolitan planning organization (MPO) responsible for transportation planning per 23 U.S.C. 134. In general, within one year after the effective date of the initial nonattainment designation for a given pollutant and standard, the area's MPO and DOT must make a conformity determination with regard to that pollutant and standard for the area's transportation plan and TIP. If, at the conclusion of the one-year grace period, the MPO and DOT have not made a plan and TIP conformity determination for the relevant pollutant and standard, the area would be in a conformity "lapse." As described in section III.B., MPOs must continue to meet conformity requirements for the 1-hour ozone standard for plan, TIP, and project approvals made up until the time that the 1-hour standard is revoked.

During a conformity lapse, only certain projects can receive additional federal funding or approvals to proceed. Such projects include: exempt projects (e.g., safety projects) listed in §§ 93.126,

93.127 and 93.128 of the current conformity rule; transportation control measures in an approved SIP; and, projects or project phases (e.g., right-of-way, final design, construction) that received all required federal funding or approval prior to the conformity lapse. The practical impact of a conformity lapse will vary on an area-by-area basis. For additional information on projects that can proceed during a conformity lapse, see the following guidance memoranda that implement the March 2, 1999 U.S. Court of Appeals decision that affected related provisions of the conformity rule: DOT's January 2, 2002 guidance, published in the **Federal Register** on February 7, 2002 (67 FR 5882); DOT's May 20, 2003, and FTA's April 9, 2003, supplemental guidance documents; as well as EPA's May 14, 1999 guidance memorandum. EPA proposed to incorporate this existing guidance into the conformity regulation on June 30, 2003 (68 FR 38974). A copy of this proposed rulemaking, as well as the guidance listed above, can be downloaded from EPA's transportation conformity Web site listed in section I.B.2. of this proposal.

#### **2. Donut Areas**

For the purposes of conformity, a "donut" area is the geographic area outside a metropolitan planning area boundary, but inside a designated nonattainment or maintenance area boundary that includes an MPO. The conformity requirements for donut areas, including the application of the one-year conformity grace period, are generally the same as those for metropolitan areas. Within one year after the effective date of an area's initial nonattainment designation, the existing and planned transportation network for the donut portion of the area (as well as for the metropolitan portion of the area) must demonstrate conformity, or conformity of the metropolitan transportation plan and TIP will lapse as discussed above, and the entire nonattainment area will be unable to obtain additional project funding and approvals at that time.

To demonstrate conformity of its plan and TIP, the adjacent MPO must include in its regional emissions analysis the emissions from the donut area's proposed transportation network and planned project activities. To demonstrate conformity of projects in the donut portion, such projects must have been included in the regional emissions analysis that supports the conformity determination of the metropolitan area's plan and TIP. In nonattainment and maintenance areas with a donut portion, the MPO and

State DOT may choose to include donut area projects in the MPO's plan and TIP. However, this approach is not required by either DOT's planning regulations or the conformity rule.

The interagency consultation group for each newly designated nonattainment area that includes a donut portion should determine how best to consider the donut area transportation system and new donut area projects in the MPO's regional emissions analyses and conformity determinations. For more discussion on how conformity determinations should be made for donut areas, see the preamble to the original conformity rule published on November 24, 1993 (58 FR 62207).

### 3. Isolated Rural 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 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 for any portion of the area, 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 (STIPs) and statewide transportation plans, when appropriate.

Like all newly designated nonattainment areas, the one-year conformity grace period will begin on the effective date of an isolated rural area's initial nonattainment designation. However, because these areas do not have federally required metropolitan transportation plans and TIPs, they are not subject to the frequency requirements for conformity determinations on plans and TIPs specified in § 93.104(b), (c) and (e) of the current rule. Instead, conformity determinations in isolated rural areas are required only when a non-exempt FHWA/FTA project(s) needs funding or approval. Therefore, although the one-year conformity grace period is available to isolated rural areas, no conformity consequences may apply upon the expiration of the one-year grace period because these areas may not have any projects that require funding and approval at that time.

In fact, many isolated rural areas may not have a transportation project in need of federal funding or approval for some time after the one-year grace period has ended, and therefore, will not have to demonstrate conformity before that time. Once the conformity grace period

has expired, a conformity determination will only be required in such areas the next time a non-exempt project needs funding or approval. For non-exempt FHWA/FTA projects, a conformity determination is normally required before the National Environmental Policy Act (NEPA) process is completed, since NEPA is typically the first stage requiring approval in a federal project's development. However, isolated rural areas that are newly designated as nonattainment may also be required to demonstrate conformity for subsequent funding and approvals for project phases (e.g., right-of-way acquisition, final design, construction) that occur after the grace period has ended, if these projects have not yet been included in a conformity determination and regional emissions analysis for the relevant pollutant and standard. For more information on the conformity requirements for isolated rural areas, see § 93.109(g) of the current conformity regulation; corresponding discussions on how to demonstrate conformity in isolated rural areas can also be found in the preambles to the November 24, 1993 transportation conformity final rule (58 FR 62207) and the August 15, 1997 final rule (62 FR 43785). Please note that the current rule's § 93.109(g) would become § 93.109(l) under today's proposal, due to other proposed revisions and additions to this regulatory section. The proposed changes to § 93.109 do not change the basic conformity requirements for isolated rural areas.

#### *B. When Does Conformity Stop Applying for the 1-Hour Ozone Standard?*

EPA proposed in a separate rulemaking to revoke the 1-hour ozone standard—in whole or in part—one year after the effective date of EPA's 8-hour ozone standard designations (June 2, 2003, 68 FR 32819). Today's conformity proposal is consistent with the revocation options in the June 2003 proposal, but does not seek additional comment on the proposed revocation options.

Clean Air Act section 176(c)(5) requires conformity only in areas that are designated nonattainment or maintenance for a given pollutant and standard. Therefore, under either of the revocation options in EPA's proposed 8-hour ozone implementation rule, conformity for the 1-hour ozone standard would no longer apply in existing 1-hour ozone nonattainment and maintenance areas once the standard and area designations are revoked. The proposed one-year delay in the revocation of the 1-hour ozone standard is linked to the one-year

statutory conformity grace period for newly designated 8-hour ozone nonattainment areas. To preserve the progress that areas have made in achieving clean air to date, EPA believes that 1-hour ozone nonattainment and maintenance areas should continue to ensure that transportation activities conform to the existing 1-hour ozone standard until conformity for the new 8-hour ozone standard applies.

During the one-year grace period, areas that are currently subject to the 1-hour ozone standard must continue to adhere to 1-hour conformity requirements. Additionally, areas should consider at what point they will determine conformity for the 8-hour ozone standard. For example, if a conformity determination is made in June 2004, an area may choose to demonstrate conformity for the 1-hour ozone standard and address the 8-hour ozone standard at a later date near the end of the one-year grace period. In contrast, if a conformity determination is made in January 2005, an area may choose to demonstrate conformity for both ozone standards because of the approaching end of the one-year grace period.

Under EPA's June 2003 implementation proposal, when the 1-hour standard is revoked, conformity would no longer apply for either ozone standard in areas that are attaining the 8-hour ozone standard. See EPA's proposed 8-hour implementation rule for more discussion on the proposed options for revoking the 1-hour ozone standard (June 2, 2003; 68 FR 32818–32825).

#### *C. When and for What Ozone Standard Does Conformity Apply in Areas With an Early Action Compact for the 8-Hour Ozone Standard?*

Areas that are violating the 8-hour ozone standard but are attaining the 1-hour ozone standard—including 1-hour ozone maintenance areas—were eligible for an Early Action Compact (EAC) as described in EPA's November 14, 2002 memorandum entitled, "Schedule for 8-Hour Ozone Designations and its Effect on Early Action Compacts" and EPA's June 2, 2003 proposal for the implementation of the 8-hour ozone standard (68 FR 32859–32860).

For areas participating in an EAC, EPA plans to provisionally defer the effective date of the area's 8-hour ozone nonattainment designation into the future. The deferral of the 8-hour designation effective date is contingent upon the participating area's adherence to all the terms and milestones of its EAC. If the EAC area attains the 8-hour

ozone standard by December 2007, EPA would take action in Spring 2008 to end the deferred nonattainment designation effective date and replace it with an attainment designation that would become effective shortly thereafter. If, however, an area misses a key EAC milestone, the November 14, 2002 memorandum states that EPA would retract its deferral, and the nonattainment designation would be effective shortly after the missed milestone. Neither today's proposal nor the June 2, 2003 rulemaking take comment on the EAC program itself.

A deferred effective date for 8-hour ozone designations in areas that opted into an EAC has certain implications for when conformity applies for both the 8-hour and 1-hour ozone standards. Consistent with the current conformity rule § 93.102(d) and Clean Air Act section 176(c)(6), conformity for the 8-hour ozone standard would not apply until one year after the effective date of an EAC area's 8-hour nonattainment designation. Therefore, conformity for the 8-hour ozone standard would apply in an EAC area only if the area fails to meet all the terms and milestones of its compact and the nonattainment designation becomes effective. In this case, conformity for the 8-hour standard would be required one year after the effective date of EPA's nonattainment designation that would occur shortly after a missed EAC milestone. Conversely, if the area meets all of the EAC milestones and attains the 8-hour ozone standard by December 2007, conformity for the 8-hour ozone standard would never apply since the area's ultimate effective designation would be attainment for the 8-hour ozone standard.

Conformity for the 1-hour ozone standard will continue to apply in EAC areas that are currently 1-hour ozone maintenance areas, and therefore are required to demonstrate conformity for that standard. For these areas, the effective date of 8-hour designations would be deferred and the 1-hour standard would not be revoked. If a maintenance area meets all of its EAC milestones and attains the 8-hour ozone standard by December 2007, conformity for the 1-hour standard would no longer apply once EPA revokes that standard one year after the effective date of EPA's 8-hour attainment designation (*i.e.*, Spring 2009).

If, however, a 1-hour ozone maintenance area fails to meet a milestone in its EAC, EPA would remove its deferral of the effective date and the area's 8-hour ozone nonattainment designation would become effective shortly after the

missed milestone. Under this scenario, conformity for the 1-hour ozone standard would continue to apply for one year after the effective date of EPA's nonattainment designation, at which time the 1-hour ozone standard would be revoked, the one-year conformity grace period would expire and conformity for the 8-hour ozone standard would begin to apply.

#### **IV. General Changes in Interim Emissions Tests**

##### *A. Background*

Conformity determinations for transportation plans and TIPs as well as transportation projects not from a conforming plan and TIP must include a regional emissions analysis that fulfills certain Clean Air Act provisions. Section 176(c) requires that transportation activities in nonattainment and maintenance areas must not worsen air quality. In addition, transportation activities in ozone and CO areas of higher nonattainment classifications need to contribute emission reductions towards attainment.

The conformity rule provides for several different regional emissions analysis tests that satisfy these Clean Air Act requirements in different situations. Once a SIP with a motor vehicle emissions budget ("budget") is submitted for an air quality standard and EPA finds the budget adequate or approves it as part of the SIP, conformity is demonstrated using the budget test for that pollutant or precursor, as described in § 93.118 of the conformity rule. Before an adequate or approved SIP budget is available, conformity of the transportation plan, TIP, or project not from a conforming plan and TIP is demonstrated with the interim emissions tests, as described in § 93.119.

Today's proposal outlines several options for completing regional emissions analyses for the new standards before SIP budgets for these standards are available. According to EPA's proposed implementation rule (June 2, 2003, 68 FR 32830–32837), 8-hour ozone nonattainment areas of moderate and above classifications and some areas designated under Clean Air Act subpart 1 would have two or three years from the effective date of designations to submit a SIP (either for attainment or reasonable further progress) with budgets for that standard. Areas classified as marginal and some areas designated under subpart 1 (those with early attainment dates) may not have 8-hour ozone SIP budgets for some time, since their attainment dates would

be relatively soon after the date of their 8-hour ozone designations. These areas would only have 8-hour ozone SIP budgets if they voluntarily submitted a control strategy SIP or submitted a maintenance plan for redesignation. In addition, EPA currently anticipates that PM<sub>2.5</sub> nonattainment areas would submit a SIP with budgets within three years of PM<sub>2.5</sub> nonattainment designations.

Therefore, as proposed, conformity would likely apply in all 8-hour ozone and PM<sub>2.5</sub> nonattainment areas before SIP budgets for the new standards are available, and during this time period, interim emissions tests would be used for conformity determinations. It is important to note that EPA has historically called such tests the "emission reduction tests." However, since the actual reduction of emissions would not always be required in many areas (as described below and in proposed § 93.119), EPA is proposing to change "emission reduction test" to "interim emissions test" throughout the conformity regulation.

The following paragraphs generally describe the proposed changes to the interim emissions tests (under § 93.119). Sections V., VI., and VII. describe the application of these tests in different 8-hour ozone and PM<sub>2.5</sub> areas (under § 93.109).

##### *B. Baseline Year Test for 8-Hour Ozone and PM<sub>2.5</sub> Areas*

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

We are proposing to add the following tests to the conformity rule for use in 8-hour ozone and PM<sub>2.5</sub> nonattainment areas:

- The "less-than-2002 emissions" test, and
- The "no-greater-than-2002 emissions" test.

Under these interim emissions tests, conformity would be demonstrated if the emissions from the proposed transportation system are less than or no greater than 2002 motor vehicle emissions in a given area. Proposed regulatory text for the 2002 baseline year tests can be found in § 93.119. See Sections V.–VII. for how these tests are proposed to be applied in 8-hour ozone and PM<sub>2.5</sub> areas.

Although today's action proposes no substantive change to the 1990 baseline year tests for existing areas, § 93.119 has been reorganized to also include the provisions for new 8-hour ozone and PM<sub>2.5</sub> areas.

###### **2. Why Are We Proposing These Changes?**

EPA believes that the year 2002 is more appropriate than the year 1990 in

meeting Clean Air Act provisions in new 8-hour ozone and PM<sub>2.5</sub> areas. Under the statute, transportation activities in nonattainment and maintenance areas cannot increase the frequency or severity of air quality violations. EPA selected the year 1990 as the baseline year for nonattainment areas under the existing standards, since that was the baseline year for many requirements in the Clean Air Act Amendments of 1990, including the base year for SIP inventories. It was also the year that the relevant Clean Air Act legislation was enacted.<sup>1</sup> However, 1990 has little relevance as a baseline year for emissions under the new standards.

Therefore, EPA has preliminarily selected 2002 as the baseline year for SIP inventories under the new 8-hour ozone and PM<sub>2.5</sub> standards. EPA's November 18, 2002 memorandum, "2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, PM<sub>2.5</sub>, and Regional Haze Programs," identifies 2002 as the anticipated emission inventory base year for the SIP planning process to address both of these pollutants and standards. In addition, EPA's 8-hour ozone implementation rule proposes 2002 as the base year for 8-hour ozone SIP inventories (June 2, 2003, 68 FR 32810). The 2002 SIP inventories would provide the baseline level of motor vehicle emissions in 2002 to complete either proposed baseline year test. In addition, EPA's memo explains that "the selection of 2002 harmonizes dates for other reporting requirements, e.g., EPA's Consolidated Emissions Reporting Rule (CERR) that requires submission of emission inventories every three years; 2002 is one of the required years for such updates." Therefore, coordinating conformity's baseline with other data collection and inventory requirements would allow state and local governments to use their resources more efficiently.

Under § 93.105(c)(1)(i) of the current rule, the interagency consultation process would be used to determine the latest assumptions and models for generating 2002 motor vehicle emissions to complete either baseline year test. In general, the 2002 baseline year test can be completed with the baseline year SIP's 2002 motor vehicle emissions inventory, if the SIP has been submitted in time for the current conformity determination. If the SIP has

not been submitted, conformity could be completed using draft 2002 baseline year emissions from a SIP inventory under development. Alternatively, an MPO, in consultation with state and local air agencies, could develop 2002 baseline year emissions as part of the conformity analysis. Whatever the source, the 2002 baseline year emissions level that is used in conformity must be based on the latest planning assumptions available for the year 2002, the latest emissions model, and appropriate methods for estimating travel and speeds as required by §§ 93.110, 93.111 and 93.122 of the current conformity rule.

### C. Build/No-Build Test for Existing and New Nonattainment Areas

#### 1. What Are We Proposing?

EPA is proposing a revised build/no-build test for certain existing and new nonattainment areas. Under the current rule, conformity is demonstrated with the "build-less-than-no-build" test for all ozone, CO, PM<sub>10</sub>, and NO<sub>2</sub> areas. The proposal would amend § 93.119 to create the "build-no-greater-than-no-build" test, where conformity would be met if emissions from the proposed transportation system ("build") were less than or equal to emissions from the existing transportation system ("no-build").

Under this proposal, the build-no-greater-than-no-build test would be available to the following subset of new and existing areas:

- 8-hour ozone areas of marginal and below classifications,
- 8-hour ozone areas designated nonattainment under Clean Air Act subpart 1,
  - All PM<sub>2.5</sub> areas,
  - 1-hour ozone areas of marginal and below classifications,
  - CO areas of moderate classification with design values less than 12.7 ppm,
  - Not classified CO areas,
  - All PM<sub>10</sub> areas, and
  - All NO<sub>2</sub> areas.

Sections V., VI., and VII. of this proposal provide more detail regarding the application of the build/no-build test in various 8-hour ozone and PM<sub>2.5</sub> areas.

For areas that would be using the build-no-greater-than-no-build test, EPA is also proposing to modify § 93.119(e) of the current rule so that a regional emissions analysis would not be necessary for future analysis years where the build (or "action" scenario) and no-build (or "baseline" scenario) contain exactly the same transportation projects and planning assumptions, for the reasons described below. Such a

case may occur in smaller areas that do not have projects planned for later years in the regional emissions analysis, and population, land use, economic, and other assumptions do not change between the build and no-build scenarios for those years. Under this proposal, a regional emissions analysis would continue to be required for applicable years where the action and baseline scenarios contain different projects and assumptions.

This proposed change can be found in § 93.119(g)(2) of the proposed regulatory text. This proposal would require that the conformity determination include documentation that a regional emissions analysis is not completed for analysis years in which no new projects are proposed and no change in planning assumptions has occurred.

Finally, § 93.119 is being reorganized in general to accommodate the above and other changes articulated in this proposal for new and existing areas.

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

EPA believes that changing the build/no-build test for certain areas is consistent with Clean Air Act section 176(c)(3)(A)(iii) which specifically requires that transportation plans and TIPs contribute to annual emissions reductions only in the higher classifications of ozone and CO areas. This statutory provision does not apply to any other type of nonattainment area.

Instead, all other areas must demonstrate only that transportation activities do not cause or contribute to new violations, increase the frequency or severity of existing violations, or delay timely attainment, pursuant to Clean Air Act section 176(c)(1)(B). EPA believes that if the "build" is no greater than (*i.e.*, less than or equal to) the "no-build," that such a demonstration is made, since only an increase in emissions would worsen air quality.

This change to the build/no-build test would make its implementation consistent with the implementation of the baseline year tests: in ozone and CO areas of higher classifications, expected emissions from the proposed transportation system must be less than emissions in the baseline year, while in all other areas, expected emissions must be no greater than emissions in the baseline year. For further discussion of the rationale for how and where the baseline year tests apply, please refer to the preamble to the January 11, 1993 proposed rule (58 FR 3782-3784) and the preamble to the July 9, 1996 proposed rule (61 FR 36116-36117).

Today's proposal would provide flexibility to certain areas by allowing

<sup>1</sup> Please note that PM<sub>10</sub> areas can use an alternate baseline year for conformity if the applicable SIP is based on a baseline inventory from a different calendar year (40 CFR 93.119(c)(2)). EPA is not proposing to offer an alternate baseline year for PM<sub>2.5</sub> areas since all PM<sub>2.5</sub> areas should be establishing 2002 baseline SIP inventories.

emissions from the proposed transportation system to be less than or equal to the emissions from the current system, rather than requiring an actual reduction in emissions as is required for ozone and CO areas with higher classifications. Where the Clean Air Act does not require such emission reductions, EPA believes that if transportation activities can be found to conform by producing no adverse impacts on the number and severity of air quality violations, such a demonstration would be consistent with the Clean Air Act requirements.

The proposal would also reduce the resource burden for analysis years where no new projects are proposed to be completed and assumptions do not change. Under the current rule, a regional emissions analysis is required for all analysis years, even if no new projects are proposed for analysis years in the distant future. For such analysis years, the emissions from the build and no-build scenarios contain the same projects and assumptions, and therefore, result in exactly the same level of emissions.

One may argue that it would be obvious that the build-no-greater-than-no-build test is passed without calculating the emissions for such analysis years. Furthermore, the Clean Air Act requirement to not worsen air quality may be met by documenting in the conformity determination that projects, assumptions, and thus emissions would remain the same for affected analysis years. On the other hand, one may argue that a build/no-build regional analysis should still be completed for all analysis years to inform long-term transportation and air quality planning. However if such information is deemed appropriate, analyses could still be done voluntarily. EPA requests comment on this proposed change to the build/no-build analysis year requirements.

#### *D. Test Options for Ozone and CO Nonattainment Areas of Higher Classifications*

##### 1. What Are We Proposing?

EPA is proposing three options that would affect regional emissions analyses before adequate or approved SIP budgets are established in ozone and CO areas of higher nonattainment classifications. Under the current rule, these areas are required to complete both the build-less-than-no-build and less-than-baseline year tests when a conformity determination is completed during this time period. This proposal would affect moderate and above 1-hour and 8-hour ozone areas, moderate CO

areas with design values greater than 12.7ppm, and serious CO areas.

EPA requests comment on the following proposed options for these areas:

(1) Complete *both* the build-less-than-no-build *and* less-than-baseline year tests;

(2) Complete *either* the build-less-than-no-build or less-than-baseline year test; or

(3) Require that only one of these tests be met and eliminate the second test as an option altogether.

The proposed regulatory text in § 93.119(b)(1) reflects the first option, although EPA could finalize any one of the three proposed options.

The first option would retain the current conformity rule requirement that such areas use both the current build-less-than-no-build test and the less-than-baseline year test. Under this option, emissions from the proposed transportation system (build) would have to be less than emissions from the existing system (no build) and less than emissions in 1990 (for higher classification 1-hour ozone and CO areas) or 2002 (for higher classification 8-hour ozone areas).

The second proposed option would allow these areas to choose between the current build-less-than-no-build test and the less-than-baseline year test (either 1990 or 2002, as applicable). The final option would require only one test in these areas while eliminating the second test as an option altogether. For example, this option could require the less-than-baseline year test and delete the build/no-build test from the conformity rule as an option for affected areas.

##### 2. Why Are We Proposing These Options?

EPA is interested in exploring alternatives in an effort to provide the most flexible and least burdensome way of meeting statutory requirements. When EPA first promulgated the transportation conformity rule (January 11, 1993, 58 FR 3782), EPA determined that moderate and above 1-hour ozone areas and CO areas of higher classifications would have to meet both the build-less-than-no-build test and the less-than-baseline year test to satisfy both statutory requirements that transportation planning activities not cause or contribute to violations of the standards (Clean Air Act section 176(c)(1)(B)) and that such activities contribute to annual emissions reductions (Clean Air Act section 176(c)(3)(A)(iii)).

The current conformity rule requires higher classification ozone and CO areas

to meet both of these tests in the absence of an adequate or approved SIP budget (option 1). For the same reasons described in previous rulemakings,<sup>2</sup> EPA proposes as its first option to continue these same requirements for current 1-hour ozone and CO and new 8-hour ozone nonattainment areas with higher classifications. EPA believes that the current conformity rule would continue to assist areas in meeting Clean Air Act requirements.

However, ten years of experience in implementing the conformity rule has caused EPA to consider whether either the build-less-than-no-build test or less-than-baseline year test (option 2) may also be sufficient to meet both the statutory requirements that transportation activities not contribute to violations and contribute to emissions reductions. First, the build-less-than-no-build test may by itself demonstrate that emissions from the proposed transportation plan would be lower than projected future emissions from the existing planned transportation system, since the build scenario must be less than the no-build scenario. Thus, one might conclude that emissions from the proposed transportation plan contribute to emissions reductions and may not cause or contribute to new violations of the ozone standard.

Alternatively, if emissions are reduced from baseline year levels, then one might conclude that air quality would not be worsened from current levels. The less-than-baseline year test by itself might also demonstrate that implementation of the proposed transportation system may produce actual emissions reductions from the motor vehicle emission baseline year, since emissions must be less than or reduced from the baseline year. Thus, by using only the less-than-baseline year test, the transportation plan may both contribute to emissions reductions and not itself produce emissions that could cause or contribute to any violations. EPA requests comment on this alternative of offering a choice between the build-less-than-no-build and less-than-baseline year tests to meet both statutory conformity requirements, for ozone areas and CO areas of higher classifications.

Further, EPA proposes a third option that such areas be required to meet only one interim emissions test while eliminating the other interim emissions test as an option altogether. As described above for option 2, if it can be concluded that either test is sufficient

<sup>2</sup> January 11, 1993, proposed conformity rule (58 FR 3782-3784) and the July 9, 1996, proposed rule (61 FR 36116-36117).

for meeting statutory requirements, then retaining only one test in the conformity regulation would also meet the statute. EPA requests comment on this alternate proposal.

## V. Regional Conformity Tests in 8-Hour Ozone Areas That Do Not Have 1-Hour Ozone SIPs

### A. What Are We Proposing?

EPA is proposing several options for completing regional emissions analyses in 8-hour ozone areas that do not have an existing 1-hour ozone SIP with applicable budgets. These 8-hour ozone areas either were never designated nonattainment under the 1-hour ozone standard or were 1-hour ozone nonattainment areas that for various reasons never submitted a control strategy SIP or maintenance plan with approved or adequate motor vehicle emissions budgets. A regional emissions analysis is the part of a conformity determination that assesses whether the emissions produced by transportation activities are consistent with state and local air quality goals.

#### 1. Conformity After 8-Hour Ozone SIP Budgets Are Adequate or Approved

Once a SIP for the 8-hour ozone standard is submitted with a budget(s) that EPA has found adequate or approved, the budget test would be used in accordance with § 93.118 to complete all applicable regional emissions analyses. Conformity would be demonstrated if the transportation system emissions reflecting the proposed transportation plan, TIP, or project not from a conforming plan and TIP were less than or equal to the motor vehicle emissions budget level defined by the SIP as being consistent with clean air.

The first 8-hour ozone SIP could be a control strategy SIP required by the Clean Air Act (e.g., rate-of-progress SIP or attainment demonstration) or a maintenance plan. The first SIP could also be submitted earlier and demonstrate a significant level of emission reductions from the current level of emissions. For example, an area could submit an early 8-hour ozone SIP that demonstrates a specific percentage of emission reductions (e.g., 5–10%) in the year 2007, from 2002 baseline year emissions. An early 8-hour SIP would include emissions inventories for all emissions sources for the entire 8-hour nonattainment area and would meet applicable requirements for reasonable further progress SIPs. EPA has discussed such an option in the context of its 8-hour ozone implementation rule (June 2, 2003, 68 FR 32822) and the

1997 final conformity rule (August 15, 1997, 62 FR 43798–43799).

Whatever the case, the interim emissions test(s) would no longer apply for conformity purposes for either NO<sub>x</sub> or VOCs once an 8-hour ozone SIP is submitted and EPA has found adequate or approved its budget(s) for that ozone precursor. Section 93.118 of the current rule describes the budget test; references in § 93.118(a) are being updated in this proposal to be consistent with proposed changes in § 93.109.

EPA encourages nonattainment areas to develop their 8-hour ozone SIPs in consultation with state and local air quality and transportation agencies to facilitate future conformity determinations. EPA Regions are available to assist on an “as needed” basis, including consultation on the development of early 8-hour ozone SIPs.

#### 2. Conformity Before 8-Hour Ozone SIP Budgets Are Adequate or Approved

The following paragraphs outline the options for doing conformity before adequate or approved 8-hour ozone SIP budgets are established in 8-hour ozone areas covered by this section of the proposal.

*Marginal and below classifications and subpart 1 areas.* 8-hour ozone areas that are not of moderate and above classifications include: 8-hour ozone areas of marginal and below classifications and 8-hour ozone areas designated nonattainment under Clean Air Act subpart 1.

EPA proposes that these 8-hour ozone areas must pass one of the following tests for conformity determinations that occur before adequate or approved 8-hour ozone SIP budgets are in place:

- The build-no-greater-than-no-build test, or
- The no-greater-than-2002 emissions test.

In other words, this proposal would give these 8-hour ozone areas a choice between two interim emissions tests, rather than provide only one test or require that both tests be completed. Conformity would be demonstrated if the transportation system emissions reflecting a proposed transportation plan or TIP were less than or equal to either the emissions from the existing transportation system (no-build) or the level of motor vehicle emissions in 2002.

A discussion of the proposed changes to the interim emissions tests can be found in Section IV. of this proposal. See the proposed regulatory text in § 93.119(b)(2). See EPA’s June 2, 2003, proposed implementation rule for the 8-hour ozone standards (68 FR 32811–32816) for more information on the

proposal to designate some 8-hour ozone areas under Clean Air Act subpart 1.

#### *Moderate and above classifications.*

As described in Section IV.D., EPA proposes three options for regional emissions analyses in moderate and above 8-hour ozone areas that do not have adequate or approved 1-hour ozone SIPs. The options are:

(1) Complete *both* the build-less-than-no-build *and* less-than-baseline year tests;

(2) complete *either* the build-less-than-no-build *or* less-than-baseline year test; or

(3) require that only one of these tests be met and eliminate the remaining test as an option altogether.

The proposed regulatory text in § 93.119(b)(1) reflects the first option, although EPA could finalize any one of the three proposed options.

#### 3. Options for 8-Hour Ozone Areas That Qualify for EPA’s Clean Data Policy

The proposal would also extend the current conformity rule’s flexibility for certain 1-hour ozone “clean data areas” to 8-hour ozone areas that are required to meet certain SIP requirements (e.g., moderate and above ozone areas). Today’s conformity proposal is also consistent with the clean data option in EPA’s proposed 8-hour ozone implementation rule (June 2, 2003, 68 FR 32835).

As background, EPA issued a policy memorandum on May 10, 1995 that addressed SIP requirements in a small number of moderate and above ozone areas (entitled “Reasonable Further Progress, Attainment Demonstrations, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard”). Under the May 1995 policy, EPA could declare through rulemaking that a moderate or above 1-hour ozone area was a “clean data area,” if an area had sufficient monitoring data showing attainment of the 1-hour ozone standard. A clean data area is not required to submit any outstanding reasonable further progress or attainment SIPs, since the area is already attaining the standard. Section 93.109(c)(5) of the existing conformity rule allows clean data areas for the 1-hour ozone standard to request that a budget based on the level of motor vehicle emissions in the most recent year of clean data be established through EPA’s rulemaking that determines an area to be a clean data area.

Similarly, today’s proposal would allow 8-hour ozone areas that have clean data and are required to submit

control strategy SIPs to use one of the following three tests to complete conformity:

- The interim emissions tests, as described above;
- The budget test using the adequate or approved motor vehicle emissions budgets in a submitted 8-hour ozone SIP; or
- The budget test using the motor vehicle emissions level in the most recent year of clean data as budgets, if the state or local air quality agency requests that budgets be established by EPA's clean data rulemaking for the 8-hour ozone standard.

The proposed regulatory text for these options is in § 93.109(d)(5).

This part of the proposal would be provided to moderate and above ozone areas with three years of clean data for the 8-hour ozone standard that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act's reasonable further progress and attainment demonstration requirements. In addition, some subpart 1 areas would also be covered by this conformity proposal if such areas are required to submit control strategy SIPs, as proposed in the June 2003 ozone implementation rule. Please note that EPA's proposed clean data SIP policy and therefore today's conformity proposal might not be used by any area for the first conformity determination, since newly designated nonattainment areas may not yet have three years of clean data for the 8-hour ozone standard.

4. General Implementation of Regional Tests

The proposal also retains the existing rule's general requirement that regional emissions analyses for ozone areas must address ozone precursors, which are nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs) (40 CFR 93.102(b)(2)(i)). All proposed interim emissions test options would be required to address both VOC and NO<sub>x</sub> precursors, unless EPA determines that additional reductions of NO<sub>x</sub> would not contribute to attainment for the 8-hour ozone standard and issues a NO<sub>x</sub> waiver under Clean Air Action section 182(f). This is consistent with the current conformity rule, although the proposal moves these provisions to § 93.119(f) due to reorganization of § 93.119. Finally, the proposal retains the current

rule's provision that the interim emissions test(s) be completed for NO<sub>x</sub> if a reasonable further progress SIP is submitted with only a budget for VOCs (e.g., a 15% SIP). See § 93.109(d)(3) for this proposed regulatory text.

The consultation process should be used to determine the models and assumptions for completing either the interim emissions tests or the budget test, as required by § 93.105(c)(1)(i) of the current rule. See the proposed regulatory text in § 93.109(d) for a general overview of when the budget test and interim emissions tests would apply in 8-hour ozone nonattainment areas without 1-hour ozone SIP budgets.

B. Why Are We Proposing These Options?

EPA has been told by some stakeholders that it is reasonable and credible to provide 8-hour ozone areas with the same flexibility that applies under the 1-hour ozone standard. To that end, EPA has proposed that 8-hour ozone areas with fewer SIP requirements (e.g., marginal and subpart 1 areas) continue to have the choice offered by the current rule between the baseline year and build/no-build tests. EPA gave this choice to 1-hour ozone areas as described in the preamble to a previous proposal (July 9, 1996, 61 FR 36116–36117). EPA continues to believe that allowing these areas a choice of conformity tests during the time period before adequate or approved 8-hour ozone SIP budgets are in place is environmentally protective and meets the statutory requirements.

As noted above, we are also considering three options for moderate and above ozone areas to ensure that every flexibility is provided to new 8-hour ozone areas while achieving environmental benefits. Please see EPA's rationale for these proposed options in Section IV.D.2.

EPA is also responding to stakeholder requests that the rule continue to provide more choices to areas that would qualify for EPA's proposed 8-hour ozone clean data policy. If the proposed clean data policy is included in the final 8-hour ozone implementation rule, EPA proposes to also include the proposed conformity options for such areas in the final conformity rule for the new standards. See EPA's previous discussion and rationale for the clean data options from the preamble to the 1996 proposal and

1997 final rules (July 9, 1996, 61 FR 36116; and August 15, 1997, 62 FR 43784–43785, respectively).

VI. Regional Conformity Tests in 8-Hour Ozone Areas That Have 1-Hour Ozone SIPs

A. What Are We Proposing?

EPA is proposing several options for completing regional emissions analyses in 8-hour ozone areas that have an existing 1-hour ozone SIP that covers either some or all of the 8-hour ozone nonattainment area.

1. Conformity After 8-Hour Ozone SIP Budgets Are Adequate or Approved

Once a SIP for the 8-hour ozone standard is submitted with budget(s) that EPA has found adequate or approved, the budget test would be used to complete the regional emissions analysis. The first 8-hour ozone SIP could be a control strategy SIP required by the Clean Air Act (e.g., rate-of-progress SIP or attainment demonstration). The first SIP could also be submitted earlier and demonstrate a significant level of emission reductions from the current level of emissions, as described in Section V.A.1. Interim emissions tests and/or any existing 1-hour ozone SIP budgets (as described below) would no longer be used for conformity for either NO<sub>x</sub> or VOCs once an adequate or approved 8-hour ozone SIP is established for such a precursor. State, local, and Federal air quality and transportation agencies should consult on the development of 8-hour ozone SIPs as appropriate.

2. Conformity Before 8-Hour Ozone SIP Budgets Are Adequate or Approved

The following paragraphs outline the options for determining conformity before adequate or approved 8-hour ozone SIP budgets are in place in 8-hour ozone areas with existing 1-hour ozone SIP budgets. EPA is proposing that these 8-hour ozone areas be able to select one test option from among a menu of test options for completing the regional emissions analysis requirement, rather than be required to complete a specific test(s).

*Summary of Options:* The following table summarizes the menu of proposed options, based on the placement of 1-hour and 8-hour ozone nonattainment boundaries:

Boundary scenario	Menu of options	Proposed regulatory text
8-hour area = 1-hour area .....	Interim emissions test(s) OR .....	§ 93.109(e)(2)(i) OR
	Budget test using 1-hour budget(s) .....	§ 93.109(e)(2)(ii)(A).
8-hour area < 1-hour area .....	Interim emissions test(s) OR .....	§ 93.109(e)(2)(i) OR

Boundary scenario	Menu of options	Proposed regulatory text
8-hour area > 1-hour area .....	Budget test for 1-hour area (with 1-hour budget(s)) OR Budget test for 8-hour area (with applicable subset of 1-hour budget(s)).	§ 93.109(e)(2)(ii)(B) OR § 93.109(e)(2)(ii)(B).
Portions of 8-hour and 1-hour areas overlap .....	Interim emissions test(s) OR ..... Budget test (with 1-hour budget(s)) PLUS Interim emissions test(s) (for remainder of 8-hour area).	§ 93.109(e)(2)(i) OR § 93.109(e)(2)(ii)(C).
Portions of 8-hour and 1-hour areas overlap .....	Interim emissions test(s) OR ..... Budget test (with applicable subset of areas 1-hour budget(s)) PLUS Interim emissions test(s) (for remainder of 8-hour area).	§ 93.109(e)(2)(i) OR § 93.109(e)(2)(ii)(C)

EPA has posted pictures of hypothetical boundary scenarios for further clarification on the transportation conformity website listed in Section I.B.2.

Please note that the proposed options are for completing conformity under the 8-hour ozone standard. EPA is proposing that the budget test with existing 1-hour ozone SIP budgets be used as a test option (or proxy) for the 8-hour ozone standard, rather than the 1-hour ozone standard. Conformity for the 1-hour and 8-hour ozone standards would not apply at the same time, as proposed in EPA's 8-hour ozone implementation rule (June 2, 2003, 68 FR 32819). In addition, for the reasons explained below, EPA is not proposing that 8-hour ozone areas must use their 1-hour ozone budgets if such budgets exist; we are proposing only that the budget test using the 1-hour ozone budgets would be an option as appropriate in addition to the interim emissions test(s).

The following paragraphs describe the above table in further detail as well as sub-options that are being proposed for some boundary scenarios. For all scenarios, once an area selects a particular test(s), EPA proposes that it must be used consistently for all regional analysis years.

*Scenario where 8-hour and 1-hour ozone boundaries are exactly the same.* In this case, the 8-hour and 1-hour ozone boundaries cover exactly the same geographic area. EPA proposes to require such areas meet one of the following:

- The interim emissions tests, depending upon an area's classification or designation; or
- The budget test using existing adequate or approved 1-hour ozone SIP budgets.

See Section V. for further description of which interim emissions test(s) would apply in a given 8-hour ozone area.

*Scenario where the 8-hour ozone boundary is smaller than and within the 1-hour ozone boundary.* In this case, the 8-hour nonattainment area is smaller than and completely encompassed by

the 1-hour nonattainment boundary. Again, EPA proposes to require such areas meet one of the following:

- The interim emissions tests, depending upon an area's classification or designation;
- The budget test using the subset or portion of existing adequate or approved 1-hour ozone SIP budgets that overlaps with the 8-hour nonattainment area; or
- The budget test using the existing adequate or approved 1-hour ozone SIP budgets for the entire 1-hour nonattainment area (any additional reductions must come from the 8-hour nonattainment area, as described below).

EPA also requests comment on when it would be feasible and appropriate to allow an area to use a subset or portion of a 1-hour ozone SIP budget for 8-hour ozone conformity. Such a test option requires an area to subtract from the 1-hour ozone budget and conformity analysis those emissions that are not produced in the 8-hour ozone area. For example, this would be straightforward if the on-road mobile inventory for the 1-hour ozone SIP budget is calculated by county, and the portion to be subtracted is a specific county that is not part of the 8-hour ozone area. However, this may not be appropriate in the case where the SIP does not clearly specify the amount of emissions in the portion of the 1-hour ozone area not covered by the 8-hour ozone area. The consultation process would be used to determine when using a portion of a 1-hour ozone SIP budget is appropriate, and if so, how deriving such a portion would be accomplished. EPA requests other examples for when using a portion of a 1-hour ozone SIP budget would be feasible and appropriate.

In addition, EPA notes that adjusting the 1-hour ozone budgets for purposes of conducting 8-hour ozone conformity analyses would be legally appropriate since any 1-hour ozone SIP demonstrations and budgets would only be used as a proxy for the 8-hour ozone standard and would themselves no longer be for an applicable standard (*i.e.*, since the 1-hour ozone standard

would be revoked under EPA's proposed 8-hour ozone implementation rule).

A conformity determination based on the entire 1-hour ozone budget would include a comparison between the on-road regional emissions produced in the entire 1-hour ozone area and existing 1-hour ozone budgets. However, if additional reductions are required to meet conformity, EPA proposes that such reductions could only be obtained within the 8-hour ozone nonattainment area, since the conformity determination would be for the 8-hour ozone standard.

*Scenarios where the 8-hour ozone boundary is larger than or overlaps with a portion of the 1-hour ozone boundary.* This part of the proposal covers the third and fourth scenarios listed in the above table in this section. The third scenario would result if an entire 1-hour ozone nonattainment area is within a larger 8-hour ozone nonattainment area. The fourth scenario would result if 1-hour and 8-hour ozone nonattainment boundaries partially overlap. In both types of 8-hour ozone areas, the 1-hour ozone budgets would not cover the entire 8-hour nonattainment area. Therefore, existing 1-hour ozone budgets cannot be the sole test of conformity under the 8-hour ozone standard in these scenarios, since a conformity determination must include a regional emissions analysis that covers the entire 8-hour ozone nonattainment area.

EPA is proposing that areas in these scenarios meet one of the following:

- The applicable interim emissions tests for the entire 8-hour ozone area; or
- The budget test based on the 1-hour ozone budget(s) for the 1-hour ozone area or relevant subset or portion of the 1-hour ozone area, plus the interim emissions test(s) for the remaining portion of the 8-hour ozone nonattainment area.

As stated above, once an area selects a particular test(s), EPA proposes that it must be used consistently for all regional analysis years.

For example, a marginal or below 8-hour ozone area that is larger than the

1-hour ozone area (third scenario) could choose to complete the budget test for the 1-hour ozone nonattainment area and the no-greater-than-2002 test for the remaining portion of the 8-hour ozone area for the attainment year, an intermediate year, and the last year of the transportation plan. EPA is not proposing to require such an area to complete the interim emissions test for the entire 8-hour ozone nonattainment area in all cases, in addition to the budget test with the 1-hour ozone SIP. EPA acknowledges that there may be cases where it is difficult to separately model the remaining portion of the 8-hour ozone area, *e.g.*, in an area where the remaining 8-hour ozone area is a ring of counties around the 1-hour ozone area. However, in this case, an area could always choose to complete only the interim emissions test(s) for the entire 8-hour ozone area, rather than the budget test with 1-hour ozone SIP budgets for the 1-hour ozone area.

For areas covered by the third boundary scenario in the above table where the 8-hour ozone area is larger than the 1-hour ozone area, the budget test would be completed for the entire 1-hour ozone area, as is done for conformity determinations for the 1-hour ozone standard. For areas covered by the fourth scenario where 8-hour and 1-hour ozone areas overlap, the budget test would only be done for the portion of the 1-hour ozone area and budgets that overlap with the 8-hour ozone area. EPA acknowledges that the budget test with a portion of a 1-hour ozone budget may be difficult to implement in many areas, since it assumes that areas will be able to determine easily the amount of budget emissions that are in the relevant portion. EPA requests examples for when using a portion of a 1-hour ozone budget would be appropriate and how to calculate such a portion. The consultation process would be used to determine whether the budget test for the fourth scenario is appropriate and if so, how it should be implemented.

Finally, EPA notes that the consultation process should be used to determine which analysis years should be selected for regional emissions analyses where the budget test and interim emissions tests are used. Sections 93.118(d) and 93.119(e) of the current conformity rule require similar analysis years for modeling in the last year of the transportation plan and for any intermediate years for both budget and interim emissions tests. However, the analysis years for the short-term may be different for the budget test and interim emissions tests in some cases. For example, § 93.118 requires modeling

for the budget test to be completed for the attainment year if it is within the timeframe of the transportation plan; § 93.119 requires the first analysis year for the interim emissions tests to be within the first five years of the transportation plan. The consultation process can be used to pick analysis years that would satisfy both the budget and interim emissions test requirements for areas using both tests prior to adequate or approved 8-hour ozone SIP budgets being established.

### 3. Options for 8-hour Ozone Areas That Qualify for EPA's Clean Data Policy

As described in Section V.A.3., today's conformity proposal would also extend the current rule's flexibility for certain 1-hour ozone areas to 8-hour ozone areas that are covered by EPA's June 2, 2003 proposal (68 FR 32835). The June 2003 proposal extends the existing 1-hour ozone clean data policy for the SIP process to future 8-hour ozone areas that are required to submit control strategy SIPs.

Specifically, we are proposing to require such 8-hour ozone areas with adequate or approved 1-hour ozone SIP budgets to meet one of the following four options to complete conformity:

- The interim emissions tests, as described in Section V.;
- The budget test using the adequate motor vehicle emissions budgets in a submitted control strategy SIP for the 8-hour ozone standard;
- The budget and/or interim emissions tests using existing 1-hour ozone SIP budgets and/or applicable interim emissions tests, as described in A.3. of this section for different scenarios of 1-hour and 8-hour ozone nonattainment boundaries; or
- The budget test using the motor vehicle emissions level in the most recent year of clean data as budgets, if such budgets are established by the EPA rulemaking that determines an area to have clean data for the 8-hour ozone standard.

See the proposed regulatory text for these options in § 93.109(e)(4).

### 4. General Implementation of Regional Tests

The proposal also retains the existing rule's general requirements that regional emissions analyses for ozone areas must address NO<sub>x</sub> and VOC precursors (40 CFR 93.102(b)(2)(i)). All proposed interim emissions test options would be required to address both precursors, unless EPA determines that additional reductions of NO<sub>x</sub> would not contribute to attainment for the 8-hour ozone standard and issues a NO<sub>x</sub> waiver under Clean Air Act section 182(f). This is

consistent with the current conformity rule, although the proposal moves these provisions to § 93.119(f) due to reorganization of § 93.119. Finally, the proposal retains the current rule's provision that the interim emissions test(s) be completed for NO<sub>x</sub> if a reasonable further progress SIP is submitted with only a budget for VOCs (*e.g.*, a 15% SIP). See § 93.109(e)(3) for this proposed regulatory text.

The consultation process should be used to determine the models and assumptions for completing the interim emissions tests and/or the budget test, as required by § 93.105(c)(1)(i) of the current rule. The consultation process can also be used to select the conformity test(s) before 8-hour ozone SIPs are submitted. See the proposed regulatory text in § 93.109(e) for a general overview of when the budget test and interim emissions tests apply in 8-hour ozone nonattainment areas with 1-hour ozone SIP budgets.

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

EPA has received stakeholder input asking EPA to provide 8-hour ozone areas with conformity flexibility in the time period before 8-hour ozone SIPs are established. In response, EPA is proposing a menu of options for 8-hour ozone areas that have existing 1-hour ozone SIP budgets, rather than requiring only one conformity test be used.

Allowing areas to choose between the interim emissions tests and/or the budget test based on 1-hour ozone SIPs would accommodate the many different boundary scenarios described in VI.A.2.

EPA has previously found that the interim emissions tests are sufficient for meeting the Clean Air Act requirements for a given standard before a SIP with adequate budgets is in place for that standard. As discussed in Sections IV. and V. of this proposal, EPA believes that Clean Air Act sections 176(c)(1) and (c)(3)(A)(iii) can be met through only one or a combination of interim emissions tests, depending upon an area's classification.

Our proposal to allow areas to use the 1-hour ozone budgets before 8-hour ozone budgets are available does not mean that areas would be determining conformity for the 1-hour ozone standard. As articulated in the proposed 8-hour ozone implementation rule, EPA is proposing that conformity for only one ozone standard apply at a time (June 2, 2003, 68 FR 32823–32824).

We are proposing to offer the budget test as a choice because we think that many 1-hour ozone budgets provide as good an analytical test as the other tests that exist or are proposed for use before

8-hour ozone budgets are available: the build/no-build and baseline year tests. In general, EPA believes the 1-hour ozone budgets may be an appropriate test like the build/no-build test, because the 1-hour ozone VOC and NO<sub>x</sub> budgets that an area has represent a reduction in emissions that is consistent with the applicable SIP for that standard. Although the 8-hour ozone standard is more stringent than the 1-hour ozone standard, many 1-hour ozone budgets have in fact served to reduce emissions over time. For example, the Clean Air Act requires that transportation plans and TIPs reduce emissions in the higher classifications of ozone and CO areas before a SIP for a given pollutant and standard is developed. We believe that the budget test using 1-hour ozone budgets may meet this requirement at least as well as the build/no-build test.

EPA also believes that the 1-hour ozone budgets may be comparable to the baseline year test for conformity under the 8-hour ozone standard. The baseline year test could actually be thought of as a type of budget test before 8-hour ozone budgets are established: emissions in the year 2002 become the ceiling on emissions, a defacto budget. The budgets in 1-hour ozone SIPs are at least as good as the 2002 baseline year test if areas are meeting them when they are designated for the 8-hour ozone standard. In the case where 2002 emissions are higher than established 1-hour ozone budgets, the budget test would actually be a more conservative test. However, in the case where 2002 emissions are lower than the 1-hour ozone budgets, the budgets should still be a valid test since they provide for attainment of the 1-hour ozone standard. In other words, consistency with the 1-hour budgets would have resulted in a certain level of emissions at the time areas were designated for the 8-hour ozone standard. An area's designation as a nonattainment area for the 8-hour ozone standard would be based on its air quality monitoring data for the years 2001–2003. Therefore, EPA does not anticipate that many areas will have 2002 emissions significantly lower than 1-hour budgets since areas would not have likely put control measures in place by 2002 that would result in lower emissions for that year. We believe that consistency with the 1-hour ozone budgets would assure an emissions level that is in line with the baseline year test, since the baseline year is 2002.

However, EPA does not believe that 8-hour ozone areas that have 1-hour ozone budgets must use these budgets for conformity prior to the development of 8-hour ozone budgets. Although an area could conclude through the

consultation process that use of a 1-hour ozone budget would be appropriate, there may be many cases where the 1-hour ozone budget would not provide the best test for conformity to the 8-hour ozone standard. For instance, 1-hour ozone budgets could be for a year different than the year for which 8-hour ozone conformity is being demonstrated. For example, 1-hour budgets could be from a rate-of-progress SIP (e.g., a 15% plan) for a past milestone year, such as 1996, that is no longer relevant to projected emissions in the post-2002 period for the 8-hour ozone standard. In contrast, an area may only have a 1-hour ozone maintenance plan with budgets for a year beyond the 8-hour ozone attainment year. The planning assumptions (such as VMT, vehicle fleet characteristics, speeds) underlying the 1-hour budget may also be significantly out-of-date.

Thus, although it is appropriate to offer areas the opportunity to use 1-hour ozone budgets, EPA believes that they should not be mandated and that the consultation process should be used to select the most appropriate test for a particular area prior to the development of adequate or approved 8-hour ozone SIP budgets. EPA requests comment on this proposal to allow areas to use applicable 1-hour ozone budgets to demonstrate conformity prior to the development of 8-hour ozone budgets, and to use the consultation process to determine whether such budgets should be used.

Finally, today's proposal responds to stakeholder requests that the rule continue to offer more choices to new ozone areas that would qualify for EPA's proposed 8-hour ozone clean data policy. If the proposed 8-hour ozone clean data policy is included in the final 8-hour ozone implementation rule, EPA would also include the proposed conformity options for such areas in the final conformity rule for the new standards. See EPA's previous discussion and rationale for the clean data options in the preamble to the 1996 proposal and 1997 final rules (July 9, 1996, 61 FR 36116, and August 15, 1997, 62 FR 43785, respectively).

## VII. Regional Conformity Tests in PM<sub>2.5</sub> Areas

### A. What Are We Proposing?

EPA proposes that the budget test would be used to complete a regional emissions analysis once a PM<sub>2.5</sub> SIP is submitted with budget(s) that EPA has found adequate or approved. Although the first PM<sub>2.5</sub> SIP may be an attainment demonstration, PM<sub>2.5</sub> nonattainment areas "are free to establish, through the

SIP process, a motor vehicle emissions budget [or budgets] that addresses the new NAAQS in advance of a complete SIP attainment demonstration. That is, a state could submit a motor vehicle emissions budget that does not demonstrate attainment but is consistent with projections and commitments to control measures and achieves some progress towards attainment." (August 15, 1997, 62 FR 43798–43799). Such a SIP would include inventories for all emissions sources. EPA encourages nonattainment areas to develop their PM<sub>2.5</sub> SIPs in consultation with Federal, state, and local air quality and transportation agencies as appropriate.

EPA is proposing that PM<sub>2.5</sub> nonattainment areas meet one of the following interim emissions tests for conformity determinations conducted before adequate or approved PM<sub>2.5</sub> SIP budgets are established:

- The build-no-greater-than-no-build test, or
- The no-greater-than-2002 emissions test.

This proposal would allow PM<sub>2.5</sub> nonattainment areas to choose between the two interim emissions tests, rather than require that only one test or both tests be completed. Conformity would be demonstrated if the transportation system emissions reflecting the proposed plan or TIP (build) were less than or equal to either the emissions from the existing transportation system (no-build) or the level of motor vehicle emissions in 2002. A discussion of the proposed changes to the interim emissions tests can be found in Section IV.

The proposal would require that regional emissions analyses always be completed for directly emitted PM<sub>2.5</sub> from motor vehicle tailpipe, brake wear, and tire wear emissions. Once a SIP is submitted, the budget test would also be completed for any PM<sub>2.5</sub> precursor for which an adequate or approved budget is established. Prior to adequate or approved SIP budgets, an interim emissions test would be completed for each applicable PM<sub>2.5</sub> precursor, as described in Section VIII. Sections IX. and X. describe proposed options for when regional emissions analyses would include direct PM<sub>2.5</sub> emissions from re-entrained road dust and construction-related dust.

The consultation process should be used to determine the models and assumptions for completing any regional emissions analysis, as required by § 93.105(c)(1)(i). See the proposed regulatory text in § 93.109(i) for a general overview of when the budget test and interim emissions tests apply in

PM<sub>2.5</sub> areas, and § 93.119(e) for a description of the interim emissions tests for PM<sub>2.5</sub> nonattainment areas.

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

We believe that the proposal addresses the concerns of many stakeholders by providing flexibility before adequate or approved PM<sub>2.5</sub> SIP budgets are established. While many PM<sub>2.5</sub> areas will have prior conformity experience with different pollutants, others will be doing conformity for the first time. In either case, the conformity process provides an important opportunity to begin addressing transportation-related PM<sub>2.5</sub> emissions early to ensure that air quality is not worsened before SIPs are submitted. Proposing a choice of interim emissions tests before SIPs are submitted addresses the desire for flexibility and environmental protection.

EPA has previously determined that only ozone and CO areas of higher classifications are required to satisfy both statutory requirements that transportation planning activities not cause or contribute to violations of the standards (Clean Air Act section 176(c)(1)(B)) and that such activities contribute to annual emissions reductions (Clean Air Act section 176(c)(3)(A)(iii)) (January 11, 1993 proposed rule, 58 FR 3782–3783). EPA continues to believe that Clean Air Act section 176(c)(3)(A)(iii) does not apply to any other areas, including PM<sub>2.5</sub> areas; only Clean Air Act section 176(c)(1)(B) applies to these areas.

To that end, the current conformity rule already allows many areas to conform based on only one interim emissions test if transportation emissions are consistent with current air quality expectations, rather than having to complete two tests and contribute further reductions towards attainment. Today's proposal continues to apply this same test structure and rationale to PM<sub>2.5</sub> areas.

### VIII. Consideration of Direct PM<sub>2.5</sub> and PM<sub>2.5</sub> Precursors in Regional Emissions Analyses

#### A. What Are We Proposing?

We are proposing to require that all regional emissions analyses in PM<sub>2.5</sub> nonattainment and maintenance areas consider all sources of directly emitted PM<sub>2.5</sub> motor vehicle emissions from the tailpipe, brake wear, and tire wear. Proposed regulatory text can be found in § 93.102(b)(1). See Sections IX. and X. for the proposed options for including direct PM<sub>2.5</sub> from re-entrained road dust

and construction-related dust in conformity analyses.

This proposal would also add potential transportation-related PM<sub>2.5</sub> precursors—NO<sub>x</sub>, VOCs, sulfur oxides (SO<sub>x</sub>), and ammonia (NH<sub>3</sub>)—for consideration in the conformity process. Once a PM<sub>2.5</sub> SIP is submitted, a regional emissions analysis would be required for a given precursor if the SIP establishes an adequate or approved budget for that particular precursor.

The following two options address how the various PM<sub>2.5</sub> precursors would be considered in conformity determinations conducted before adequate or approved PM<sub>2.5</sub> SIP budgets are established, for the reasons explained below. EPA is proposing regulatory text in §§ 93.102(b)(2) and 93.119(f) for both of these options. We are providing the regulatory text for both options to maximize the public's opportunity to provide meaningful comments.

The first proposed option would require regional emissions analyses for NO<sub>x</sub> and VOC precursors in all areas, unless the State air agency or the EPA Regional Administrator makes a finding that one or both of these specific precursors *are not a significant contributor* to the PM<sub>2.5</sub> air quality problem in a given area. Regional emissions analyses would not be required for SO<sub>x</sub> and NH<sub>3</sub> before an adequate or approved SIP budget for such precursors is established, unless the State or EPA makes a finding that on-road emissions of one or both of these precursors *is a significant contributor*. Under the first option, the MPO and DOT would document in their conformity determinations when regional emissions analyses are not being conducted when EPA or the State has determined NO<sub>x</sub> or VOCs to be insignificant.<sup>3</sup>

EPA's second option would only require regional emissions analyses for one or more PM<sub>2.5</sub> precursors (*i.e.*, NO<sub>x</sub>, VOC, SO<sub>x</sub> and NH<sub>3</sub>) before adequate or approved PM<sub>2.5</sub> SIPs have been established if the State or EPA makes a finding that one or more of these precursors *are significant contributors* to the PM<sub>2.5</sub> air quality problem in a given area.

A State air agency or EPA finding of significance or insignificance (a "significance finding") would be based on criteria similar to the general criteria currently used by EPA to evaluate SIPs that claim on-road emissions are

insignificant for a given pollutant or precursor. EPA's existing policy for insignificance serves as the basis for today's proposal, as described in Section XIV.B. of this notice. The following criteria should be considered in making significance findings for PM<sub>2.5</sub> precursors under either proposed option: the contribution of on-road emissions of the precursor to the total 2002 baseline SIP inventory; the current state of air quality for the area; the results of speciation monitoring for the area; the likelihood of future motor vehicle control measures for a given precursor; and projections of future on-road emissions of the precursor. The State air agency or EPA Regional Administrator would determine significance or insignificance of motor vehicle emissions in a given area on a case-by-case basis.

Under either option, a significance finding should be made only after discussions with the interagency consultation group for the PM<sub>2.5</sub> nonattainment area. These discussions should include a review of the available data being considered to support the significance finding. Interagency consultation also ensures that all of the relevant agencies are aware that such a finding is being considered. It is important to provide transportation agencies with adequate notice of which, if any, precursors they may need to address in conformity analyses. A significance finding would be made through a letter to the relevant State and local air quality and transportation agencies, MPO(s), DOT and EPA (in the case of a State air agency finding).

EPA notes that any significance finding made prior to the SIP should not be viewed as the ultimate determination of the significance of precursor emissions in a given area. State and local agencies may find through the SIP development process that emissions of one or more precursors are significant, even if a precursor had previously been considered insignificant. In such a case, the PM<sub>2.5</sub> SIP would establish motor vehicle emissions budgets and significant precursors would be included in subsequent conformity analyses.

To calculate emission factors for direct PM<sub>2.5</sub> from motor vehicles and PM<sub>2.5</sub> precursors areas in all states except California would use the latest EPA-approved motor vehicle emissions factor model (currently MOBILE6). PM<sub>2.5</sub> nonattainment and maintenance areas in California should use EMFAC2002 or a more recently EPA-approved model. It should be noted that EMFAC2002 currently does not calculate emissions factors for NH<sub>3</sub>.

<sup>3</sup>The public would be notified of when NO<sub>x</sub> or VOC is considered insignificant through the documentation in a conformity determination under the first option.

However, EPA understands that California is working on a revision to EMFAC that should enable the model to calculate emissions factors for NH<sub>3</sub>. A schedule for completing the necessary revisions has not been established. As a practical matter, conformity for NH<sub>3</sub> would not be required in California until there is an acceptable method for estimating such emissions, since a method would be needed to estimate current or future NH<sub>3</sub> emissions for either a significance finding or SIP motor vehicle emissions budget.

Including any precursors in regional emissions analyses prior to the submission of a SIP should not result in any additional transportation or emissions modeling work since the nonattainment areas will already be estimating vehicle miles traveled (VMT) from transportation activities for the direct PM<sub>2.5</sub> regional emissions analysis. In addition, EPA's upcoming MOBILE6.2 and California's EMFAC2002 are designed to generate emissions factors for direct PM<sub>2.5</sub> and PM<sub>2.5</sub> precursors in the same modeling run. Therefore, if any area is already generating PM<sub>2.5</sub> emissions factors, precursor estimates would be available without any additional effort, with the possible exception of NH<sub>3</sub> estimates in California, as indicated above.

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

Section 176(c)(1)(B) of the Clean Air Act requires that federal funding and approval be given only to transportation activities that are consistent with state and local air quality goals. To fulfill this requirement with respect to PM<sub>2.5</sub>, EPA is proposing that transportation conformity determinations consider PM<sub>2.5</sub> and its precursors if they are significant contributors to an area's PM<sub>2.5</sub> air quality problem.

EPA anticipates that in most nonattainment and maintenance areas direct PM<sub>2.5</sub> emissions would be an important contributor to the PM<sub>2.5</sub> air quality problem, and therefore, we are proposing that direct PM<sub>2.5</sub> emissions from motor vehicles be included in all conformity analyses. In addition, EPA's proposal to require conformity to all relevant budgets established in the PM<sub>2.5</sub> SIP is consistent with the Clean Air Act in that transportation activities must conform to the air quality goals established and estimates of future emissions in the SIP for a given area.

EPA has proposed NO<sub>x</sub>, VOCs, SO<sub>x</sub>, and NH<sub>3</sub> as potential transportation-related PM<sub>2.5</sub> precursors since all of these precursors are emitted from on-road motor vehicles. Based on data collected from monitoring sites in the

national speciation trends network,<sup>4</sup> secondary particles from precursors commonly account for over half of the total fine particle mass from all emissions sources measured at these sites. Therefore, we expect that areas may need to address on-road emissions of relevant precursors (*i.e.*, NO<sub>x</sub>, VOC, SO<sub>x</sub> and NH<sub>3</sub>) in their SIPs and in conformity.

EPA believes that the two proposed options would allow for the consideration of the four potential precursors in conformity prior to PM<sub>2.5</sub> SIPs when such precursors are significant. However, they differ in terms of whether a NO<sub>x</sub> or VOC precursor is presumed to be significant and considered in conformity from the start, or whether a finding of significance is necessary before a precursor is addressed. The proposed options attempt to strike a balance between: (1) Expediently addressing transportation-related emissions that could exacerbate the PM<sub>2.5</sub> air quality problem before a SIP is established, and (2) targeting conformity requirements in PM<sub>2.5</sub> areas in an efficient and reasonable manner. As described above, the proposed options would only require SO<sub>x</sub> and NH<sub>3</sub> analyses if either precursor was found to be significant before a PM<sub>2.5</sub> SIP.

For example, the first proposed option is more environmentally conservative by requiring that NO<sub>x</sub> and VOC conformity analyses be included in all areas initially. If EPA finds that in most areas motor vehicle emissions of these precursors are significant contributors to PM<sub>2.5</sub> air quality problems, it may warrant the first option's more straightforward approach to meeting Clean Air Act requirements. In other words, areas would begin addressing NO<sub>x</sub> and VOC emissions upon designation under the first option, without having a separate state or EPA finding of significance. This option is similar to the current rule's requirement that ozone areas must address NO<sub>x</sub> and VOC precursors.

On the other hand, the second proposed option is consistent with the current rule's approach for PM<sub>10</sub> precursors, where NO<sub>x</sub> and VOC conformity analyses are only conducted prior to PM<sub>10</sub> SIPs if the State or EPA finds either precursor significant (40 CFR 93.102(b)(2)(iii)). EPA finalized this approach in the November 24, 1993 conformity rule because at that time secondary formation appeared to be less

important for the PM<sub>10</sub> NAAQS in general, although some PM<sub>10</sub> areas have since established NO<sub>x</sub> and/or VOC SIP budgets.

The second proposed option would account for regional variability and target conformity analyses where EPA or the state determine NO<sub>x</sub> and VOC precursors to be significant to an area's PM<sub>2.5</sub> problem. Although we know that NO<sub>x</sub> and VOC precursors generally play a more important role in PM<sub>2.5</sub> formation, we continue to gather more specific information on the significance of these precursors in different parts of the country. One could argue that it may be more appropriate to focus scarce state and local efforts on NO<sub>x</sub> and VOC precursors only when they are determined to be significant, especially if adopting control measures early in conformity may prove not to be necessary in the PM<sub>2.5</sub> SIPs.

The following paragraphs present information on current speciated air quality data and on-road emissions of the precursors that contribute to the formation of secondary particles. The information is intended to illustrate what we know about PM<sub>2.5</sub> precursor emissions and air quality. This type of information is relevant to deciding whether or not to initially require that a precursor be considered in conformity before a more thorough evaluation is conducted through the SIP development process. The emission inventory data used in the following discussion is for 372 potential nonattainment counties based on 1999–2001 ambient data.<sup>5</sup> Summaries of the air quality and emissions inventory data discussed below are available in the docket for this rulemaking. More detailed air quality emission inventory data is available on the EPA Web site at <http://www.emissionsonline.org/nei99v3/index.htm>. The public is welcome to submit additional data on the importance of including PM<sub>2.5</sub> precursors in conformity before SIPs are established.

**NO<sub>x</sub> precursor emissions.** On-road sources accounted for approximately 40% of total NO<sub>x</sub> emissions in 1999 in the 372 potential nonattainment counties. Based on data collected from monitoring sites in the national speciation trends network, nitrates—which result from reactions involving NO<sub>x</sub>—make up between 5 and 40% of the total PM<sub>2.5</sub> constructed mass. The areas with the highest percentages of nitrates are in California and parts of the

<sup>4</sup> The speciation trends network consists of over 50 monitoring sites in urban areas and provides nationally consistent data on PM<sub>2.5</sub> constituents including nitrates, elemental carbon, organic carbon and sulfates.

<sup>5</sup> Through this data, we identified 129 counties that have violating monitors for PM<sub>2.5</sub>. EPA is currently reviewing 2000–2002 ambient data which may affect the numbers discussed in today's proposal.

Midwest. The areas with lowest percentages tend to be in the southeast, where nitrates make up only 5 to 10% of the total PM<sub>2.5</sub> constructed mass.

The 2003 NARSTO-PM report ("Particulate Matter Science for Policy Makers: A NARSTO Assessment," February 2003) states, "Nitrates represent a major fraction of the PM<sub>2.5</sub> mass measured in some locations, though the management of the nitrate fraction via NO<sub>x</sub> emission reductions needs to be addressed in combination with VOCs, NH<sub>3</sub> and SO<sub>2</sub>. This must be done in consideration of the relationship between nitrate production and local or regional ozone formation." The report also states, "Reductions of NO<sub>x</sub>, VOCs, and associated NH<sub>3</sub> throughout the year in and around large urban areas may be important in the East as well as the West to bring down the nitrate contributions to the 24-hr and/or annual PM averages. While summer nitrate concentrations in eastern North America are low in comparison with other PM<sub>2.5</sub> components, higher winter nitrate concentrations occur in northern urban areas." The report goes on to indicate that the application of chemical transport models and comprehensive air quality monitoring will be useful in determining how best to address nitrates.

A number of factors should be taken into account when considering the two options for addressing NO<sub>x</sub> as presented above. The first proposed option (which specifies that conformity demonstrations during the pre-SIP period must cover NO<sub>x</sub> unless a finding is made that NO<sub>x</sub> is *not* a significant contributor to the area's PM<sub>2.5</sub> problem) is supported by the fact that on a national basis, NO<sub>x</sub> is clearly a significant contributor to the PM<sub>2.5</sub> problem, that nitrates constitute some portion of the problem in each metropolitan area, and that on-road sources are significant contributors of NO<sub>x</sub> emissions in the potential nonattainment counties. In addition, assuming further sulfur dioxide reductions are required in order to attain the PM<sub>2.5</sub> standards, certain areas may see an increase in nitrate formation as sulfur dioxide emissions decline due to the reaction of ammonia with NO<sub>x</sub>, which in relative terms would be more "available" for such reactions. In order to minimize this "NO<sub>x</sub> disbenefit" situation, NO<sub>x</sub> emissions should be further reduced at the same time. These factors may argue that a more environmentally conservative approach is needed to meet the Clean Air Act conformity provisions, and that NO<sub>x</sub> should be considered in conformity

analyses under the first proposed option unless the State or EPA determine otherwise.

The second option (in which conformity demonstrations during the pre-SIP period must consider NO<sub>x</sub> *only if* the State or EPA make a finding that NO<sub>x</sub> is a significant contributor) is under consideration because the contribution of nitrates to total PM<sub>2.5</sub> concentrations in different metropolitan areas can vary significantly as noted above. In addition, this option would enable states to consider NO<sub>x</sub> emission reductions in combination with potential reductions of VOCs, NH<sub>3</sub> and SO<sub>2</sub> as part of the process for developing an area's attainment demonstration (due within 3 years of the area's nonattainment designation), in which air quality modeling at a more refined spatial resolution (*e.g.* 12 kilometer grid size) would be performed. EPA seeks comment on the two options for addressing NO<sub>x</sub> in conformity prior to PM<sub>2.5</sub> SIPs.

*VOC precursor emissions.* In 1999, on-road sources accounted for approximately 34% of the total VOC emissions in the 372 potential nonattainment counties for PM<sub>2.5</sub> (based on the 1999–2001 air quality data). Carbonaceous particles, which result, in part, from reactions involving VOCs, account for 25–70% of constructed fine particle mass measured at speciation trends network sites. The highest percentages of carbonaceous particles tend to be in California and the lowest percentages tend to be in the eastern United States.

Our understanding of the role of VOCs in PM<sub>2.5</sub> air quality problems continues to evolve. VOCs play several different functions in the formation of the organic fraction of PM<sub>2.5</sub>. The 2003 NARSTO report characterizes VOC precursors into three main categories. High molecular weight organic molecules (*i.e.*, molecules with 25 or more carbon atoms) are either emitted directly as particles or as liquids that rapidly condense onto existing particles. Intermediate weight organic molecules (*e.g.*, compounds with 7 to 24 carbon atoms) often exhibit a range of volatilities and can exist in both the gas and aerosol phase. For this reason they are also referred to as semivolatile compounds. These compounds react at higher temperatures to form secondary organic aerosols (SOAs). Aromatic compounds such as toluene, xylene, ethyl benzene are considered to be the most significant anthropogenic SOA precursors and have been estimated to be responsible for 50 to 70 percent of SOAs. The smallest organic molecules (*i.e.*, molecules with six or less carbon

atoms) occur in the atmosphere mainly as vapors and typically do not form organic particles at ambient temperatures. However, they participate in atmospheric chemistry processes resulting in the formation of ozone and certain free radical compounds (such as the hydroxyl ion [OH]). These free radicals participate in the oxidation of other gas-phase compounds (such as semivolatile aromatics) to form SOAs. The relative importance of each of these groups of organic compounds in the formation of organic particles varies from area to area. Also, the contribution of on-road source emissions to each of these three groups of organic compounds may vary from area to area.

Since on-road motor vehicles account for a substantial portion of total VOC emissions and on-road VOCs should be significant in many PM<sub>2.5</sub> areas, one could argue that the first proposed option is the most logical and environmental approach. Under this proposed option, VOCs would be considered in conformity automatically unless states or the EPA Regions determine that VOCs are insignificant for a given area. On the other hand, it may be appropriate to allow states and EPA the opportunity to evaluate the local significance of VOC emissions prior to consideration in conformity, given the likely variations between areas regarding the role of VOCs in the formation of PM<sub>2.5</sub>. EPA seeks comment on the two options for addressing VOCs in conformity prior to PM<sub>2.5</sub> SIPs.

*SO<sub>x</sub> precursor emissions.* EPA believes that statutory requirements are met under both proposed options if SO<sub>x</sub> is only addressed in conformity if it is determined to be significant to an individual nonattainment area. Although SO<sub>x</sub> may significantly contribute to total PM<sub>2.5</sub> in terms of emissions from all sources, emissions inventory data indicates that on-road emissions of SO<sub>x</sub> generally represent a very small portion of the total SO<sub>x</sub> emissions. Emissions inventory data for 1999 for the 372 potential PM<sub>2.5</sub> nonattainment counties for PM<sub>2.5</sub> (based on 1999–2001 air quality data) shows that on-road sources were responsible for only 2% of total SO<sub>x</sub> emissions. By comparison, fuel combustion sources (*e.g.*, electric utility and industrial combustion of coal and oil) were responsible for approximately 88% of the SO<sub>x</sub> emissions in 1999 in these same counties.

In addition, EPA has already adopted two regulations that will greatly reduce emissions of SO<sub>x</sub> from on-road sources by the time such regulations are both in full effect in 2009. First, in 2004 the low sulfur gasoline program begins to be

phased in and is fully effective in 2007 (February 10, 2000, 65 FR 6697). This regulation will reduce the sulfur content of gasoline by approximately 90%.<sup>6</sup> Second, in 2006 the low sulfur diesel program begins to be phased in and is fully effective by 2009 (January 18, 2001, 66 FR 5001). This regulation will reduce the sulfur content of diesel fuel by approximately 97% nationally.

Projections of on-road emissions of SO<sub>2</sub> in 2020 in the 372 potential PM<sub>2.5</sub> nonattainment counties based on 1999–2001 air quality data indicates that on-road sources will be responsible for less than 1% of the total SO<sub>2</sub> emissions in 2020 in these counties.<sup>7</sup> These projections confirm that the implementation of the fuel regulations discussed above will ensure that SO<sub>2</sub> emissions from on-road sources remain at insignificant levels.

**NH<sub>3</sub> precursor emissions.** EPA believes that both proposed options are appropriate and consistent with the statute by only requiring NH<sub>3</sub> conformity analyses if it is found significant in a given area. States and EPA should have a better understanding of the effect of NH<sub>3</sub> reductions on PM<sub>2.5</sub> concentrations by 2007, when PM<sub>2.5</sub> SIPs would be due. Based on the limited state of knowledge about on-road mobile source NH<sub>3</sub> contributions to PM<sub>2.5</sub> and indications that such emissions may be small, EPA does not generally believe that any areas should be required to consider NH<sub>3</sub> in conformity before SIPs are submitted, unless the State or EPA determines that NH<sub>3</sub> emissions are significant.

First, the 2003 NARSTO–PM report states that in most areas, insufficient information exists at this time to predict how particle mass and composition would change in response to changing NH<sub>3</sub> emissions. In some areas, reductions in NH<sub>3</sub> could actually lead to formation of acid aerosols that could worsen air quality. Second, existing emissions data show that on-road sources are a relatively small contributor to national NH<sub>3</sub> emissions, approximately 5%. In addition, information on 1999 emissions indicates that about 17% of the NH<sub>3</sub> in the 372 potential PM<sub>2.5</sub> nonattainment counties (based on 1999–2001 air quality data) comes from on-road sources. Although this information provides some

evidence that on-road NH<sub>3</sub> emissions can be important in some urban areas, this is likely due to urbanized counties having fewer agricultural and other NH<sub>3</sub> sources.

## IX. Re-entrained Road Dust in PM<sub>2.5</sub> Regional Emissions Analyses

### A. Background

Fugitive dust is released into the atmosphere by the mechanical disturbance of granular material. Common sources of fugitive dust include agricultural operations, construction, and on-road motor vehicle activity. Motor vehicles produce direct particulate emissions of dust through resuspension of loose material on the road surface, also known as re-entrained road dust.

Re-entrained road dust can come from both paved and unpaved roads, including pavement wear and decomposition, atmospheric deposition onto the road surface, mud and dirt carry-out from off-road sites, and sand, salt, and other materials applied for ice or skid control. In the preamble to the 1993 final conformity rule, EPA identified re-entrained road dust as a potential on-road mobile source contributor to some local PM<sub>10</sub> nonattainment problems. EPA stated, “All highway and transit related source categories that contribute to the nonattainment problem should be identified and included in the motor vehicle emissions budget, including exhaust, evaporative, and re-entrained dust emissions (including emissions from antiskid and deicing materials, where treated as mobile source emissions by the SIP).” (November 24, 1993, 58 FR 62194)

### B. What Are We Proposing?

This part of the proposal addresses when direct PM<sub>2.5</sub> from re-entrained road dust would be included in conformity analyses in PM<sub>2.5</sub> nonattainment and maintenance areas. Once a PM<sub>2.5</sub> SIP is submitted, re-entrained road dust would be included in regional emissions analyses if road dust is considered significant in the context of the SIP’s air quality modeling and included in an adequate or approved PM<sub>2.5</sub> motor vehicle emissions budget. EPA would consider the significance of road dust in its adequacy review or approval of a submitted PM<sub>2.5</sub> SIP. The following two options address road dust emissions in the time period before adequate or approved PM<sub>2.5</sub> SIP budgets are established.

The first option would require that, prior to adequate or approved PM<sub>2.5</sub> SIP budgets, re-entrained road dust would

only be included in regional emissions analyses if the State air quality agency or EPA Regional Administrator determines that re-entrained road dust *is a significant contributor* to the PM<sub>2.5</sub> regional air quality problem. In other words, PM<sub>2.5</sub> areas could presume that re-entrained road dust is not a significant contributor and not include road dust in PM<sub>2.5</sub> transportation conformity analyses prior to the SIP, unless the State or EPA finds road dust significant. The proposed regulatory text for this option can be found in § 93.102(b)(3).

EPA requests comment on whether the first proposed option should be modified to require certain PM<sub>2.5</sub> areas that are also PM<sub>10</sub> areas to include road dust in PM<sub>2.5</sub> conformity analyses, if road dust is currently included in PM<sub>10</sub> conformity analyses. Such a caveat would result in a limited number of PM<sub>2.5</sub> areas including road dust in all PM<sub>2.5</sub> conformity analyses prior to a PM<sub>2.5</sub> SIP, unless the State or EPA found that road dust is not a significant contributor to the regional air quality problem. This proposal does not affect how re-entrained road dust is addressed in conformity for the PM<sub>10</sub> standard.

The second proposed option would require that re-entrained road dust be included in conformity analyses in all PM<sub>2.5</sub> nonattainment areas prior to adequate or approved PM<sub>2.5</sub> SIP budgets, unless the State air quality agency or EPA Regional Administrator determines that re-entrained road dust *is not a significant contributor* to the regional air quality problem. For this option, MPOs and DOT would document in their conformity determinations that regional emissions analyses for direct PM<sub>2.5</sub> do not include road dust emissions when EPA or the State has determined that such emissions are insignificant.<sup>8</sup>

An EPA or State air agency finding of significant or insignificant re-entrained road dust emissions (a “significance finding”) would be based on a case-by-case review of the following factors for either proposed option: the contribution of road dust to current and future PM<sub>2.5</sub> nonattainment; an area’s current design value for the PM<sub>2.5</sub> standard; whether control of road dust appears necessary to reach attainment; and whether increases in re-entrained dust emissions may interfere with attainment. Such a review would include consideration of local air quality data and/or air quality modeling results. Today’s proposed options for PM<sub>2.5</sub> road dust are consistent with EPA’s existing

<sup>6</sup> In addition, California has adopted its own rule which addresses the sulfur content of gasoline in that State. California’s regulation is similar in stringency to the federal regulation.

<sup>7</sup> EPA 420–R–00–020, October 2002, “Procedures for Developing Base Year and Future Year Mass and Modeling Inventories for the Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel (HDD) Rulemaking.”

<sup>8</sup> The public would be notified when road dust is considered insignificant through the documentation in a conformity determination for this option.

insignificance policy for all areas as described in Section XIV.B.

Under either option, a significance finding should be made only after discussions with the interagency consultation group for the PM<sub>2.5</sub> nonattainment area. These discussions should include a review of the data being considered. Interagency consultation would also ensure that all of the relevant agencies are aware that such a finding is being considered and is supported by the air quality information that is available at the time. A significance finding would be made through a letter to the relevant state and local air quality and transportation agencies, MPO(s), DOT, and EPA (in the case of a State air agency finding).

EPA notes that any significance finding made prior to the SIP should not be viewed as the ultimate determination of the significance of road dust emissions in a given area. State and local agencies may find through the SIP development process that road dust emissions are significant and should be included in the PM<sub>2.5</sub> SIP motor vehicle emissions budget and subsequent conformity analyses, even in the case where road dust emissions were previously considered insignificant.

As described further below, under any of the proposed options, EPA would issue guidance on how to calculate PM<sub>2.5</sub> road dust emissions to reflect the true impact of re-entrained road dust on regional air quality. This guidance would be available before EPA's final PM<sub>2.5</sub> nonattainment designations. See Section IX.D. for more details on EPA's ideas for such guidance.

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

At issue is the question of whether or not re-entrained road dust has a significant impact on air quality and should be included in conformity analyses in all PM<sub>2.5</sub> areas. Existing PM<sub>10</sub> areas include re-entrained road dust in conformity because fugitive dust from roadways and other sources dominate PM<sub>10</sub> regional emissions inventories. However, the role of re-entrained road dust for PM<sub>2.5</sub> air quality issues is less clear. Furthermore, there does not appear to be a direct correlation between the amount of road dust calculated for PM<sub>2.5</sub> motor vehicle inventories and what is being collected on PM<sub>2.5</sub> monitoring filters, as discussed further in this section.

Specifically, analysis of local air quality data indicates wide regional variation in the fractions of PM<sub>2.5</sub> found on air quality monitors that consists of chemical elements associated with fugitive dust. Moreover, not all

emissions of these chemical elements are attributable to re-entrained road dust, as they can also be emitted by other sources that disturb or process minerals or metals. In some areas, especially those areas in the eastern United States, preliminary analyses indicate that fugitive dust may not have a significant impact on regional air quality.<sup>9</sup> In those areas, it may be more productive prior to a PM<sub>2.5</sub> SIP to focus control efforts on vehicle emissions that contribute to the PM<sub>2.5</sub> air quality problem, rather than on re-entrained road dust emissions.

The first proposed option would address regional variability, and ultimately allow the SIP's analysis to determine whether or not re-entrained road dust is a significant factor in the regional PM<sub>2.5</sub> problem. A more thorough air quality analysis as required for the SIP may be the best determination of the real impact of re-entrained road dust on PM<sub>2.5</sub> air quality, unless there is clear evidence before the SIP that road dust emissions are significant.

Under the first proposed option, EPA is requesting comment on whether it is appropriate to require PM<sub>2.5</sub> areas that are also PM<sub>10</sub> areas to include road dust in conformity analyses, unless a finding is made that road dust is not significant. Areas that are nonattainment for PM<sub>10</sub> may be more likely to have significant re-entrained road dust contributing to the PM<sub>2.5</sub> problem. Due to the significant amount of road dust in existing PM<sub>10</sub> inventories, it may be appropriate to also initially presume that road dust is significant for PM<sub>2.5</sub> for these limited number of PM<sub>10</sub> areas, unless the State or EPA find that road dust is not significant.

Finally, because the second option begins with the presumption that re-entrained road dust emissions is a problem, it may be more conservative in protecting PM<sub>2.5</sub> air quality with respect to the impact of road dust. However, in many areas, the second proposed option might result in the diversion of resources toward road dust analyses as well as road dust control measures that might be more effectively used to understand and control other emissions sources. These areas do have the option of supporting an EPA or state finding that road dust emissions are not

significant, but this may be difficult to do prior to the completion of the SIP analysis in some areas.

### D. Request for Comment on Estimating Road Dust Emissions

Under any of the proposed options, road dust SIP emissions inventories and regional emissions analyses for conformity at this time should be calculated using methods described in EPA's guidance entitled, "AP-42, Fifth Edition, Volume 1, Chapter 13, Miscellaneous Sources" (US EPA Office of Air Quality Planning and Standards; available at <http://www.epa.gov/ttn/chief/ap42/ch13/>) or locally developed estimation methods approved through the interagency consultation process. For reasons described below, under EPA's future guidance, calculated emissions would then be adjusted downward based on an analysis of the relative impact of re-entrained road dust on ambient PM<sub>2.5</sub> concentrations as determined by regional air quality monitors in a given area.

Review of PM<sub>2.5</sub> air quality data raises significant questions of uncertainty in the estimation methods for PM<sub>2.5</sub> dust emissions. Emissions of road dust are estimated using methods that are based on data collected from particulate monitors set up close to the road edge. These methods are used to create a PM<sub>2.5</sub> inventory, which is an estimation of the total amount of PM<sub>2.5</sub> road dust released into the atmosphere. When used with standard air quality simulation models, the methods that are used to create the inventory may adequately estimate the dust in the air immediately adjacent to the road, but may overestimate the impact that dust has on concentrations in the larger region and in particular at the PM<sub>2.5</sub> monitors that determine attainment with the PM<sub>2.5</sub> NAAQS. Regional air quality is assessed by air quality monitors that are set up in a wide range of locations. These regional air quality monitors generally indicate much lower fractions of dust in the atmosphere than are predicted based on the emissions inventories. ("Reconciling Urban Fugitive Dust Emissions Inventory and Ambient Source Contribution Estimates: Summary of Current Knowledge and Needed Research", Desert Research Institute Document 6110.4F, May 2000, available at <http://www.epa.gov/ttn/chief/efdocs/fugitivedust.pdf>).

There are several likely contributing factors to explain this discrepancy. The first factor is that road dust particles are distributed more toward the high end of the PM<sub>2.5</sub> size range than are exhaust particle or PM<sub>2.5</sub> emissions from many other source types. The second factor is

<sup>9</sup>"National Air Quality and Emissions Trends Report, 1999," EPA-454/R-01-004, U.S. EPA Office of Air Quality Planning and Standards, March 2001; also J. Szykman, D. Mintz, J. Creilson, and M. Wayland, "Impact of April 2001 Asian Dust Event on Particulate Matter Concentrations in the United States," in the "Proceedings of the Air & Waste Management Association Symposium on Air Quality Measurement Methods and Technology, San Francisco, November 13-15, 2002.

the low height to which re-entrained road dust is lifted (75% of unpaved road dust emissions were less than 2 meters above the ground when they were measured; compared to emissions released from stacks at stationary sources or vertical exhaust pipes on heavy-duty trucks) (Desert Research Institute Document 6110.4F, May 2000). This low-lifting height provides an extended "opportunity" for impaction, filtration, agglomeration and other physical mechanisms that lead to particle removal to occur. The third factor is that the lack of any thermal buoyancy for dust emissions would somewhat reduce their impact, in contrast to emissions from vehicle exhaust and other combustion or high temperature sources. All three factors increase the likelihood that road dust particles would settle out of the atmosphere onto the ground or adhere onto other surfaces such as vegetation, structures, *etc.*, before contributing substantially to the PM<sub>2.5</sub> regional air quality problem.

There are other reasons for uncertainty associated with the current method for estimating PM<sub>2.5</sub> re-entrained road dust emissions. The original data used to develop this method were based on measurements of PM<sub>10</sub> rather than PM<sub>2.5</sub>. The PM<sub>10</sub> data were subsequently adjusted to reflect the fraction of PM<sub>2.5</sub> in PM<sub>10</sub>, but these adjustments add uncertainty. In addition, the data used to develop the emissions estimation method are highly variable. This variability adds to uncertainty about its interpretation. ("AP-42, Fifth Edition, Volume 1, Chapter 13: Miscellaneous Sources", U.S. EPA Office of Air Quality Planning and Standards).

Attempting to adjust for discrepancies between estimated inventories and air quality measurements, EPA has discounted national PM<sub>2.5</sub> emissions inventories by 75% in air quality analyses for recent EPA rulemakings and other national analyses, to create the "effective emissions" that are used as input into regional air quality models. (Desert Research Institute Document 6110.4F, May 2000). Even with this discount, absolute air quality model predictions of the concentration of chemical elements associated with road dust typically have remained higher than observed at most urban PM<sub>2.5</sub> monitoring sites, suggesting that an even larger discount may be needed in at least some situations. In areas where PM<sub>2.5</sub> transportation conformity for road dust is required, we believe that discounting local re-entrained road dust inventories is necessary to ensure that the overall impact of road dust is

properly estimated, and that decisions about control strategies for road dust emissions and exhaust emissions reflect actual relative impacts on ambient concentrations and attainment. Without these adjustments, planners may not apply the proper combination of control measures on dust and vehicle emissions needed to properly address the regional PM<sub>2.5</sub> air quality problem. Based on observed discrepancies, EPA believes that controls on road dust would have a much smaller impact on regional air quality than would initially appear based on unadjusted emission inventories.

Preliminary analysis of air quality data and modeling studies indicates that there will likely be wide local variation in the size of the necessary adjustments to PM<sub>2.5</sub> dust emissions. For this reason, it would be inappropriate to apply EPA's 75% downward adjustment for national inventories for all areas. EPA believes it is more appropriate for PM<sub>2.5</sub> areas to create locally-specific adjustments based on the amount of road dust on an area's monitoring filters and its relationship to an area's nonattainment problem. Therefore, EPA intends to develop methods to make these adjustments locally both before and after a regional SIP air quality analysis has been done. EPA would issue this guidance by the time PM<sub>2.5</sub> designations are made. EPA invites comments and suggestions for possible methods for determining such local adjustments in areas where road dust is included in conformity analyses.

## X. Construction-Related Fugitive Dust in PM<sub>2.5</sub> Regional Emissions Analyses

### A. Background

Construction-related fugitive dust is granular material released into the atmosphere during construction. Activities associated with construction-related fugitive dust emissions include land clearing, drilling and blasting, ground excavation, cut and fill operations (*i.e.* earth moving), and facility construction. Often, a large portion of such emissions results from equipment traffic over temporary roads at the construction site. Construction-related fugitive dust is distinct from re-entrained road dust, which is emitted by motor vehicles traveling over permanent paved or unpaved roads. The discussion here applies only to fugitive dust emitted during the construction of highway or transit projects.

### B. What Are We Proposing?

EPA proposes to include construction-related fugitive dust from highway or transit projects in regional

emissions analyses in PM<sub>2.5</sub> nonattainment and maintenance areas only if the SIP identifies such dust as a *significant contributor* to the regional air quality problem. In other words, PM<sub>2.5</sub> areas would only include construction-related fugitive dust if the SIP identifies it as contributing to an area's air quality problem. Construction-related dust emissions would not be included in any PM<sub>2.5</sub> conformity analyses before adequate or approved PM<sub>2.5</sub> SIP budgets are established. EPA has included proposed regulatory text for this option as § 93.122(e).

Under this proposal, if construction-related fugitive dust is included in transportation conformity, we propose to allow PM<sub>2.5</sub> SIP budgets and conformity analyses to be adjusted to reflect the true impact of construction-related fugitive dust on regional air quality, as explained in Section IX.D. EPA would issue guidance on how to calculate PM<sub>2.5</sub> construction dust emissions to more accurately reflect the impact of construction dust on regional air quality before EPA's final PM<sub>2.5</sub> nonattainment designations. Construction dust SIP emissions inventories and regional emissions analyses for conformity should be calculated using methods described in EPA's guidance entitled, "AP-42, Fifth Edition, Volume 1, Chapter 13, Miscellaneous Sources" (US EPA Office of Air Quality Planning and Standards; available at <http://www.epa.gov/ttn/chief/ap42/ch13/>) or locally developed estimation methods approved through the consultation process.

Under EPA's future guidance, calculated emissions would then be adjusted downward to account for discrepancies based on an analysis of the relative impact of construction dust on ambient PM<sub>2.5</sub> concentrations as determined by regional air quality monitors in a given area. See previous discussion in Section IX.D. for more details on ideas that EPA is considering for its future guidance. EPA is also requesting comment from the public on such guidance.

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

Section 176(c) of the Clean Air Act requires that the air quality impacts of transportation projects be evaluated so that new violations or worsened violations do not occur. If emissions of fugitive dust from highway or transit projects contribute to air quality problems in PM<sub>2.5</sub> areas and as a result, air quality is worsened, then it may be appropriate to evaluate those emissions in conformity before federal funding or approval is given. Section 93.122(d) of the transportation conformity rule

requires regional PM<sub>10</sub> emissions analyses to include construction-related PM<sub>10</sub> dust if the SIP identifies such emissions as a contributor to the nonattainment problem. If construction-related fugitive PM<sub>10</sub> is not identified as a contributor to the air quality problem in the implementation plan, areas are not required to include these emissions in the regional emissions analysis for transportation conformity. The proposal applies the current rule's approach for PM<sub>10</sub> areas to PM<sub>2.5</sub> areas.

In nonattainment and maintenance areas where construction-related fugitive dust is a part of the nonattainment problem, we would allow states to adjust the construction-related fugitive dust SIP inventories and subsequent conformity analyses to resolve any discrepancies between the dust inventories and the amount of dust observed at air quality monitors, as described above. As noted, regional air quality monitors generally indicate much lower fractions of dust in the atmosphere than are predicted based on the emissions inventories. (Desert Research Institute Document 6110.4F, May 2000). As explained above, factors such as larger particle size, low release height, and low thermal buoyancy increase the likelihood that dust particles would quickly settle out of the atmosphere onto the ground or adhere onto other surfaces such as vegetation, structures, etc.

In areas where PM<sub>2.5</sub> transportation conformity for construction dust is required, we believe that discounting local construction dust inventories is necessary to ensure that the overall impact of road dust is properly estimated, and that decisions about control strategies for dust emissions (including construction dust) and exhaust emissions reflect actual relative impacts on ambient concentrations and attainment. EPA will develop separate guidance for these adjustments to SIP budgets and conformity analyses and this guidance would be available before EPA's final nonattainment designations for the PM<sub>2.5</sub> standard.

#### *D. Implementation and Request for Additional Information*

EPA addressed implementation issues for including construction dust in PM<sub>10</sub> conformity analyses in an October 28, 1996 memorandum.<sup>10</sup> Under the

proposal, EPA would apply similar implementation guidance to PM<sub>2.5</sub> areas.

During the development of the SIP, air quality agencies would ensure that the PM<sub>2.5</sub> SIP inventory clearly identifies the role (if any) of construction dust in the PM<sub>2.5</sub> air quality problem. If construction dust is a contributor, dust from highway and transit projects would be included in the PM<sub>2.5</sub> SIP motor vehicle emissions budget. MPOs and state transportation agencies would work together with local and state air quality agencies to ensure that construction dust emissions are properly analyzed with respect to the transportation plan and TIP for conformity analyses. If the PM<sub>2.5</sub> SIP identifies construction dust as a significant PM<sub>2.5</sub> problem, the regional emissions analysis would account for the level of construction activity, the fugitive PM<sub>2.5</sub> control measures in the SIP (if there are any), and the dust-producing capacity of the proposed construction activities.

### **XI. Compliance With PM<sub>2.5</sub> Control Measures**

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

We are proposing that FHWA and FTA projects in PM<sub>2.5</sub> nonattainment and maintenance areas must comply with the applicable SIP's control measures, when such measures exist. Through this proposal, FHWA/FTA would assure implementation of a required control or mitigation measure by obtaining enforceable written commitments from the project sponsor and/or operator prior to making a project-level conformity determination. This requirement would be satisfied if the project-level conformity determination contains a written commitment from the project sponsor to include the control measures in the final plans, specifications and estimates for the project. This proposal is consistent with a similar requirement for PM<sub>10</sub> areas in § 93.117 of the current conformity rule.

We should note, however, that this proposed requirement in § 93.117 is only applicable after a PM<sub>2.5</sub> nonattainment area has an approved PM<sub>2.5</sub> SIP, since the requirement is to comply with the measures in the approved SIP. Today's proposal does not affect any separate state or SIP requirements for compliance with control measures.

The purpose of a PM<sub>2.5</sub> control measure would be to limit the amount of PM<sub>2.5</sub> emissions from construction activities and/or normal use and operation associated with the project. Examples of control or mitigation

measures that may be approved into a SIP include limitations on fugitive dust during construction or street sweeping. Normal project design elements (dimensions, lane widths, materials, etc.), however, are not considered mitigation or control measures.

EPA requests information from current PM<sub>10</sub> nonattainment and maintenance areas on how the current requirement in § 93.117 has been implemented in PM<sub>10</sub> areas and what types of measures have been effective in limiting these emissions. Information on how PM<sub>10</sub> areas have addressed this requirement and the types of measures that have been implemented could prove valuable to new PM<sub>2.5</sub> nonattainment areas.

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

The purpose of conformity is to ensure that federal actions are consistent with the SIP. If the approved SIP includes control measures for mitigating PM<sub>2.5</sub> emissions from federal transportation projects, then conformity should ensure that these SIP measures are implemented. We believe that this requirement would help PM<sub>2.5</sub> areas achieve clean air by ensuring that federal projects comply with control measures that result in air quality improvements as anticipated in the SIP. Although such projects must comply with SIP requirements in any event, documenting compliance in a conformity determination would add an important enforcement tool to aid in SIP compliance.

The interagency consultation process is required to discuss the inclusion of control measures in an area's SIP. Section 93.105(b)(1) of the current conformity rule requires that the interagency consultation process be used in the development of the SIP, particularly when an agency is responsible "for developing, submitting or implementing provisions of an implementation plan." The interagency consultation group may also be a source of recommendations for the most appropriate approach to addressing PM<sub>2.5</sub> emissions in the SIP.

Section 93.117 of the current conformity rule has an identical requirement for project-level conformity determinations in PM<sub>10</sub> nonattainment and maintenance areas. We do not believe that compliance with this requirement has been a burden for PM<sub>10</sub> areas. Therefore, we do not anticipate that our proposal in § 93.117 should be a burden on new PM<sub>2.5</sub> nonattainment areas, as this requirement simply ensures that control measures which the interagency consultation group has

<sup>10</sup> "Transportation Conformity: Regional Analysis of PM<sub>10</sub> Emissions from Highway and Transit Project Construction," memorandum from Gay MacGregor, then-director, Regional and State Programs Division, Office of Mobile Sources to EPA Regional Air Division Directors.

previously agreed upon and included in the SIP are implemented.

## XII. PM<sub>2.5</sub> Hot-Spot Analyses

### A. What Are We Proposing?

EPA is taking comment on two options concerning the need to conduct hot-spot analyses for FHWA and FTA projects in PM<sub>2.5</sub> nonattainment and maintenance areas. A hot-spot analysis as defined in § 93.101 of the rule for CO and PM<sub>10</sub> areas is an estimation of likely future localized pollutant concentrations and a comparison of those concentrations to the air quality standard. A hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including for example, congested roadway intersections and highways or transit terminals, and uses a dispersion model to determine the effects of emissions on air quality. In general, a hot-spot analysis must show that the project does not cause any new violations of the air quality standard or increase the frequency or severity of existing violations. The conformity rule currently requires hot-spot analyses in CO and PM<sub>10</sub> nonattainment and maintenance areas. The reader should refer to §§ 93.116 and 93.123 of the current conformity regulation for specific CO and PM<sub>10</sub> hot-spot analysis requirements.

The first proposed option would not require hot-spot analyses for FHWA and FTA projects in PM<sub>2.5</sub> nonattainment and maintenance areas, for the reasons described below. We recognize that there is on-going research on PM<sub>2.5</sub> and, if this research provides evidence in the future that clearly indicates that transportation-related PM<sub>2.5</sub> hot-spots exist, we would revise the conformity rule in the future to require PM<sub>2.5</sub> hot-spot analyses at locations that are most likely to experience hot-spot problems. We invite commenters with data relevant to the existence of transportation-related PM<sub>2.5</sub> hot-spots to submit this data during the comment period for this proposal.

EPA also requests comment on a second option that would require PM<sub>2.5</sub> hot-spot analyses for FHWA and FTA projects at certain types of locations if the PM<sub>2.5</sub> SIP for the area identifies such locations. Under this option, PM<sub>2.5</sub> hot-spot analyses would not be required for any projects prior to the submission of a SIP and then only if the PM<sub>2.5</sub> SIP identifies susceptible types of locations.

We request comment on what potential PM<sub>2.5</sub> hot-spot location types could be identified in the SIP, including locations of: significant congestion, highest traffic volumes, existing or

suspected future localized violations of the PM<sub>2.5</sub> standard, or high diesel vehicle traffic such as near freight or transit terminals. EPA seeks comment on these potential location types or others that may be appropriate to consider for the second proposed option. The locations listed above are similar to those described in §§ 93.123(a)(1)(i)–(iv) and 93.123(b)(1)(i)–(iii) of the current conformity rule where quantitative hot-spot analyses must be performed for CO and PM<sub>10</sub>. However, under this proposal, PM<sub>2.5</sub> hot-spot analyses would only be required for projects at the types of locations identified in the SIP. This option would not require qualitative analyses for all projects in the PM<sub>2.5</sub> nonattainment or maintenance area as is currently required for CO and PM<sub>10</sub> nonattainment and maintenance areas.

If the second option is finalized, the required hot-spot analysis would address only the contribution of directly emitted particles to ambient PM<sub>2.5</sub> concentrations, including re-entrained emissions if those are addressed under conformity in that area. Typically, a hot-spot analysis would be done for an intersection, a short segment of roadway or the immediate vicinity of a transit terminal. Since secondary particles take several hours to form in the atmosphere giving emissions time to disperse beyond the immediate area of concern, hot-spot analyses could only examine direct particulate emissions that are attributable to an individual project. In other words, precursor emissions from a project would not be considered in a hot-spot analysis. Secondary particles would only be considered as part of the PM<sub>2.5</sub> background concentration that would be included in the assessment of whether or not a hot-spot exists.

If EPA finalizes the second option, we would provide guidance on how to identify locations where transportation-related PM<sub>2.5</sub> hot-spots may exist. This guidance would be available for use when states prepare PM<sub>2.5</sub> SIPs. We would also provide guidance and appropriate models for carrying out quantitative analyses at identified locations of concern, prior to the requirement to perform any PM<sub>2.5</sub> hot-spot analyses.

Finally, under the second option we are also proposing that prior to making a project-level conformity determination in a PM<sub>2.5</sub> nonattainment or maintenance area, FHWA or FTA must obtain from the project sponsor and/or operator enforceable written commitments to implement any required control or mitigation measures otherwise applicable to the project. These control or mitigation measures

may be a condition of either a NEPA approval or a conformity determination for a plan or TIP or be included in the design concept and scope of the project that is used in the regional emissions analysis required by §§ 93.118 or 93.119. These measures may be applicable during construction and/or operation of the project. Such measures would already be applicable to such projects, however including commitments to them in conformity determinations will provide an additional enforcement tool. Section 93.125(a) of the conformity rule already includes this requirement for CO and PM<sub>10</sub> nonattainment and maintenance areas, and EPA would include similar language if a PM<sub>2.5</sub> hot-spot analysis requirement is included in the final rule. Although EPA has not proposed regulatory language, either of these proposals could be finalized as described above.

### B. Existing Research on PM<sub>2.5</sub> Hot-Spots and Request for Additional Information

EPA has reviewed a number of key studies that represent the range of research that is currently available on the impact of on-road mobile source emissions of particles on air quality near roadways. The results of these studies are not conclusive as to whether or not transportation-related PM<sub>2.5</sub> hot-spots exist. The majority of these studies indicate that concentrations of some components of PM<sub>2.5</sub> increase near roadways, such as black carbon and ultrafine particles. However, it is difficult to relate these measures directly to PM<sub>2.5</sub>, as many of the studies did not measure PM<sub>2.5</sub> directly. The magnitude of increased concentrations appears to be related to several factors including the total number of vehicles operating on the roadway, the number of diesel vehicles operating on the roadway and the level of congestion or amount of stop-and-go driving on the roadway. However, these studies were less clear as to whether or not PM<sub>2.5</sub> hot-spots exist. Several studies concluded that on-road sources were one of several contributors to the concentrations measured near roadways. At least one study concluded that hot-spots do not exist. Several studies reported that they had identified hot-spots caused by local on-road emissions. However, it is difficult to relate the conclusions of many of these studies to the PM<sub>2.5</sub> standards, because a number of these studies collected individual air quality samples for less than 24 hours and only collected data over a period of several months. All of the studies that were reviewed are available in the docket for this rulemaking. We invite others with

data relevant to the existence of transportation-related hot-spots to submit their data during the comment period for this rulemaking.

### *C. Why Are We Proposing These Options?*

Section 176(c)(3)(B)(ii) only specifically requires a hot-spot analysis for projects in CO nonattainment areas. Since Congress only specifically required hot-spot analyses in CO areas, EPA has discretion to decide if hot-spot analyses are necessary to protect air quality in particulate matter nonattainment and maintenance areas. If EPA determines that analyses are necessary for a given particulate matter standard, EPA also has discretion to target such analyses toward certain locations or certain types of projects. Given the uncertainty found in the literature on the existence of PM<sub>2.5</sub> hot-spots, we are proposing two options which are described below.

If PM<sub>2.5</sub> hot-spots are not expected to occur, the Clean Air Act's conformity provisions are met without performing hot-spot analyses in PM<sub>2.5</sub> areas. Section 176(c)(1)(B) of the Clean Air Act requires that activities funded or approved by the federal government must not "cause or contribute to any new violation of any standard in any area; increase the frequency or severity of any of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." For projects in ozone areas, we have previously determined that the requirements of section 176(c)(1)(B) are met if the project meets the requirements of section 176(c)(2)(C) of the Clean Air Act, since ozone impacts occur at a regional level. Section 176(c)(2)(C) indicates that a project may be adopted or approved if it is included in a conforming plan and TIP, the design concept and scope of the project has not changed significantly since the conformity finding for the plan and TIP, and the design concept and scope of the project was adequate to determine emissions when the conformity determination was made.

Because projects in PM<sub>2.5</sub> nonattainment and maintenance areas would be included in the area's regional emission analysis, as discussed in Section VII. of this proposal, they would also conform without a hot-spot analysis, if hot-spots are not expected to occur. Available air quality data indicate that PM<sub>2.5</sub> air quality problems are similar to ozone in that they are both primarily regional in nature.

EPA's January 2001 draft SIP guidance entitled "Guidance for Demonstrating Attainment of Air Quality Goals for PM<sub>2.5</sub> and Regional Haze" indicates that, due to the nature of the PM<sub>2.5</sub> NAAQS, sharp concentration gradients that lead to hot-spots are unlikely because: individual air quality samples are collected over a 24-hour period; compliance with the annual PM<sub>2.5</sub> standard is determined over a 3-year period; and, secondary formation of particles plays a significant role in determining PM<sub>2.5</sub> concentrations in a given area.

Therefore, we are proposing the first option (that would not require hot-spot analyses) because we are not certain that hot-spots will occur, and in that case hot-spot analyses would not be needed to protect air quality. If evidence clearly indicates that transportation-related PM<sub>2.5</sub> hot-spots exist, we would revise the conformity rule in the future to require PM<sub>2.5</sub> hot-spot analyses at locations that are most likely to experience hot-spot problems.

The second option would require hot-spot analyses at certain types of locations if the PM<sub>2.5</sub> SIP identified locations susceptible to PM<sub>2.5</sub> hot-spots. As discussed above, the results of research on transportation-related PM<sub>2.5</sub> hot-spots is inconclusive as to whether or not PM<sub>2.5</sub> hot-spots exist or would exist in the future. However, most of the research we have reviewed indicates that concentrations of some components of PM<sub>2.5</sub> increase near heavily traveled roadways. If a state identified types of locations in its SIP where it had evidence that a PM<sub>2.5</sub> hot-spot exists or is likely to exist, a quantitative PM<sub>2.5</sub> hot-spot analysis would be required for FHWA and FTA projects at these locations.

This option would be consistent with the purpose of conformity, which is to ensure that federally funded or approved transportation projects are consistent with the SIP for the area. Requiring a hot-spot analysis for projects at these locations would also be environmentally protective because, if the planned project would cause a new violation or increase the frequency or severity of an existing violation, a project-level conformity determination would ensure that the estimated air quality impacts of the project would be mitigated. Also, the requirement for a hot-spot analysis would only result in an increased resource burden for conformity if the SIP for the area identified locations where the analyses would be required, and then only if a project was planned for one of these locations. This option would be an environmentally protective way of

responding to the scientific uncertainty surrounding PM<sub>2.5</sub> hot-spots, because it retains a mechanism to address PM<sub>2.5</sub> hot-spots if states ultimately determine there could be potential problems. At the same time, it would impose no conformity resource burden prior to PM<sub>2.5</sub> SIPs in any area; additional conformity resources would be required only in the case where an individual area identifies PM<sub>2.5</sub> hot-spots as a local air quality issue in the SIP.

In the event that the existence of PM<sub>2.5</sub> hot-spots is confirmed, we do not believe that performing a qualitative hot-spot analysis for every FHWA and FTA project in PM<sub>2.5</sub> nonattainment and maintenance areas would provide an environmental benefit due to the regional nature of PM<sub>2.5</sub> and the significant role of secondary formation of these fine particles. In addition, we recognize that performing a hot-spot analysis for every project in a PM<sub>2.5</sub> nonattainment or maintenance area would require a significant amount of resources, which may not result in environmental benefits. Therefore, we are proposing that hot-spot analyses not be required for PM<sub>2.5</sub>, or in the second option that quantitative hot-spot analyses only be required for project locations if identified as a concern in the PM<sub>2.5</sub> SIP.

## **XIII. PM<sub>10</sub> Hot-spot Analyses**

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

EPA is requesting comment on whether to retain the current conformity rule's requirement that hot-spot emissions analyses be conducted for FHWA and FTA projects in all PM<sub>10</sub> nonattainment and maintenance areas. A PM<sub>10</sub> hot-spot analysis is required to examine the localized impacts of an individual highway or transit project as required in §§ 93.116 and 93.123, including all direct emissions from vehicle and re-entrained road dust.

We are considering a wide range of options for modifying the current PM<sub>10</sub> hot-spot analysis requirements, and no regulatory text is being proposed for any option. However, based on this proposal and any comments submitted, we may finalize any of the options discussed in this proposal. We also invite commenters to suggest additional options.

One option is to maintain the current conformity rule requirements. These provisions require a hot-spot analysis for FHWA/FTA projects in PM<sub>10</sub> nonattainment and maintenance areas to ensure that the project does not cause or contribute to any new localized PM<sub>10</sub> violation or increase the frequency or severity of any existing PM<sub>10</sub> violation.

There currently is no federal guidance for conducting quantitative PM<sub>10</sub> hot-spot analyses, although qualitative guidance, developed by FHWA in consultation with EPA, is available.<sup>11</sup> Local areas can develop their own procedures that meet the rule's requirements.

EPA is also considering other options that would result in PM<sub>10</sub> hot-spot analyses only being required under certain circumstances. For example, it may be appropriate to only require PM<sub>10</sub> hot-spot analyses in nonattainment and maintenance areas where the SIP has identified motor vehicle emissions as a localized problem. Alternatively, under this option, hot-spot analyses would not be required in a PM<sub>10</sub> area if the SIP has determined that motor vehicle emissions do not create a localized problem.

Another option would be to only require PM<sub>10</sub> hot-spot analysis at certain types of project locations (e.g., highly congested intersections) or for certain types of highway and/or transit projects (e.g., large transit stations where significant traffic and engine idling occurs). Such an option would be similar to the alternate option being proposed for hot-spot analyses for projects in PM<sub>2.5</sub> nonattainment and maintenance areas in Section XII. of today's proposal. EPA is requesting information on any existing PM<sub>10</sub> SIPs that identify motor vehicle emissions or specific locations as a hot-spot concern.

We also request comment on an option that would delete PM<sub>10</sub> hot-spot requirements from the conformity rule. When the transportation conformity rule was first promulgated in 1993, EPA was primarily concerned about the possibility of localized PM<sub>10</sub> exceedances in urban street canyons or near transit terminals (November 24, 1993, 58 FR 3780). However, since other factors affecting PM<sub>10</sub> emissions have changed since 1993, as discussed below, it may be appropriate to delete the current PM<sub>10</sub> hot-spot requirement entirely and focus limited state and local resources on other air quality concerns.

We are soliciting information on how PM<sub>10</sub> hot-spot analyses have been completed to date; whether PM<sub>10</sub> hot-spots have been detected from all or certain types of transportation projects; and whether stakeholders believe the current requirements result in environmental benefits. It has been 10 years since the current PM<sub>10</sub> hot-spot

analysis requirements were promulgated, and our understanding of PM<sub>10</sub> air quality issues has improved over that time.

We also invite commenters to submit the results of recent research, reports or data collection that would provide information on the nature of PM<sub>10</sub> hot-spots and on appropriate methods for performing hot-spot analyses. For example, we are aware that the Transportation Center at the University of Tennessee conducted a series of analyses at various types of public transit facilities to determine their impact on nearby PM<sub>10</sub> concentrations. None of these analyses showed that there was a significant risk of localized PM<sub>10</sub> problems as a result of emissions from these facilities.

Finally, we would also like to receive information on whether any PM<sub>10</sub> problems have been identified through PM<sub>10</sub> qualitative analyses and how the identified problems were resolved for project level conformity determinations.

#### *B. Why Are We Considering These Options?*

EPA believes that it is appropriate to re-evaluate the need for hot-spot analyses for all projects in PM<sub>10</sub> nonattainment and maintenance areas at this time. When the conformity rule was promulgated in 1993, we interpreted the Clean Air Act section 176(c)(1)(B) to require PM<sub>10</sub> hot-spot analyses because of the requirement to ensure that transportation activities do not worsen air quality (January 11, 1993, 58 FR 3776). Section 93.116 of the current rule states that transportation projects cannot cause or contribute to new violations or increase the frequency or severity of existing ones.

It should be noted that Clean Air Act section 176(c)(3)(B)(ii) only specifically requires hot-spot analyses for projects in CO nonattainment areas. Congress did not specifically require hot-spot analyses for PM<sub>10</sub> areas. Therefore, if EPA concludes in this rulemaking that PM<sub>10</sub> hot-spots are not an air quality concern or that PM<sub>10</sub> hot-spots are only a concern in certain cases, then a rule revision would be consistent with the statute.

In 1993, EPA believed that typically sized bus terminals or transfer points would not create PM<sub>10</sub> hot-spots but that it was practical to require a determination to that effect. We also believed at that time that direct PM<sub>10</sub> emissions would be capable of causing violations only in conditions of unusually heavy diesel truck/bus traffic and limited dispersion, such as street canyons (January 11, 1993, 58 FR 3780).

We are not aware of any such locations that are currently causing localized PM<sub>10</sub> exceedances. As stated previously, the University of Tennessee study did not show a risk of localized PM<sub>10</sub> problems as a result of emissions from public transit facilities. We are requesting information on whether other studies on this issue are available.

In addition, EPA's diesel fuel and engine standards (January 18, 2001, 66 FR 5002) will significantly impact the amount of particulate emissions that will be emitted by new diesel vehicles. The fuel standards will be implemented in 2006 and the engine standards in 2004 with more stringent standards starting in 2007. These standards may address EPA's original concern about the potential of localized PM<sub>10</sub> hot-spots in certain urban or transit locations where diesel vehicle traffic is significant. Currently, agencies are required to perform such analyses on all projects regardless of their likelihood to produce a localized exceedance. However, areas that were at risk in the past may not be at risk in the future as the new vehicle and fuels standards take effect. Therefore, as vehicles and fuels become cleaner through fleet turnover, the likelihood of a PM<sub>10</sub> hot-spot at any given location may be reduced.

However, we are not proposing a preferred option for changing the current PM<sub>10</sub> hot-spot requirements. Instead, we are soliciting input to guide our decision on maintaining, amending or eliminating the PM<sub>10</sub> hot-spot requirements in the final rule. EPA believes it is appropriate to focus conformity resources where air quality issues are significant and need to be in place to address Clean Air Act section 176(c)(1)(B). A review of recent information may show either that PM<sub>10</sub> hot-spot analyses are no longer warranted or that they can be better targeted at projects or locations where these types of problems may occur. We expect that the comments that we receive in response to this portion of the proposal would allow us to make appropriate changes to the existing requirements in the final rule, if necessary.

#### **XIV. Miscellaneous Revisions for New and Existing Areas**

##### *A. Definitions*

EPA is proposing to clarify the current conformity rule's definitions for "control strategy implementation plan revision" and "milestone" in § 93.101. The current rule defines a control strategy implementation plan revision as an implementation plan which contains specific strategies for

<sup>11</sup> Guidance for Qualitative Project-Level "Hot Spot" Analysis in PM<sub>10</sub> Nonattainment and Maintenance Areas. Federal Highway Administration. Office of Natural Environment. 2001.

controlling emissions and reducing ambient levels of pollutants to satisfy certain Clean Air Act requirements for reasonable further progress and attainment. The conformity regulation lists these Clean Air Act requirements as: Sections 182(b)(1), 182(c)(2)(A), and 182(c)(2)(B) for ozone areas; section 187(a)(7) for CO areas; sections 189(a)(1)(B) and 189(b)(1)(A) for PM<sub>10</sub> areas; and sections 192(a) and 192(b) for NO<sub>2</sub> areas.

EPA has determined, however, that the current list of Clean Air Act provisions in § 93.101 is incomplete, as the list does not include all the provisions of the Act that require a control strategy SIP revision for the purposes of demonstrating reasonable further progress or attainment. For example, the current rule definition does not include Clean Air Act section 172(c) that includes the general plan provisions that any attainment or reasonable further progress SIP revision must satisfy. In addition, the conformity rule's definition does not address SIP revisions submitted under Clean Air Act sections 187(g) or 189(d). These provisions of the Act require serious CO and PM<sub>10</sub> areas, respectively, to submit SIP revisions that would reduce emissions by 5% per year until attainment of the relevant standard is ultimately achieved ("5% plans"), if these areas initially fail to attain on time.

In implementing the conformity regulation, EPA has always interpreted the definition of a control strategy SIP revision to consist of any SIP that is established for the purposes of attainment or progress towards attainment, including those SIPs submitted to satisfy Clean Air Act sections 172(c), 187(g) or 189(d). Therefore, in today's rulemaking we are simply clarifying that any implementation plan revisions that are submitted to fulfill these additional Clean Air Act requirements are considered control strategy SIPs for conformity purposes. We are also clarifying that any SIP that is established to demonstrate reasonable further progress and/or attainment should be considered a control strategy SIP. This definition would include any progress or attainment SIP that is submitted for existing and future criteria pollutants and standards that are subject to the conformity regulation.

Similarly, EPA is expanding the current definition of milestone in § 93.101 to more adequately reflect EPA's original intent and implementation of this term. The current conformity rule defines milestone as having the meaning given

in sections 182(g)(1) and 189(c) of the Clean Air Act. The rule also states that a milestone consists of an emissions level and the date on which it is required to be achieved.

EPA has historically interpreted the conformity rule's definition of milestone to mean any year for which the Clean Air Act requires a demonstration of reasonable further progress towards attainment. Our interpretation covers all nonattainment areas, including all classifications of ozone areas, that are required to submit reasonable further progress SIPs and motor vehicle emission budgets. In reevaluating the current milestone definition, however, EPA has concluded that the current rule could be misinterpreted to mean that only serious and above ozone areas and PM<sub>10</sub> areas would need to consider budgets established for milestone years required by Clean Air Act sections 182(g)(1) and 189(c), respectively. This interpretation could lead to confusion over how certain reasonable further progress SIPs should apply for conformity purposes. For example, the current milestone definition does not specifically address reasonable further progress SIP and budget years established by moderate ozone areas per Clean Air Act section 182(b)(1). As a result, the rule could be considered unclear about how moderate ozone areas should consider these particular SIPs in conformity. To address this ambiguity in the rule, we are proposing to expand our current definition of milestone so that it will include any year for which a motor vehicle emissions budget has been established to satisfy Clean Air Act requirements for demonstrating reasonable further progress. This definition would include all years in the applicable SIP for which emission targets showing progress towards attainment are established in any nonattainment area.

EPA believes that neither of these proposed clarifications would have a practical impact on the current conformity process. The Clean Air Act and conformity rule require transportation activities to conform to the applicable SIP and motor vehicle emissions budgets prior to receiving funding and approval. Therefore, any adequate or approved budgets, including those that demonstrate reasonable further progress, that are available at the time a conformity determination is made must be included in that determination.

Furthermore, it is EPA's understanding that conformity practitioners have historically been implementing the current rule's definitions as described above. For

example, PM<sub>10</sub> areas that have submitted 5% plans to satisfy Clean Air Act section 189(d) have used the motor vehicle emissions budgets established in these SIPs for conformity purposes and should continue to do so. Likewise, moderate ozone areas with reasonable further progress SIPs and budgets have historically used these budgets in conformity determinations. Therefore, the proposed clarifications to the rule's definitions for control strategy SIP revision and milestone should not impose any new requirements on nonattainment and maintenance areas; these rule revisions would simply clarify our original intent and current implementation of the existing conformity rule.

#### *B. Areas With Insignificant Motor Vehicle Emissions*

EPA is proposing two changes to incorporate our existing insignificance policy in the conformity rule. First, we are proposing to add § 93.109(k) for nonattainment and maintenance areas for which EPA makes a finding that the SIP's motor vehicle emissions for a pollutant or precursor for a given standard are an insignificant contributor to the area's air quality problem. The proposal would waive the regional emissions analysis requirements in §§ 93.118 and 93.119 for an insignificant pollutant or precursor in these areas upon the effective date of EPA's adequacy finding or approval of such a SIP. In addition, this proposal would waive the hot-spot requirements in §§ 93.116 and 93.123 in CO and PM<sub>10</sub> areas, if EPA determines that the SIP demonstrates that hot-spot emissions are also insignificant. The proposed § 93.109(k) would also establish the minimum criteria that are necessary to demonstrate that motor vehicle emissions are insignificant as described below.

Under this proposal and the existing policy, an area with insignificant motor vehicle emissions for a pollutant or precursor for a given standard would still be required to make a conformity determination that satisfies other relevant requirements including: SIP TCM implementation, interagency and public consultation, hot-spot requirements including the use of latest planning assumptions and emissions models in CO and PM<sub>10</sub> areas (if EPA has not made a finding that such emissions are also insignificant), and compliance with SIP control measures in PM<sub>10</sub> and PM<sub>2.5</sub> areas. Areas would also need to satisfy the regional emissions analysis requirements in §§ 93.118 and/or 93.119 for pollutants

or precursors for which EPA has not made a finding of insignificance.

Second, EPA is proposing a new § 93.121(c) to address the conformity requirements for regionally significant non-federal projects in areas with insignificant motor vehicle emissions. The current rule's § 93.121(a) and (b) require that the emissions impacts of such projects be considered prior to project approval. However, a regional analysis would not be required for a pollutant or precursor for a given standard that EPA has found insignificant. Consistent with proposed § 93.109(k) for federal projects, this proposal would not require a regional emissions analysis per §§ 93.118 and/or 93.119 for an insignificant pollutant or precursor for new regionally significant non-federal projects. However, the requirements in either § 93.121(a) or (b) would be required for any remaining pollutants or precursors for a given standard that are still considered significant (*i.e.*, EPA has not determined such remaining pollutants or precursors to be insignificant). Therefore, § 93.121(c) is proposed to allow non-federal project approvals in the limited cases of an EPA finding of insignificant emissions.

Since EPA promulgated the original conformity rule (November 24, 1993, 58 FR 62188), we have not required areas with insignificant motor vehicle emissions to conduct a regional emissions analysis for a pollutant or precursor that EPA has determined is insignificant to an area's air quality problem. In the preamble to the 1993 rule we explained that if a control strategy SIP demonstrates "that motor vehicle emissions (including exhaust, evaporative and re-entrained road dust emissions) are insignificant and reductions are not necessary for attainment, the conformity determination is not required to satisfy the criteria for regional emissions analysis of that pollutant. If the control strategy SIP demonstrates that motor vehicle emissions of a precursor are insignificant and reductions are not necessary for attainment, the conformity determination is not required to satisfy the criteria for a regional emissions analysis of the precursor" (58 FR 62194).

In the proposal to the 1997 rule (July 9, 1996, 61 FR 36118), we provided additional guidance to areas on what is necessary to demonstrate that motor vehicle emissions are insignificant contributors to an area's air quality problem. Specifically, the 1996 proposal states: "the SIP would have to demonstrate that it would be unreasonable to expect that such an area

would experience enough motor vehicle growth for a violation to occur. Such a demonstration would have to be based on a number of factors, including the percentage of the inventory comprised by motor vehicle-related emissions currently and in the future, how close the monitoring data is to the standard, the absence of SIP motor vehicle control measures, historical trends in growth of motor vehicle emissions and VMT, and projections of motor vehicle emissions and VMT." EPA's existing policy and guidance for insignificance serves as the basis for today's proposal and would apply when determining whether regional or hot-spot emissions are insignificant, and we are proposing to incorporate these criteria into the conformity rule.

The proposed § 93.109(k) is also consistent with other existing and proposed provisions of the rule in §§ 93.102 and 93.119 that address insignificance of pollutants and precursors before and after a SIP is submitted. See Sections VIII. and IX. for proposals for when PM<sub>2.5</sub> precursors and re-entrained road dust would be considered significant for PM<sub>2.5</sub> analyses.

The July 1996 conformity proposal also indicates that EPA would conduct an adequacy review of initial SIPs that claim that motor vehicle emissions are insignificant. The adequacy review process would provide the public with an opportunity to comment on the adequacy of these SIPs and on whether or not the insignificance criteria have been met. EPA's adequacy finding for such SIPs would signify that we agree that the area has satisfactorily demonstrated insignificance based on the list of factors described above from the July 1996 proposal. EPA will determine significance of regional and hot-spot motor vehicle emissions in a given area on a case-by-case basis, and we will consider the impact of individual precursors, as well as the overall impact of all motor vehicle emissions in our insignificance finding. For more information on EPA's adequacy review of SIPs that claim insignificant motor vehicle emissions, see the preamble to the June 30, 2003 conformity proposal that addresses the March 2, 1999 conformity court decision (68 FR 38983).

Section 93.105(b) describes when the interagency consultation process is used in SIP development. The interagency consultation process can be used to consider the insignificance criteria reflected in today's proposed § 93.109(k), and any other relevant local information. If the interagency consultation group for an area agrees

that regional and/or hot-spot motor vehicle emissions are insignificant, such a finding should be clearly stated and well supported in a SIP that is subsequently submitted to EPA for adequacy review and/or approval.

EPA developed the insignificance policy to provide flexibility for areas where motor vehicle emissions had little to no impact on an area's air quality problem. We believe that requiring these areas to perform a regional emissions analysis is not necessary to meet Clean Air Act section 176(c) requirements that transportation actions not worsen air quality, since the overall contribution of motor vehicle emissions in these areas is small and any significant change in such emissions over time would be unlikely. In addition, regional analyses may drain limited State and local resources from targeting the most important sources of air pollution in these areas. To date, approximately a dozen areas have taken advantage of the insignificance policy, consisting mainly of PM<sub>10</sub> areas with air quality problems caused primarily by stationary or area sources. This current universe of areas has not changed significantly since 1993, and we do not anticipate the number of areas that could demonstrate insignificance of motor vehicle emissions to substantially increase in the future. Therefore, the proposal would waive regional emissions analyses in these areas without compromising air quality, since state and local resources could then be directed toward reducing emissions from those sources that contribute the most to an area's air quality problem.

### C. Limited Maintenance Plans

EPA currently has limited maintenance plan policies for the 1-hour ozone, CO, and PM<sub>10</sub> standards. If a nonattainment area attains one of these standards and requests to be redesignated, it can choose to submit a more streamlined maintenance plan provided certain criteria are met. Although the three limited maintenance plan policies vary slightly, in general, an area would have to provide air quality data that shows with certainty that the area is attaining the standard and assurance that future violations of that standard are unlikely. In addition, an area would need to demonstrate that only limited growth in transportation emissions in the area is expected.

EPA is proposing three rule revisions that would make the conformity rule consistent with EPA's existing limited maintenance plan policies. Today's proposal would also allow for any future limited maintenance plan

policies for other standards to be considered in the conformity process.

First, EPA is proposing in § 93.101 to add a basic definition for "limited maintenance plan." Second, we are proposing a new paragraph § 93.109(j) that states that a regional emissions analysis is not required to satisfy §§ 93.118 and/or 93.119 in areas that have an adequate or approved limited maintenance plan for a given pollutant and standard. However, a conformity determination that meets other applicable criteria, including the hot-spot requirements for projects in CO and PM10 nonattainment and maintenance areas, interagency and public consultation, and SIP TCM implementation, would still be required in these areas. A regional analysis would also be required for any other pollutants or standards that otherwise apply. The proposed § 93.109(j) would require a limited maintenance plan to demonstrate that it would be unreasonable to expect that an area would experience enough motor vehicle emissions growth to cause a violation. The interagency consultation process should be used to discuss the development of a limited maintenance plan (40 CFR 93.105(b)).

Third, as discussed above, EPA is proposing a new § 93.121(c) to clarify when funding and approval for new regionally significant non-federal projects would be granted. Consistent with our proposed § 93.109(j) for federal projects in areas with limited maintenance plans, this proposal would not require a regional emissions analysis per §§ 93.118 and/or 93.119 to be satisfied for regionally significant non-federal projects for the pollutant and standard that is addressed by the limited maintenance plan. However, the requirements in either § 93.121(a) or (b) would be required to be satisfied for any remaining pollutant or standard that apply in an area that are not addressed by the limited maintenance plan.

EPA believes that violations of a pollutant and standard due to unexpected growth would be highly unlikely in limited maintenance plan areas. Furthermore, EPA considers it a reasonable assumption that motor vehicle emissions in a limited maintenance plan area could increase to any realistic level during the maintenance period without causing or contributing to a violation of the standard. As a result, limited maintenance plans are treated as essentially not constraining for the length of the maintenance period, and the Clean Air Act requirements to not worsen air quality are met without a regional conformity analysis. While this

policy does not exempt an area from the need to affirm conformity, it does eliminate the basis for the regional emission analysis since EPA would be concluding through our adequacy review or approval of the limited maintenance plan that limits on motor vehicle emissions during the maintenance period are unnecessary.

The proposed revisions to §§ 93.101, 93.109 and 93.121 would not have a practical impact on how conformity is demonstrated in areas with applicable limited maintenance plans, as EPA is simply proposing to incorporate into the conformity rule our existing policies for these areas. The purpose of these proposed revisions is to assist limited maintenance plan areas in their efforts to implement conformity. These revisions would in no way impose additional requirements for limited maintenance plan areas, nor would it eliminate any existing requirements that could compromise air quality.

For more information on transportation conformity and limited maintenance plans, see the preamble to the July 9, 1996 proposed conformity rule (61 FR 36118) and EPA's existing limited maintenance plan policies. For a discussion on EPA's adequacy review of limited maintenance plans, see the preamble to the June 30, 2003 proposal (68 FR 38974).

#### *D. Grace Period for Transportation Modeling and Plan Content Requirements in Certain Ozone and CO Areas*

EPA is proposing three changes to the conformity rule's provisions for when more rigorous transportation modeling and plan content requirements apply in certain ozone and CO areas. First, we are proposing a two-year grace period before the more advanced transportation modeling requirements in § 93.122(b) are required in the following types of areas: (1) Ozone and CO areas that are already classified as serious or above in which the urbanized area population increases to over 200,000, and (2) moderate ozone and CO areas that have an urbanized area population over 200,000 and are reclassified to serious (for ozone and CO) or severe (for ozone only). Section 93.122(b) of the current rule requires more advanced transportation network modeling requirements only in serious and above ozone and CO areas with urbanized populations over 200,000.

Second, EPA is proposing to expand the types of areas covered by the current rule's grace period for transportation plan content requirements. Section 93.106(b) currently includes a two-year grace period before the more specific

transportation plan requirements in § 93.106(a) apply in moderate ozone and CO areas that are reclassified to serious and have urbanized populations over 200,000. The proposal would provide that same flexibility to: (1) Serious and severe ozone areas and serious CO areas in which the urbanized area population increases to over 200,000, and (2) moderate ozone areas that are reclassified to severe.

Third, we are clarifying in both §§ 93.106 and 93.122 that the two-year grace periods would begin upon either: (1) The official notice by the Census Bureau that the urbanized area population is over 200,000, or (2) the effective date of EPA's action that reclassifies a larger metropolitan moderate ozone or CO area to serious (ozone and CO) or severe (ozone only). An example of an official notice by the Census Bureau would be an announcement in the **Federal Register** that the urbanized population in a metropolitan area has increased to over 200,000.

EPA is making the above changes to provide flexibility as originally intended. In the proposal to the 1993 conformity rule, EPA explained that the purpose of the two-year grace period in applying these more specific transportation plan content requirements in moderate areas that are bumped-up to a serious classification is to "allow these areas time to specify their networks and perform the other research and data collection activities necessary to develop network models and specific plans" (January 11, 1993, 58 FR 3776). Adding the two-year grace period to § 93.122 provides this extra time. Furthermore, specific transportation plans are required in higher classification ozone and CO areas in § 93.106(a) to allow for more sophisticated modeling in such areas in § 93.122(b). For example, § 93.106(a) requires the most recent demographic and land-use information and a detailed description of the transit and highway system for each required transportation plan horizon year. Such details would be part of a more advanced analysis under § 93.122(b).

For the reasons stated in the 1993 rule, EPA originally intended §§ 93.106 and 93.122 of the conformity rule to work together. Providing a two-year grace period for the more specific transportation plan requirements in § 93.106(a), without providing such a grace period for the more advanced modeling requirements in § 93.122(b) does not achieve the flexibility that was intended for these areas.

In addition, EPA believes that the two-year grace periods should also

apply in ozone and CO areas that are already classified serious or above, but that are currently not required to meet the more rigorous plan and modeling requirements because their urbanized area population is lower than 200,000. If the urbanized area population in such an area increases to over 200,000, EPA believes it is reasonable that such an area would also need additional time to specify its networks and gather additional data to develop a more specific plan and conduct more advanced transportation modeling.

The proposed clarification to the existing § 93.106(b) provision, as well as the proposed § 93.122(c), would also provide flexibility in limited cases where a moderate ozone area is reclassified to severe. For example, when moderate ozone areas with an urbanized population greater than 200,000 fail to attain the standard by either the moderate or serious ozone attainment dates specified in the Clean Air Act, EPA could reclassify these areas to severe. Today's proposal would clarify how the grace period would be implemented in such limited cases. This particular proposal would not be relevant to moderate CO areas, as these areas can only be reclassified to serious if they fail to attain by their specified attainment date. The Clean Air Act does not provide for a severe CO classification.

Finally, we should note that today's proposals would not make any changes to the existing transportation plan content and modeling requirements. The proposal would simply clarify when these requirements begin to apply when circumstances change in certain areas.

#### *E. Minor Clarification to the List of PM<sub>10</sub> Precursors*

We are proposing minor clarifications to §§ 93.102(b)(2)(iii) and 93.119(f)(5) of the conformity rule. Under the proposed § 93.102(b)(2)(iii), only VOC and NO<sub>x</sub> would be identified as PM<sub>10</sub> precursors, and PM<sub>10</sub> would be deleted from the list of PM<sub>10</sub> precursors in this paragraph. We are proposing this clarification because § 93.102(b)(1) already requires that direct PM<sub>10</sub> emissions be addressed in conformity analyses in PM<sub>10</sub> nonattainment and maintenance areas. Therefore, inclusion of direct PM<sub>10</sub> as a PM<sub>10</sub> precursor in § 93.102(b)(2)(iii) is duplicative.

The proposed changes to § 93.119(f)(5) would provide consistency with other pollutants and precursors discussed in this paragraph. Neither of these proposals would affect conformity determinations in PM<sub>10</sub> nonattainment and maintenance areas.

#### *F. Clarification of Requirements for Non-federal Projects in Isolated Rural Areas*

EPA is proposing a minor clarification to § 93.121(b)(1) of the conformity rule that addresses the conformity requirements for non-federal projects in isolated rural nonattainment and maintenance areas. Specifically, the proposal would require a regionally significant non-federal project to be included in the regional emissions analysis of the most recent conformity determination "that reflects" the portion of the statewide transportation plan and STIP which includes projects planned for the isolated rural nonattainment or maintenance area.

Today's proposed revision to § 93.121(b)(1) is intended to clarify that conformity determinations in isolated rural nonattainment and maintenance areas should not be "for" the statewide transportation plan or STIP, as written in the current rule. In the proposal for the original 1993 conformity rule, we explain that "STIPs are not TIPs as the latter term is meant in Clean Air Act section 176(c), and that conformity therefore does not apply to [STIPs] directly" (January 11, 1993, 58 FR 62206). However, isolated rural areas do not develop metropolitan transportation plans and TIPs per DOT's planning regulations. Instead, conformity determinations in isolated rural nonattainment and maintenance areas should include those existing and planned projects that are within the area and that are reflected in the statewide transportation plan and STIP, including regionally significant non-federal projects. This proposed change simply clarifies the conformity requirements for isolated rural nonattainment and maintenance areas and should not have a practical impact on how conformity is demonstrated in these areas.

#### *G. Use of Adequate and Approved Budgets in Conformity*

EPA is clarifying in § 93.109 for each criteria pollutant and standard covered by the conformity rule that the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after one of the following:

- The effective date of EPA's finding that a motor vehicle emissions budget in a submitted SIP is adequate,
- The publication date of EPA's approval of such a budget in the **Federal Register**, or
- The effective date of EPA's approval of such a budget in the **Federal Register**, if the approval is completed through direct final rulemaking.

Under this proposal, the budget would be used the first time one of these

three EPA actions occur. In EPA's June 30, 2003 proposal that would implement the March 2, 1999 conformity court decision, we proposed to only require the budget test after the effective date of EPA's finding that a control strategy SIP or maintenance plan submission is adequate. Our June 2003 proposal for § 93.109 was incomplete.

When an area submits an attainment demonstration, rate-of-progress plan or maintenance plan with motor vehicle emissions budgets, EPA will generally review that SIP for adequacy so that the budgets can be used prior to EPA's approval of the SIP. However, there have been limited and unique cases where EPA has not conducted the adequacy review process prior to the approval of the SIP. Rather, EPA may simply approve such SIPs through a separate proposal and final rule or through direct final rulemaking. Today's proposal would simply clarify that in these limited cases the budget test would be required upon the publication date of EPA's final approval of the SIP and motor vehicle emissions budgets in the **Federal Register**, or the effective date of EPA's direct final rulemaking, whichever applies in a given situation.

EPA believes that this proposed clarification would have no practical impact on how the budget test is implemented when new budgets become available for conformity purposes. The Clean Air Act section 176(c) requires that transportation activities conform to the motor vehicle emissions level established in the approved SIP. Therefore, once a SIP is approved, its budgets must be used in conformity under the statute. In addition, since the March 2, 1999 court decision, areas have incorporated new budgets from submitted SIPs into the transportation planning and conformity processes as soon as they are deemed appropriate for conformity—either through EPA's adequacy or approval processes.

We should also note that this clarification to § 93.109 as proposed in the June 30, 2003 conformity proposal, is consistent with the March 1999 court decision and EPA's May 14, 1999 guidance implementing that decision. Under this proposal, submitted SIPs and motor vehicle emissions budgets would be used in conformity determinations only after EPA has formally found such budgets to be consistent with an area's plan for achieving clean air. For more information on EPA's adequacy process and the types of submitted SIPs that EPA will review for adequacy, see EPA's May 14, 1999 guidance implementing the March 1999 court decision and the

preamble to the June 30, 2003 proposal (68 FR 38974).

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

Clean Air Act section 176(c)(4)(C) currently requires states to submit revisions to their SIPs to reflect all of the federal 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. However, a state must have the authority to make an MOU or MOA enforceable as a matter of state law, if such mechanisms are used.

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 sections of the federal conformity rule that are covered by the approved conformity SIP). Areas without approved conformity SIPs will be able to use immediately any conformity amendments that are finalized in the future as a result of today's proposed action.

In contrast, EPA has already approved conformity SIPs in some areas that include sections from previous conformity rulemakings. In general, amendments to a section of the federal rule other than those compelled by a court decision become effective in states with approved conformity SIPs only when the State includes the amended section in a conformity SIP revision and EPA approves that SIP revision. EPA will continue to work with states to approve such revisions as expeditiously as possible through flexible administrative techniques, such as parallel processing or direct final rulemaking.

There are, however, aspects of today's proposal that should not already be in any approved conformity SIPs, since new provisions are being proposed to implement the 8-hour ozone and PM<sub>2.5</sub> standards. For these new provisions, all 8-hour ozone and PM<sub>2.5</sub> areas will be able to use such amendments upon the effective date of a final rule based on this proposal. When a final rule is issued, EPA will provide guidance on when sections of the rule can be used in the conformity process in areas with approved conformity SIPs.

### XVI. Public Hearing

Anyone who wants to present testimony about this proposal at the public hearing (*see DATES*) should, if possible, notify the contact persons listed in the **FOR FURTHER INFORMATION CONTACT** section of this proposal at least

seven days prior to the day of the hearing. The contact person(s) should be given an estimate of the time required for the presentation of testimony and notification of any need for audio/visual equipment. A sign-up sheet will be available at the registration table the morning of the hearing for scheduling those who have not notified the EPA contact(s) earlier. This testimony will be scheduled on a first-come, first-serve basis to follow the previously scheduled testimony.

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

The official records of the hearing will be kept open until the close of the comment period to allow submission of rebuttal and supplementary testimony. All such submissions should be directed to the Air Docket I.D. No. OAR-2003-0049. See Section I.C. of this proposal for more information on how to submit comments to the docket. The hearing will be conducted informally, and technical rules of evidence will not apply. A written transcript of the hearing will be placed in the docket for review. Anyone who desires to purchase a copy of the transcript should make individual arrangements with the court reporter recording the proceeding.

### XVII. 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 a "significant regulatory action" because this action raises novel legal or policy issues arising out of legal mandates and the principles set forth in the Executive Order. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

#### B. Paperwork Reduction Act

The information collection requirements in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* (ICR 2103.01). The information collection requirements are not enforceable until OMB approves them.

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

EPA estimates that this rulemaking will place additional burden on those areas that are designated nonattainment for the first time and have no prior experience with the conformity process. For these completely "new" areas there will be burden associated with rule familiarization, transportation and emissions modeling and interagency consultation. New metropolitan

nonattainment areas will be required to demonstrate conformity of their transportation plans every three years. In addition, DOT's planning regulations require TIP updates every two years, and consequently, a TIP conformity determination will be required every two years. Based on preliminary air quality data and State recommendations for new nonattainment areas, we estimate that approximately 40 areas will be designated nonattainment for the first time under the 8-hour ozone and PM<sub>2.5</sub> standards. We estimate that the total annual burden per respondent for transportation conformity activities is 275 hours at a total annual cost per respondent of \$6750.00.

The information collection requirements of EPA's current transportation conformity rule are covered under the DOT information collection request (ICR) entitled, "Metropolitan and Statewide Transportation Planning," with the OMB Control Number 2132-0529. Today's total burden for new areas is based on DOT's ICR for developing transportation plans and TIPs in nonattainment and maintenance areas, and should be viewed as a cursory estimate. Today's estimate only includes the incremental burden associated with making conformity determinations for the new standards; it does not address the development of transportation plans and TIPs or motor vehicle emissions budgets, since these documents are developed to meet other requirements. The total annual burden also assumes that all new areas will be metropolitan areas that develop transportation plans and TIPs. Accounting for newly designated isolated rural nonattainment areas may reduce the total burden for new areas, as isolated rural areas are not required to demonstrate conformity as often as metropolitan areas. In addition, this estimate of new burden assumes that plan and TIP conformity determinations are developed separately. However, the regional emissions analysis requirements in the conformity regulation are the same for plans and TIPs, and many areas rely on the same regional emissions analysis and conformity determination when plan and TIP updates are done concurrently. EPA plans to further examine this burden estimate for new areas designated under the 8-hour ozone and PM<sub>2.5</sub> standards, along with any incremental burdens for existing nonattainment and maintenance areas that have previous conformity experience, in our subsequent ICR for this rulemaking.

Burden means the total time, effort, or financial resources expended by persons

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

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this rulemaking, which will include the ICR, under Docket ID number OAR-2003-0049. EPA is seeking comment on the general description of this proposal's information collection. EPA intends, in the near future, to develop and submit to OMB an ICR that includes a more detailed estimate of the incremental burden of this rulemaking. The public will be provided a separate comment period to comment on the ICR once it is submitted to OMB. Submit any comments related to the collection of information and subsequent ICR for this proposed rule to EPA and OMB. See the **ADDRESSES** section of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal and subsequent ICR.

#### 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 under Federal transportation laws only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities within the meaning of the Regulatory Flexibility Act. 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 itself 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 amend the existing Federal conformity regulations to cover areas newly designated nonattainment under the recently promulgated 8-hour ozone and fine particulate (PM<sub>2.5</sub>) ambient air quality standards. Clean Air Act section 176(c)(5) requires the applicability of conformity to such areas as a matter of law one year after nonattainment designations. Thus, although this rule explains how conformity should be conducted, it merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of \$100 million or more in any year. 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 beyond that already imposed by applicable Federal law; 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 certain nonattainment and maintenance areas as a matter of law, and this proposed rule merely establishes and revises procedures for transportation planning entities in subject areas to follow in meeting their existing statutory obligations. Similarly, other minor amendments included in today's proposal are the result of 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 statutory requirements imposed by the Clean Air Act, and the proposed rule 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 provisions addressing newly designated nonattainment areas subject to conformity requirements under 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 and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus 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: October 22, 2003.

Marianne Lamont Horinko, Acting 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, new definitions for "1-hour ozone NAAQS," "8-hour ozone NAAQS" and "Limited maintenance plan," and by revising definitions for "Control strategy implementation plan revision" and "Milestone" to read as follows:

§ 93.101 Definitions.

1-hour ozone NAAQS means the 1-hour ozone national ambient air quality standard codified at 40 CFR 50.9.

8-hour ozone NAAQS means the 8-hour ozone national ambient air quality standard codified at 40 CFR 50.10.

Control strategy implementation plan revision is the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (including implementation plan revisions submitted to satisfy CAA sections 172(c), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 187(g), 189(a)(1)(B), 189(b)(1)(A), and 189(d); sections 192(a) and 192(b), for nitrogen dioxide; and any other applicable CAA provision requiring a demonstration of reasonable further progress or attainment).

Limited maintenance plan is a maintenance plan that EPA has determined meets EPA's limited maintenance plan policy criteria for a given NAAQS and pollutant. To qualify for a limited maintenance plan, for example, an area must have a design value that is below a given NAAQS, and it must be reasonable to expect that a NAAQS violation will not result from any level of future motor vehicle emissions growth.

Milestone has the meaning given in CAA sections 182(g)(1) and 189(c) for serious and above ozone nonattainment areas and PM10 nonattainment areas, respectively. For all other nonattainment areas, a milestone consists of an emissions level and the date on which that level is to be achieved as required by the applicable CAA provision for reasonable further progress towards attainment.

- 3. Section 93.102 is amended by: a. Revising paragraphs (b)(1), (b)(2) introductory text and (b)(2)(iii); b. removing the word "and" at the end of paragraph (b)(2)(ii); c. adding paragraphs (b)(2)(iv) and (v); d. redesignating paragraph (b)(3) as paragraph (b)(4); e. adding a new paragraph (b)(3); and f. revising paragraph (d).

The revisions and additions read as follows:

§ 93.102 Applicability.

\* \* \* \* \*

(b) \* \* \* (1) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide (NO2), particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM10); and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM2.5).

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

\* \* \* \* \*

(iii) VOC and/or NOx in PM10 areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related emissions of one or both of these precursors within the nonattainment area are a significant contributor to the PM10 nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy;

Option 1 for paragraphs (b)(2)(iv) and (v):

(iv) VOC and/or NOx in PM2.5 areas, unless the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related emissions of one or both of these precursors within the nonattainment area are not a significant contributor to the PM2.5 nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) does not establish an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy; and

(v) Oxides of sulfur (SOx) and/or ammonia (NH3) in PM2.5 areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related emissions of one or both of these precursors within the nonattainment

area are a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

*Option 2 for paragraph (b)(2)(iv) without paragraph (b)(2)(v):*

(iv) VOC, NO<sub>x</sub>, oxides of sulfur (SO<sub>x</sub>) and/or ammonia (NH<sub>3</sub>) in PM<sub>2.5</sub> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related emissions of any of these precursors within the nonattainment area are a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

(3) The provisions of this subpart apply to PM<sub>2.5</sub> nonattainment and maintenance areas with respect to PM<sub>2.5</sub> from re-entrained road dust if the EPA Regional Administrator or the director of the State air agency has made a finding that re-entrained road dust emissions within the area are a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) includes re-entrained road dust in the approved (or adequate) budget as part of the reasonable further progress, attainment or maintenance strategy. Re-entrained road dust emissions are produced by travel on paved and unpaved roads (including emissions from anti-skid and deicing materials).

(d) *Grace period for new nonattainment areas.* For areas or portions of areas which have been continuously designated attainment or

not designated for any NAAQS for ozone, CO, PM<sub>10</sub>, PM<sub>2.5</sub> or NO<sub>2</sub> since 1990 and are subsequently redesignated to nonattainment or designated nonattainment for any NAAQS for any of these pollutants, the provisions of this subpart shall not apply with respect to that standard for 12 months following the effective date of final designation to nonattainment for each NAAQS for such pollutant.

4. Section 93.105(c)(1)(vii) is amended by revising the reference “§ 93.109(g)(2)(iii)” to read “§ 93.109(l)(2)(iii)”.

5. Section 93.106 is amended by revising paragraph (b) to read as follows:

**§ 93.106 Content of transportation plans.**

\* \* \* \* \*

(b) *Two-year grace period for transportation plan requirements in certain ozone and CO areas.* The requirements of paragraph (a) of this section shall not apply for two years from the following:

(i) The effective date of EPA’s reclassification of a moderate ozone or CO area that has an urbanized area population greater than 200,000 to serious or severe (ozone only); or,

(ii) The official notice by the Census Bureau that determines the urbanized area population of a serious or above ozone or CO area to be greater than 200,000.

\* \* \* \* \*

6. Section 93.109 is amended by:

a. Revising the paragraph (b) introductory text;

b. In Table 1 of paragraph (b), revising the entry for “§ 93.118 and or § 93.119” under “Transportation Plan:” and the entry for “§ 93.118 and or § 93.119” under “TIP:”, and revising the entry for “§ 93.117” under “Project (From a Conforming Plan and TIP):” and the entries for “§ 93.117” and “§ 93.118 and or § 93.119” under “Project (Not From a Conforming Plan and TIP):”;

c. Revising paragraph (c);

d. Redesignating paragraphs (d), (e), (f) and (g) as paragraphs (f), (g), (h) and (l);

e. Adding new paragraphs (d), (e), (i), (j) and (k);

f. Revising newly designated paragraphs (f) introductory text, (f)(2), (f)(3) and (f)(4)(i) and (ii);

g. Revising newly redesignated paragraphs (g) introductory text, (g)(2), and (g)(3) introductory text, and removing newly designated paragraphs (g)(3)(i) and (g)(3)(ii) and redesignating paragraph (g)(3)(iii) as (g)(3)(ii) and adding new paragraph (g)(3)(i);

h. Revising newly designated paragraph (h); and

i. Revising newly designated paragraph (l)(2) introductory text; and, in newly designated paragraph (l)(2)(ii)(B), revising “§ 93.119(d)(2)” to read “§ 93.119(f)(2)”; and, in newly redesignated paragraph (l)(2)(iii), revising “paragraph (g)(2)(ii)” and “paragraph (g)(2)(ii)(C)” to read “paragraph (l)(2)(ii)” and “paragraph (l)(2)(ii)(C)”, respectively.

The revisions and additions read as follows:

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

\* \* \* \* \*

(b) Table 1 in this paragraph indicates the criteria and procedures in §§ 93.110 through 93.119 which apply for transportation plans, TIPs, and FHWA/FTA projects. Paragraphs (c) through (i) of this section explain when the budget, interim emissions, and hot-spot tests are required for each pollutant and NAAQS. Paragraph (j) of this section addresses conformity requirements for areas with approved or adequate limited maintenance plans. Paragraph (k) of this section addresses nonattainment and maintenance areas which EPA has determined have insignificant motor vehicle emissions. Paragraph (l) of this section addresses isolated rural nonattainment and maintenance areas. Table 1 follows:

TABLE 1.—CONFORMITY CRITERIA

Transportation plan:	*	*	*	*	*	*
§ 93.118 and/or § 93.119 .....	*	*	*	*	*	*
TIP:	*	*	*	*	*	*
§ 93.118 and/or § 93.119 .....	*	*	*	*	*	*
Project (From a Conforming Plan and TIP):	*	*	*	*	*	*
§ 93.117 .....	*	*	*	*	*	*

PM<sub>10</sub> and PM<sub>2.5</sub> control measures.

TABLE 1.—CONFORMITY CRITERIA—Continued

*	*	*	*	*	*	*
Project (Not From a Conforming Plan and TIP):						
*	*	*	*	*	*	*
§ 93.117 .....				PM <sub>10</sub> and PM <sub>2.5</sub> control measures.		
§ 93.118 and/or § 93.119 .....				Emissions budget and/or Interim emissions.		
*	*	*	*	*	*	*

(c) *1-hour ozone NAAQS nonattainment and maintenance areas.* This paragraph applies when an area is nonattainment or maintenance for the 1-hour ozone NAAQS (*i.e.*, until the effective date of any revocation of the 1-hour ozone NAAQS for an area). In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In all 1-hour ozone nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) The effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 1-hour ozone NAAQS is adequate for transportation conformity purposes;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(2) In ozone nonattainment areas that are required to submit a control strategy implementation plan revision for the 1-hour ozone NAAQS (usually moderate and above areas), the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made when there is no approved motor vehicle emissions budget from an applicable implementation plan for the 1-hour ozone NAAQS and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan for the 1-hour ozone NAAQS.

(3) An ozone nonattainment area must satisfy the interim emissions test for NO<sub>x</sub>, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations

is a 15% plan or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO<sub>x</sub>. The implementation plan for the 1-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<sub>x</sub> if the implementation plan or plan submission contains an explicit NO<sub>x</sub> motor vehicle emissions budget that is intended to act as a ceiling on future NO<sub>x</sub> emissions, and the NO<sub>x</sub> motor vehicle emissions budget is a net reduction from NO<sub>x</sub> emissions levels in 1990.

(4) Ozone nonattainment areas that have not submitted a maintenance plan and that are not required to submit a control strategy implementation plan revision for the 1-hour ozone NAAQS (usually marginal and below areas) must satisfy one of the following requirements:

(i) The interim emissions tests required by § 93.119; or

(ii) The State shall submit to EPA an implementation plan revision for the 1-hour ozone NAAQS that contains motor vehicle emissions budget(s) and a reasonable further progress or attainment demonstration, and the budget test required by § 93.118 must be satisfied using the adequate or approved motor vehicle emissions budget(s) (as described in paragraph (c)(1) of this section).

(5) Notwithstanding paragraphs (c)(1) and (c)(2) of this section, moderate and above ozone nonattainment areas with three years of clean data that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements for the 1-hour ozone NAAQS must satisfy one of the following requirements:

(i) The interim emissions tests as required by § 93.119;

(ii) The budget test as required by § 93.118, using the adequate or approved motor vehicle emissions budgets in the submitted or applicable control strategy implementation plan for the 1-hour ozone NAAQS (subject to the timing requirements of paragraph (c)(1) of this section); or

(iii) The budget test as required by § 93.118, using the motor vehicle emissions of ozone precursors in the most recent year of clean data as motor vehicle emissions budgets, if such budgets are established by the EPA rulemaking that determines that the area has clean data for the 1-hour ozone NAAQS.

(d) *8-hour ozone NAAQS nonattainment and maintenance areas without motor vehicle emissions budgets for the 1-hour ozone NAAQS for any portion of the 8-hour nonattainment area.* This paragraph applies to areas that were never designated nonattainment for the 1-hour ozone NAAQS and areas that were designated nonattainment for the 1-hour ozone NAAQS but that never submitted a control strategy SIP or maintenance plan with approved or adequate motor vehicle emissions budgets. This paragraph applies 1 year after the effective date of EPA's nonattainment designation for the 8-hour ozone NAAQS, according to § 93.102(d). In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such 8-hour ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In such 8-hour ozone nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) The effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 8-hour ozone NAAQS is adequate for transportation conformity purposes;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

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

implementation plan revision for the 8-hour ozone NAAQS (moderate and above and certain subpart 1 areas), the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made when there is no approved motor vehicle emissions budget from an applicable implementation plan for the 8-hour ozone NAAQS and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan for the 8-hour ozone NAAQS.

(3) Such an 8-hour ozone nonattainment area must satisfy the interim emissions test for NO<sub>x</sub>, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or other control strategy SIP that addresses reasonable further progress that does not include a motor vehicle emissions budget for NO<sub>x</sub>. The implementation plan for the 8-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<sub>x</sub> if the implementation plan or plan submission contains an explicit NO<sub>x</sub> motor vehicle emissions budget that is intended to act as a ceiling on future NO<sub>x</sub> emissions, and the NO<sub>x</sub> motor vehicle emissions budget is a net reduction from NO<sub>x</sub> emissions levels in 2002.

(4) Ozone nonattainment areas that have not submitted a maintenance plan and that are not required to submit a control strategy implementation plan revision for the 8-hour ozone NAAQS (usually marginal and below areas) must satisfy one of the following requirements:

(i) The interim emissions tests required by § 93.119; or

(ii) The State shall submit to EPA an implementation plan revision for the 8-hour ozone NAAQS that contains motor vehicle emissions budget(s) and a reasonable further progress or attainment demonstration, and the budget test required by § 93.118 must be satisfied using the adequate or approved motor vehicle emissions budget(s) (as described in paragraph (d)(1) of this section).

(5) Notwithstanding paragraphs (d)(1) and (d)(2) of this section, moderate and above ozone nonattainment areas with three years of clean data for the 8-hour ozone NAAQS that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements for the 8-hour ozone NAAQS must

satisfy one of the following requirements:

(i) The interim emissions tests as required by § 93.119;

(ii) The budget test as required by § 93.118, using the adequate or approved motor vehicle emissions budgets in the submitted or applicable control strategy implementation plan for the 8-hour ozone NAAQS (subject to the timing requirements of paragraph (d)(1) of this section); or

(iii) The budget test as required by § 93.118, using the motor vehicle emissions of ozone precursors in the most recent year of clean data as motor vehicle emissions budgets, if such budgets are established by the EPA rulemaking that determines that the area has clean data for the 8-hour ozone NAAQS.

(e) *8-hour ozone NAAQS nonattainment and maintenance areas with motor vehicle emissions budgets for the 1-hour ozone NAAQS that cover all or a portion of the 8-hour nonattainment area.* This provision applies 1 year after the effective date of EPA's nonattainment designation for the 8-hour ozone NAAQS, according to § 93.102(d). In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such 8-hour ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In such 8-hour ozone nonattainment and maintenance areas the budget test must be satisfied as required by §§ 93.118 for conformity determinations made on or after:

(i) The effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 8-hour ozone NAAQS is adequate for transportation conformity purposes;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(2) Prior to the effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan or maintenance plan for the 8-hour ozone NAAQS is adequate or the publication of EPA's approval of such a budget in the **Federal Register**, one of the following test(s) must be satisfied:

(i) The interim emissions tests as required by § 93.119 for the entire 8-hour ozone nonattainment area; or

(ii) The budget test and interim emissions tests as required by §§ 93.118 and 93.119 as follows:

(A) If the 8-hour ozone nonattainment area covers the same geographic area as the 1-hour ozone nonattainment or maintenance area, the budget test as required by § 93.118 for the entire 8-hour nonattainment area using the approved or adequate motor vehicle emissions budgets in the 1-hour ozone applicable implementation plan or implementation plan submission;

(B) If the 8-hour ozone nonattainment area covers a smaller geographic area within the 1-hour ozone nonattainment or maintenance area, the budget test as required by § 93.118 for either the 1-hour nonattainment or 8-hour nonattainment area using the approved or adequate motor vehicle emissions budgets or corresponding portions thereof in the 1-hour ozone applicable implementation plan or implementation plan submission, respectively. If additional control measures are necessary to meet the budget test for the 8-hour ozone NAAQS, such control measures could only be established within the 8-hour nonattainment area; or

(C) If the 8-hour ozone nonattainment area covers a larger geographic area and encompasses the entire or a portion of the 1-hour ozone nonattainment or maintenance area:

(1) The budget test as required by § 93.118 for the portion of the 8-hour ozone nonattainment area covered by the approved or adequate motor vehicle emissions budgets or corresponding portions thereof in the 1-hour ozone applicable implementation plan or implementation plan submission; and

(2) The interim emissions tests as required by § 93.119 for the portion of the 8-hour ozone nonattainment area not covered by the approved or adequate budgets in the 1-hour ozone implementation plan.

(3) Such an 8-hour ozone nonattainment area must satisfy the interim emissions test for NO<sub>x</sub>, as required by § 93.119, if the only implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or other control strategy SIP that addresses reasonable further progress that does not include a motor vehicle emissions budget for NO<sub>x</sub>. The implementation plan for the 8-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<sub>x</sub> if the implementation plan or plan submission contains an

explicit NO<sub>x</sub> motor vehicle emissions budget that is intended to act as a ceiling on future NO<sub>x</sub> emissions, and the NO<sub>x</sub> motor vehicle emissions budget is a net reduction from NO<sub>x</sub> emissions levels in 2002. Prior to an adequate or approved NO<sub>x</sub> motor vehicle emissions budget in the implementation plan submission for the 8-hour ozone NAAQS, the implementation plan for the 1-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<sub>x</sub> if the implementation plan contains an explicit NO<sub>x</sub> motor vehicle emissions budget that is intended to act as a ceiling on future NO<sub>x</sub> emissions, and the NO<sub>x</sub> motor vehicle emissions budget is a net reduction from NO<sub>x</sub> emissions levels in 1990.

(4) Notwithstanding paragraphs (e)(1) and (e)(2) of this section, ozone nonattainment areas with three years of clean data for the 8-hour ozone NAAQS that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements for the 8-hour ozone NAAQS must satisfy one of the following requirements:

(i) The interim emissions tests as required by § 93.119 and as described in paragraph (e)(2) of this section;

(ii) The budget test as required by § 93.118 and as described in paragraph (e)(2)(ii) of this section;

(iii) The budget test as required by § 93.118, using the adequate or approved motor vehicle emissions budgets in the submitted or applicable control strategy implementation plan for the 8-hour ozone NAAQS (subject to the timing requirements of paragraph (e)(1) of this section); or

(iv) The budget test as required by § 93.118, using the motor vehicle emissions of ozone precursors in the most recent year of clean data as motor vehicle emissions budgets, if such budgets are established by the EPA rulemaking that determines that the area has clean data for the 8-hour ozone NAAQS.

(f) *CO nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in CO nonattainment and maintenance areas conformity determinations must include a demonstration that the hot-spot, budget and/or interim emissions tests are satisfied as described in the following:

\* \* \* \* \*

(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:

(i) 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;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(3) Except as provided in paragraph (d)(4) of this section, in CO nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made when there is no approved 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.

(4) \* \* \*

(i) The interim emissions tests required by § 93.119; or

(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by § 93.118 must be satisfied using the adequate or approved motor vehicle emissions budget(s) (as described in paragraph (f)(2) of this section).

(g) *PM<sub>10</sub> nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in PM<sub>10</sub> nonattainment and maintenance areas conformity determinations must include a demonstration that the hot-spot, budget and/or interim emissions tests are satisfied as described in the following:

\* \* \* \* \*

(2) In PM<sub>10</sub> nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) 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;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(3) In PM<sub>10</sub> nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made:

(i) If there is no approved 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

\* \* \* \* \*

(h) *NO<sub>2</sub> nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in NO<sub>2</sub> nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In NO<sub>2</sub> nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) 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;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(2) In NO<sub>2</sub> nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made when there is no approved 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.

(i) *PM<sub>2.5</sub> nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in PM<sub>2.5</sub> nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In PM<sub>2.5</sub> nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for

conformity determinations made on or after:

(i) 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;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(2) In PM<sub>2.5</sub> nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made if there is no approved 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.

(j) *Areas with limited maintenance plans.* Notwithstanding the other paragraphs of this section, an area is not required to satisfy the regional emissions analysis for § 93.118 and/or § 93.119 for a given pollutant and NAAQS, if the area has an adequate or approved limited maintenance plan for such pollutant and NAAQS. A limited maintenance plan would have to demonstrate that it would be unreasonable to expect that such an area would experience enough motor vehicle emissions growth for a NAAQS violation to occur. A conformity determination that meets other applicable criteria in Table 1 of paragraph (b) of this section is still required, including the hot-spot requirements for projects in CO and PM<sub>10</sub> areas.

(k) *Areas with insignificant motor vehicle emissions.* Notwithstanding the other paragraphs in this section, an area is not required to satisfy a regional emissions analysis for § 93.118 and/or § 93.119 for a given pollutant/precursor and NAAQS, if EPA finds through the adequacy or approval process that a SIP demonstrates that regional motor vehicle emissions are an insignificant contributor to the air quality problem for that pollutant/precursor and NAAQS. The SIP would have to demonstrate that it would be unreasonable to expect that such an area would experience enough motor vehicle emissions growth in that pollutant/precursor for a NAAQS violation to occur. Such a finding would be based on a number of factors, including the percentage of motor vehicle emissions in the context of the total SIP inventory,

the current state of air quality as determined by monitoring data for that NAAQS, the absence of SIP motor vehicle control measures, and historical trends and future projections of the growth of motor vehicle emissions. A conformity determination that meets other applicable criteria in Table 1 of paragraph (b) of this section is still required, including regional emissions analyses for § 93.118 and/or § 93.119 for other pollutants/precursors and NAAQS that apply. Hot-spot requirements for projects in CO and PM<sub>10</sub> areas must also be satisfied, unless EPA determines that the SIP demonstrates that hot-spot emissions are also insignificant. If EPA subsequently finds that motor vehicle emissions of a given pollutant/precursor are significant, this paragraph would no longer apply for future conformity determinations for that pollutant/precursor and NAAQS.

(1) \* \* \*

(2) Isolated rural nonattainment and maintenance areas are subject to the budget and/or interim emissions tests as described in paragraphs (c) through (k) of this section, with the following modifications:

\* \* \* \* \*

7. Section 93.117 is revised to read as follows:

**§ 93.117 Criteria and procedures: Compliance with PM<sub>10</sub> and PM<sub>2.5</sub> control measures.**

The FHWA/FTA project must comply with any PM<sub>10</sub> and PM<sub>2.5</sub> control measures in the applicable implementation plan. This criterion is satisfied if the project-level conformity determination contains a written commitment from the project sponsor to include in the final plans, specifications, and estimates for the project those control measures (for the purpose of limiting PM<sub>10</sub> and PM<sub>2.5</sub> emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.

8. In § 93.118, paragraph (a) is amended by revising the reference “§ 93.109(c) through (g)” to read “§ 93.109(c) through (l)”, and paragraph (e)(2) is amended by revising the phrase “emission reduction tests required by § 93.119” to read “interim emissions tests required by § 93.119”.

9. Section 93.119 is amended by:

- a. Revising paragraphs (a) and (b);
- b. Redesignating paragraphs (c), (d), (e), (f), (g) and (h) as paragraphs (d), (f), (g), (h), (i) and (j);
- c. Adding new paragraphs (c) and (e);

d. Revising newly redesignated paragraphs (d) introductory text and (d)(1);

e. Revising newly redesignated paragraph (f)(5), removing the period at the end of newly redesignated paragraph (f)(6) and adding a semicolon in its place, and adding new paragraphs (f)(7) and (f)(8), (f)(9) and (f)(10);

f. Revising newly redesignated paragraph (g);

g. In newly redesignated paragraphs (h) introductory text and (i) introductory text, revising the reference “paragraphs (b) and (c)” to read “paragraphs (b) through (e)”; and,

h. In newly redesignated paragraph (j), revising the reference “paragraphs (b) and (c)” to read “paragraphs (b) through (e)”.

The revisions and additions read as follows:

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

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must satisfy the interim emissions test(s) as described in § 93.109(c) through (l). This criterion applies to the net effect of the action (transportation plan, TIP, or project not from a conforming plan and TIP) on motor vehicle emissions from the entire transportation system.

(b) *Ozone areas.* The requirements of this paragraph apply to all 1-hour ozone and 8-hour ozone NAAQS areas, except for certain requirements as indicated. This criterion may be met:

(1) In moderate and above ozone nonattainment areas that are subject to the reasonable further progress requirements of CAA section 182(b)(1) if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the “Action” scenario are less than the emissions predicted in the “Baseline” scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(ii) The emissions predicted in the “Action” scenario are lower than:

- (A) 1990 emissions by any nonzero amount, in areas for the 1-hour ozone NAAQS as described in § 93.109(c); or
- (B) 2002 emissions by any nonzero amount, in areas for the 8-hour ozone NAAQS as described in § 93.109(d) and (e).

(2) In marginal and below ozone nonattainment areas and other ozone

nonattainment areas that are not subject to the reasonable further progress requirements of CAA section 182(b)(1) if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(ii) The emissions predicted in the "Action" scenario are not greater than:

(A) 1990 emissions, in areas for the 1-hour ozone NAAQS as described in § 93.109(c); or

(B) 2002 emissions, in areas for the 8-hour ozone NAAQS as described in § 93.109(d) and (e).

(c) *CO areas*. This criterion may be met:

(1) In moderate areas with design value greater than 12.7 ppm and serious CO nonattainment areas that are subject to CAA section 187(a)(7) if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(ii) The emissions predicted in the "Action" scenario are lower than 1990 emissions by any nonzero amount.

(2) In moderate areas with design value less than 12.7 ppm and not classified CO nonattainment areas if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(ii) The emissions predicted in the "Action" scenario are not greater than 1990 emissions.

(d) *PM<sub>10</sub> and NO<sub>2</sub> areas*. This criterion may be met in PM<sub>10</sub> and NO<sub>2</sub> nonattainment areas if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section

demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

\* \* \* \* \*

(e) *PM<sub>2.5</sub> areas*. This criterion may be met in PM<sub>2.5</sub> nonattainment areas if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(2) The emissions predicted in the "Action" scenario are not greater than 2002 emissions.

(f) \* \* \*

\* \* \* \* \*

(5) VOC and/or NO<sub>x</sub> in PM<sub>10</sub> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that one or both of such precursor emissions from within the area are a significant contributor to the PM<sub>10</sub> nonattainment problem and has so notified the MPO and DOT;

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

(7) PM<sub>2.5</sub> in PM<sub>2.5</sub> areas;

**Option 1 for paragraphs (f)(8), (f)(9) and (f)(10):**

(8) VOC and/or NO<sub>x</sub> in PM<sub>2.5</sub> areas, unless the EPA Regional Administrator or the director of the State air agency has made a finding that one or both of such precursor emissions from within the area are not a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT;

(9) SO<sub>x</sub> and/or NH<sub>3</sub> in PM<sub>2.5</sub> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that one or both of such precursor emissions from within the area are a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT; and

(10) Re-entrained road dust in PM<sub>2.5</sub> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that emissions from re-entrained road dust within the area are a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT.

**Option 2 for paragraphs (f)(8) and (f)(9) without paragraph (f)(10):**

(8) NO<sub>x</sub>, VOC, SO<sub>x</sub> and/or NH<sub>3</sub> in PM<sub>2.5</sub> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that one or more of such precursor emissions from within the area are a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT; and

(9) Reentrained road dust in PM<sub>2.5</sub> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that emissions from reentrained road dust within the area are a significant contributor to the PM<sub>2.5</sub> nonattainment problem and has so notified the MPO and DOT.

(g) *Analysis years*. (1) The regional emissions analysis must be performed for analysis years that are no more than ten years apart. The first analysis year must be no more than five years beyond the year in which the conformity determination is being made. The last year of the transportation plan's forecast period must also be an analysis year.

(2) For areas using paragraphs (b)(2)(i), (c)(2)(i), (d)(1), and (e)(1) of this section, a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section would not be required for analysis years in which the transportation projects and planning assumptions in the "Action" and "Baseline" scenarios are exactly the same. In such a case, paragraph (a) of this section can be satisfied by documenting that the transportation projects and planning assumptions in both scenarios are exactly the same, and consequently, the emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario for such analysis years.

10. Section 93.121 is amended by revising paragraph (b) introductory text by removing the reference "§ 93.109(g)" and adding in its place a reference for "§ 93.109(l)", and revising paragraph (b)(1) and adding new paragraph (c) 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.**

\* \* \* \* \*

(b) \* \* \*

(1) The project was included in the regional emissions analysis supporting the most recent conformity determination that reflects the portion of the statewide transportation plan and TIP which are in the nonattainment or maintenance area, and the project's

design concept and scope has not changed significantly; or

\* \* \* \* \*

(c) Notwithstanding paragraphs (a) and (b) of this section, in nonattainment and maintenance areas subject to § 93.109(j) or (k) for a given pollutant/precursor and NAAQS, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met for that pollutant/precursor and NAAQS:

(1) The project was included in the most recent conformity determination for the transportation plan and TIP and the project's design concept and scope has not changed significantly; or

(2) The project was included in the most recent conformity determination that reflects the portion of the statewide transportation plan and TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly.

11. Section 93.122 is amended by:

a. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e) and (g), respectively;

b. Adding new paragraphs (c) and (f); and

c. In newly redesignated paragraph (g)(1), revising the reference to "93.119

("Emission reductions in areas without motor vehicle emissions budgets")" to read "93.119 ("Interim emissions in areas without motor vehicle emissions budgets")".

The revisions and additions read as follows:

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

\* \* \* \* \*

(c) *Two-year grace period for regional emissions analysis requirements in certain ozone and CO areas.* The requirements of paragraph (b) of this section shall not apply for two years from the following:

(i) The effective date of EPA's reclassification of a moderate ozone or CO area that has an urbanized area population greater than 200,000 to serious or severe (ozone only); or,

(ii) The official notice by the Census Bureau that determines the urbanized area population of a serious or above ozone or CO area to be greater than 200,000.

\* \* \* \* \*

(f) *PM<sub>2.5</sub> from construction-related fugitive dust.* (1) For PM<sub>2.5</sub> areas in which the implementation plan does not identify construction-related fugitive PM<sub>2.5</sub> as a significant contributor to the nonattainment problem, the fugitive PM<sub>2.5</sub> emissions associated with highway and transit

project construction are not required to be considered in the regional emissions analysis.

(2) In PM<sub>2.5</sub> nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM<sub>2.5</sub> as a significant contributor to the nonattainment problem, the regional PM<sub>2.5</sub> emissions analysis shall consider construction-related fugitive PM<sub>2.5</sub> and shall account for the level of construction activity, the fugitive PM<sub>2.5</sub> control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

\* \* \* \* \*

**§ 93.125 [Amended]**

12. In § 93.125, paragraph (a) is amended by revising the reference "93.119 ("Emissions reductions in areas without motor vehicle emissions budgets")" to read "93.119 ("Interim emissions in areas without motor vehicle emissions budgets")", and paragraph (d) is amended by revising the phrase "emission reduction requirements of § 93.119" to read "interim emissions requirements of § 93.119".

[FR Doc. 03-27372 Filed 11-4-03; 8:45 am]

**BILLING CODE 6560-50-P**