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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 93**

[EPA-HQ-OAR-2011-0393; FRL-9636-5]

RIN 2060-AR03

**Transportation Conformity Rule: MOVES Regional Grace Period Extension****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to extend the grace period before the Motor Vehicle Emission Simulator (MOVES) model is required for regional emissions analyses for transportation conformity determinations (“regional conformity analyses”). This final rule provides an additional year to the previously established two-year conformity grace period. As a result, EPA is announcing in this **Federal Register** that MOVES must be used for new regional conformity analyses that begin after March 2, 2013. This action does not affect EPA’s previous approval of the use of MOVES in state air quality implementation plan (SIP) submissions or the existing grace period before MOVES is required for carbon monoxide and particulate matter hot-spot analyses for project-level

conformity determinations (75 FR 79370).

**DATES:** This rule is effective on February 27, 2012.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2011-0393. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information may not be publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744 and the telephone number for the Air and Radiation Docket is (202) 566-1742.

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Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214-4812; fax number: (734) 214-4052; email address: [larsen.astrid@epa.gov](mailto:larsen.astrid@epa.gov).**SUPPLEMENTARY INFORMATION:**

The content of this preamble is listed in the following outline:

- I. General Information
- II. Background
- III. Extension of MOVES Regional Conformity Grace Period
- IV. Conformity SIPs
- V. Statutory and Executive Order Reviews

**Availability of MOVES and Support Materials**

Copies of the official version of the MOVES motor vehicle emissions model, along with user guides and supporting documentation, are available on EPA’s MOVES Web site: [www.epa.gov/otaq/models/moves/index.htm](http://www.epa.gov/otaq/models/moves/index.htm).

Guidance on how to apply MOVES for SIPs and transportation conformity purposes can be found on the EPA’s transportation conformity Web site at: [www.epa.gov/otaq/stateresources/transconf/policy.htm](http://www.epa.gov/otaq/stateresources/transconf/policy.htm).

**I. General Information***A. Does this action apply to me?*

Entities potentially regulated by the transportation conformity rule are those that adopt, approve, or fund transportation plans, transportation improvement programs (TIPs), or projects under title 23 U.S.C. or title 49 U.S.C. chapter 53. 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 final rule. This table lists the types of entities of which EPA is aware that potentially could be regulated by the transportation conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in 40 CFR 93.102. If you have questions regarding the applicability of this final rule to a particular entity, consult the persons

listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. How do I get copies of this final rule and other documents?***1. Docket**

EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OAR-2011-0393. You can get a paper copy of this **Federal Register** document, as well as the documents specifically referenced in this action, any public comments received, and other information related to this action at the official public docket. See the **ADDRESSES** section for its location.

**2. Electronic Access**

You may access this **Federal Register** document electronically through EPA’s transportation conformity Web site at: [www.epa.gov/otaq/stateresources/transconf/conf-regstr.htm](http://www.epa.gov/otaq/stateresources/transconf/conf-regstr.htm). You may also access this document electronically under the **Federal Register** listings at: [www.epa.gov/fedrgstr/](http://www.epa.gov/fedrgstr/).

An electronic version of the official public docket is available through [www.regulations.gov](http://www.regulations.gov). You may use [www.regulations.gov](http://www.regulations.gov) to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available

electronically. Once in the system, select “search,” then key in the appropriate docket identification number.

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

To the extent feasible, publicly available docket materials will be made available in the electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in the electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in the **ADDRESSES** section. EPA intends to provide electronic access in the future to all of the publicly available docket materials through the electronic public docket.

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

#### C. What is the effective date?

The final rule amendments are effective on February 27, 2012. Section 553(d) of the Administrative Procedures Act, 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. However, section 5 U.S.C. 553(d)(1) allows an effective date less than 30 days after publication for a rule that “grants or recognizes an exemption or relieves a restriction.” Since this rule provides additional time before the requirement to use MOVES applies, it is effectively granting an exemption or relieving the restriction that would require state and local governments to use MOVES2010 and minor revisions for regional conformity analyses earlier than March 2, 2013.

## II. Background

### A. What is transportation conformity?

Transportation conformity is required under Clean Air Act (CAA) section 176(c) (42 U.S.C. 7506(c)) to ensure that transportation plans, TIPs, and federally supported highway and transit projects are consistent with the purpose of the SIP. Conformity to the purpose of the

SIP means that transportation activities will not cause or contribute to new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standard (NAAQS) or required interim milestones.

Transportation conformity (hereafter, “conformity”) applies to areas that are designated nonattainment, and those areas redesignated to attainment after 1990 (“maintenance areas”) for transportation-related criteria pollutants: ozone, particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>),<sup>1</sup> carbon monoxide (CO), and nitrogen dioxide (NO<sub>2</sub>). EPA’s conformity rule (40 CFR Parts 51 and 93) establishes the criteria and procedures for determining whether transportation activities conform to the SIP. EPA first promulgated the conformity rule on November 24, 1993 (58 FR 62188) and subsequently published several amendments to the rule. The Department of Transportation (DOT) is EPA’s federal partner in implementing the conformity regulation.

### B. What is MOVES, and how has it been implemented to date?

MOVES is EPA’s state-of-the-art model for estimating emissions from highway vehicles, based on analyses of millions of emission test results and considerable advances in the Agency’s understanding of vehicle emissions. MOVES is EPA’s latest motor vehicle emissions model for state and local agencies to estimate volatile organic compounds (VOCs), nitrogen oxides (NO<sub>x</sub>), PM, CO, and other precursors from cars, trucks, buses, and motorcycles for SIP purposes and conformity determinations outside of California. The database-centered design of MOVES allows EPA to update emissions data more frequently and allows users much greater flexibility in organizing input and output data than EPA’s prior emissions model. MOVES improves the quality of results and overall functionality, as compared to the previous emissions model, MOBILE6.2.<sup>2</sup>

EPA announced the release of MOVES2010 in the **Federal Register** on March 2, 2010 (75 FR 9411), and also announced a two-year grace period before MOVES2010 was required for regional conformity analyses. EPA subsequently released MOVES2010a on September 8, 2010, and MOVES2010a is considered a minor revision that

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

<sup>2</sup> EPA announced the release of MOBILE6.2 in 2004 (69 FR 28830).

enhances model performance and does not significantly affect the criteria pollutant emissions results from MOVES2010. Therefore, MOVES2010a is not considered a “new model” under section 93.111 of the conformity rule.<sup>3</sup> As a result, the MOVES2010 grace period for regional conformity analyses has also applied to the use of MOVES2010a.<sup>4</sup> EPA notes that references to “MOVES” in this notice relate to the approved versions of MOVES2010 and subsequent minor revisions (e.g., MOVES2010a). However, in some cases, EPA has specifically referred to MOVES2010 and MOVES2010a for clarification.

MOVES incorporates the latest emissions data, more sophisticated calculation algorithms, increased user flexibility, new software design, and significant new capabilities. While these changes improve the quality of on-road mobile source inventories, the overall degree of change in the model’s function also adds to the start-up time required for state and local agencies to transition from MOBILE6.2 to MOVES.

### C. Why are we issuing this final rule?

Today’s action provides additional time for nonattainment and maintenance areas to learn and apply MOVES for regional conformity analyses.<sup>5</sup> On October 13, 2011 (76 FR 63575), EPA proposed to extend the two-year grace period to provide an additional year for state and local agencies to transition to using MOVES for regional conformity analyses.<sup>6</sup> As stated in the proposal, EPA was contacted by several state and local transportation and air quality agencies and associations that requested additional transition time for using MOVES in regional conformity analyses, due to the significant software, operational and technical differences between MOVES and MOBILE. These agencies were concerned about having sufficient time to build technical capacity for using MOVES as well as completing such analyses and making

<sup>3</sup> See Section III. for further background on the use of latest emissions models and grace periods for conformity purposes.

<sup>4</sup> See EPA’s MOVES2010a Questions and Answers at: [www.epa.gov/otaq/models/moves/MOVES2010a/420f10050.pdf](http://www.epa.gov/otaq/models/moves/MOVES2010a/420f10050.pdf).

<sup>5</sup> MPOs in nonattainment and maintenance areas conduct regional conformity analyses to demonstrate that transportation plans and TIPs are consistent with the air quality purposes of the SIP. Regional conformity analyses are also conducted in isolated rural areas (defined by 40 CFR 93.101).

<sup>6</sup> A direct final rule was also published on October 13, 2011 (76 FR 63554) in parallel with the proposal. However, EPA received an adverse comment within the 30-day public comment period, and subsequently withdrew the direct final rule on December 5, 2011 (76 FR 75797).

any necessary SIP and/or transportation plan/TIP changes to assure conformity in the future.

During the comment period, EPA received one comment letter that was relevant to the October 2011 proposal.<sup>7</sup> EPA is finalizing the regional conformity grace period extension as proposed, and is not making any changes after consideration of comments. This final rule is critical to helping state and local agencies during this unique transition. See Section III. for additional discussion.

Finally, EPA notes that today's action does not affect our previous approvals for using MOVES for official SIP submissions developed outside of California.<sup>8</sup> Today's rulemaking also does not affect the existing grace period before MOVES is required for PM<sub>2.5</sub>, PM<sub>10</sub>, and CO hot-spot analyses for project-level conformity determinations (75 FR 79370). For further information regarding EPA's previous model approvals and conformity policy guidance/implementation, see EPA's transportation conformity Web site at [www.epa.gov/otaq/stateresources/transconf/policy.htm](http://www.epa.gov/otaq/stateresources/transconf/policy.htm). EPA coordinated closely with DOT in developing today's action, and DOT concurs on this final rule.

### III. Extension of MOVES Regional Conformity Grace Period

#### A. Background

CAA section 176(c)(1) states that “\* \* \* [t]he determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel, and congestion estimates \* \* \*.” To meet this requirement, section 93.111(a) of the conformity rule requires that conformity determinations be based on the latest motor vehicle emissions model approved by EPA. When EPA approves a new emissions model, EPA consults with DOT to establish a grace period before the model is required for conformity analyses (40 CFR 93.111(b)). EPA must consider the following factors when establishing a grace period for conformity determinations (40 CFR 93.111(b)(2)): “The length of the grace period will depend on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity.”

<sup>7</sup> A second comment was submitted that raised issues not germane to this rulemaking.

<sup>8</sup> MOVES is not approved for use in California. EPA approved and announced the latest version of California's EMFAC model (EMFAC2007) for SIP development and regional conformity analyses in that state on January 18, 2008 (73 FR 3464).

The conformity rule provides for a grace period for new emissions models of between three and 24 months (40 CFR 93.111(b)(1)).

In the preamble to the original 1993 conformity rule, EPA articulated its intentions for establishing the length of a conformity grace period for a new emissions model (58 FR 62211):

EPA and DOT will consider extending the grace period if the effects of the new emissions model are so significant that previous SIP demonstrations of what emission levels are consistent with attainment would be substantially affected. In such cases, states should have an opportunity to revise their SIPs before MPOs must use the model's new emissions factors. EPA encourages all agencies to inform EPA of the impacts of new emissions models in their area, and EPA may pause to seek such input before determining the length of the grace period.

The provisions in section 93.111, including the use of the latest emissions model and the establishment of a new model grace period, have not changed since 1993, and have been implemented successfully for many previous model transitions.

#### B. Description of Final Rule

In today's action, EPA is providing an additional year to the maximum time period permitted under the pre-existing regulations before MOVES is required for regional conformity analyses. As a result, EPA is also announcing in today's **Federal Register** that MOVES will be required for new regional conformity analyses that begin after March 2, 2013. The previously established two-year conformity grace period would have ended on March 2, 2012 (75 FR 9411).

Under today's action, state and local agencies outside California can use MOVES for regional conformity analyses that begin before or on March 2, 2013. However, MOVES will be required prior to the end of the extended grace period for any new regional conformity analyses once an area has MOVES-based SIP motor vehicle emissions budgets (“budgets”) that have been found adequate or approved for conformity purposes.

Today's action adds a new paragraph (b)(3) to section 93.111 of the conformity rule, which applies to the transition from MOBILE to MOVES only. EPA notes that the regulatory text in today's final rule is clarified from what was proposed,<sup>9</sup> since the grace period applies to MOVES2010 and

<sup>9</sup> The proposed text did not explicitly refer to MOVES2010, but instead referred to “the MOVES2010a emissions model (and minor model revisions)”.

minor revisions to MOVES2010. A minor revision, such as MOVES2010a, is a version that would not significantly affect the criteria pollutant emissions results from MOVES2010. Minor revisions will not start a new grace period for regional conformity analyses and could include performance enhancements that reduce MOVES run time or other model improvements. EPA would evaluate any future major model update as a “new model” under the conformity rule's previously established requirements in section 93.111(b)(1) and (2), including any new conformity grace period as warranted. EPA will note at the time of a future model release whether an approved model version is a minor revision to MOVES2010 or is to be considered a “new model” under the rule.

Between now and the end of the extended conformity grace period (March 2, 2013), areas should use the interagency consultation process to examine how MOVES results will impact their future metropolitan transportation plan/TIP conformity determinations. Isolated rural areas should also consider the impact of MOVES on future regional conformity analyses. Agencies should carefully consider whether the SIP and its budgets should be revised with MOVES or if transportation plans and TIPs should be revised before the end of the conformity grace period, since doing so may be necessary to ensure conformity in the future.

In general, regional conformity analyses that are started during the grace period can use either MOBILE6.2 or MOVES. When the grace period ends on March 2, 2013, MOVES must be used for new regional conformity analyses outside California. This means that all new regional conformity analyses started after March 2, 2013 must be based on MOVES, even if the SIP is based on MOBILE6.2 or earlier versions of MOBILE.

EPA encourages state and local agencies to use the latest version of the MOVES model available at the time that regional emissions modeling begins, since the model framework enhancements included in such versions will optimize model performance. If you have questions about which model should be used in your conformity determination, you can consult with your EPA Regional Office. For complete explanations of how MOVES is to be implemented for transportation conformity, including details about using MOVES during the

grace period, refer to EPA's latest MOVES policy guidance.<sup>10</sup>

#### C. Rationale and Response to Comments

Today's final rule is consistent with CAA requirements and critical to supporting state and local agencies in this unique transition. EPA continues to believe its MOVES model is the best tool for estimating criteria pollutant emissions, and it is a significant improvement over previous MOBILE models. EPA recognizes that state and local agencies have made significant progress to date in using MOVES, and we will continue to support these efforts. However, as discussed in the October 2011 proposal and further below, challenges related to the transition from MOBILE to MOVES have been much greater than past transitions between MOBILE model versions. Today's action ensures that state and local governments have the necessary time to implement the CAA conformity requirements as originally intended.

Since 1993, the fundamental purpose of section 93.111(b) of the conformity rule has been to provide a sufficient amount of time for MPOs and other state and local agencies to learn and employ new emissions models. As discussed in the October 2011 proposal and further below, the transition to a new emissions model for conformity involves more than learning to use the new model and preparing input data and model output. After model start-up is complete, state and local agencies also need to consider how the model affects regional conformity analysis results and whether SIP and/or transportation plan/TIP changes are necessary to assure future conformity determinations. EPA believes that the final rule's one-time extension of the regional grace period for MOVES2010 and subsequent minor revisions is consistent with section 93.111(b)(2) and the CAA.

EPA received one comment letter that was relevant to the October 2011 proposal. EPA has summarized this comment letter with our responses in the remainder of this section.

The commenter believed the proposal was arbitrary and capricious and inconsistent with CAA section 176(c)(1) because it did not require areas to use the latest emissions factors when making conformity determinations. The commenter believed that Congress intended regional conformity analyses for transportation plans and TIPs to be

based on EPA's latest motor vehicle emissions factors.<sup>11</sup>

EPA has not made changes in response to these comments, which raise issues for conformity rule provisions that were finalized in 1993 (58 FR 62211) and which EPA did not propose to revise in this action. Specifically, in 1993, EPA established the existing rule provisions that a conformity grace period of between 3 and 24 months could be established for new model releases (40 CFR 93.111(b)(1)), as well as the factors that EPA uses when determining the length of a grace period (40 CFR 93.111(b)(2)). As a result, EPA has used its existing discretion many times since 1993 to approve new emissions models and establish grace periods consistent with these requirements.

In the proposal for today's final rule, EPA did not propose to reopen the question of whether the Agency has the discretion to establish a grace period before which the use of a new emissions model is required for conformity purposes, nor did the proposed rule address the factors to be considered in establishing an appropriate grace period. EPA's statutory authority to establish a grace period is not at issue in this rulemaking.<sup>12</sup> Rather, the only issue addressed in the proposed rule was the appropriate length of the grace period for MOVES—specifically, whether allowing an additional year for the MOVES regional conformity grace period is reasonable. EPA believes that it is, based on the degree of model change and the scope of re-planning necessary as further described in this section.

The commenter believed that MOVES is based on the latest emissions factors, and MOBILE6.2 is not appropriate for estimating emissions. EPA agrees that the MOVES model is the best tool for estimating motor vehicle emissions and is based on the latest science. When EPA approves any new emissions model, the Agency is stating that it is an improvement over the existing model. Therefore, it will always be the case that new models that are approved are better than previous models. However, the issue raised in EPA's proposed rule was not the validity of using MOVES instead of MOBILE6.2, but whether state and local agencies have sufficient time to

<sup>11</sup> Although the commenter referred to "legislative history" in making this comment, no documentation or citations to specific legislative history were submitted with the comment.

<sup>12</sup> EPA notes that on May 26, 1994 the commenter filed a Petition for Reconsideration of the November 1993 conformity rule (58 FR 62188), but did not raise issues related to section 93.111(b) in that petition.

transition to using MOVES for future regional conformity analyses. The one-year extension provided by the final rule is reasonable and consistent with the existing rule's requirements for establishing grace periods for new emissions models.

The commenter also believed that the October 2011 proposal was inconsistent with the law because it exceeded the maximum two-year grace period length in section 93.111(b)(1) of the conformity rule. While it is true that the one-year grace period extension is longer than the two-year grace period in the existing conformity rule for other emissions model transitions, this fact does not make the final rule's extension inconsistent with the CAA. EPA believes that today's final rule is reasonable and meets statutory requirements.

The commenter argued that "[t]he need for agency staff to learn how to apply MOVES provides no justification for the continued use of [MOBILE6.2] \* \* \*." EPA disagrees that it is arbitrary for EPA to consider this need. In fact, the pre-existing regulations require EPA to consider start-up needs whenever a new grace period is established, and EPA did not propose to revise these factors.

As stated above and in the October 2011 proposal, section 93.111(b)(2) of the conformity rule requires the length of the grace period to be based on two factors. The first factor in this provision is "the degree of change in the model." EPA described extensively in its proposal how this particular transition from MOBILE to MOVES creates a unique learning curve for state and local agencies. The following is a summary of the major model changes that were noted in the proposal for this transition:

- *New model framework and software:* Whereas MOBILE6.2 was written in FORTRAN and used simple text files for data input and output, MOVES is written in JAVA and uses a relational database structure in MYSQL to handle input and output as data tables.<sup>13</sup>

- *New model input and output structure:* MOVES significantly changes the basic input and output structure for emissions modeling, as compared to previous emissions models that have been essentially unchanged since the early 1980s. Before MOVES can be used by state and local agencies, MOBILE-based input data will need to be converted for use in MOVES. MPOs may

<sup>13</sup> Some states have found it necessary to purchase new computers with additional capacity and features for running MOVES.

<sup>10</sup> See [www.epa.gov/otaq/stateresources/transconf/policy.htm](http://www.epa.gov/otaq/stateresources/transconf/policy.htm).

also need to revise the way model output is post-processed.

EPA has created tools and provided technical assistance for the MOBILE to MOVES transition, and EPA and DOT have provided hands-on MOVES training in many states.<sup>14</sup> EPA will continue to work with state and local agencies throughout the regional conformity grace period extension. See the October 2011 proposal for further details on the differences between MOBILE and MOVES (76 FR 63577–78).

The other factor that EPA must consider under section 93.111(b)(2) is the “scope of re-planning likely to be necessary by MPOs in order to assure conformity.” As in any new model transition, state and local agencies need to consider how results from using a new emissions model will affect their ability to conform when the new model is required for regional conformity analyses. When emissions are higher with a new model compared to the previous model, the “scope of re-planning” can entail revising a SIP strategy and budget that is based on the previous model and/or revising a transportation plan/TIP.<sup>15</sup> Updating a SIP budget with MOVES, for example, involves preparing new data input and output for MOVES, re-running the on-road mobile source inventory with MOVES, ensuring this new inventory continues to support the SIP’s demonstration (and making any adjustments to other inventories as needed), coordinating the SIP submission with other agencies, and meeting other state and federal requirements for SIP submissions (e.g., providing public notice and comment). None of these steps can be taken until state and local agencies learn how to run MOVES and obtain results, as results inform whether a revision is even needed. Unlike past model transitions, the start-up involved in building technical capacity for MOVES appears to have postponed state and local “re-planning” decisions on whether any updates to SIP budgets or transportation plans/TIPs are needed. The final rule’s additional year directly provides the necessary time for

<sup>14</sup> To date, EPA and DOT staff have provided a 2-day hands-on MOVES course for regional emissions inventories (including regional conformity analyses) at over 25 locations around the country. In addition, since January 2010, EPA has sent more than 2,500 responses to requests for help with MOVES that have come into EPA’s email box for modeling questions ([mobile@epa.gov](mailto:mobile@epa.gov)).

<sup>15</sup> See the November 1993 conformity rule (58 FR 62211), the March 2, 2010 FR notice for EPA’s approval of MOVES2010 for regional conformity analyses (75 FR 9411–9414), and EPA’s latest MOVES policy guidance ([www.epa.gov/otaq/stateresources/transconf/policy.htm](http://www.epa.gov/otaq/stateresources/transconf/policy.htm)).

considering the implications as EPA originally intended.

EPA’s decision to finalize this rulemaking is also supported by stakeholder feedback that was received in implementing the MOVES transition. Starting in September 2010, EPA was contacted by several state and local transportation and air agencies that were concerned that there was insufficient transition time before MOVES would be required in regional conformity analyses. At the time, the conformity grace period for MOVES would have expired on March 2, 2012. EPA Regional Offices confirmed the status of the transition in their nonattainment and maintenance areas. These general communications occurred until March of 2011 and informed EPA’s decision to proceed with this rulemaking.<sup>16</sup> Although EPA had provided MOVES training for regional conformity analyses in most states, as of March of 2011 (one year after the original conformity grace period had begun), due to the major model changes mentioned earlier, EPA was concerned that most nonattainment and maintenance areas needed more time to build technical capacity for using MOVES as well as sufficient transition time for using MOVES in regional conformity analyses. We believe that state and local agencies are making a good faith effort to transition to MOVES in a timely manner, but the start-up issues have taken longer than originally anticipated.

The commenter also believed the proposal would allow areas to delay additional reductions, in areas where emissions with MOVES would be higher than with MOBILE. The commenter stated that EPA did not candidly disclose which areas could use the proposed grace period extension and how the rule could adversely affect public health.

The commenter mischaracterizes the regulatory purpose of the emissions model grace period provisions as well as EPA’s reasons for establishing a longer grace period for this model transition. As described above, since 1993, EPA has clearly stated that the conformity grace period for a new emissions model is to be based on the two factors provided in 40 CFR 93.111(b)(2), and which are not at issue in this rulemaking.

As described above, it has taken longer than anticipated for MPOs to

complete emissions analyses with MOVES, and to ascertain the implications of using MOVES on future conformity determinations. In other words, it has taken longer for MPOs to know how MOVES would affect future regional conformity analyses, because they are building technical capacity and addressing other start-up issues.

Potential changes in emissions estimates are unrelated to the issue in this rulemaking, i.e., the appropriate length of the grace period for use of MOVES in regional conformity analyses.

In addition, the grace period extension applies equally to all nonattainment and maintenance areas. EPA did not need to “disclose” which areas could use the additional year because every nonattainment and maintenance area can use the additional year. Every area has the discretion of using either MOBILE6.2 or MOVES for transportation conformity during this additional year, unless the area’s SIP is updated with MOVES first. In those cases, as described above, MOVES must be used in transportation plan and TIP conformity determinations made after those MOVES-based budgets are found adequate or approved. This was clearly stated in the October 2011 proposal (76 FR 63578).

EPA does not agree that the rule is arbitrary and capricious because it did not disclose how the rule could adversely affect public health. The commenter also mischaracterized the conformity rule’s requirements by implying that the extended grace period will allow areas to avoid meeting their applicable SIP budgets in regional conformity analyses (40 CFR 93.109, 93.118). Regardless of what model is required for a given conformity determination, MPOs are required by the CAA and the conformity rule to meet applicable SIP budgets in regional conformity analyses. Today’s final rule does not change these requirements. Today’s action does not relieve an area’s statutory obligation to attain the NAAQS by its attainment date and thereby protect public health or EPA’s air quality planning obligations under the CAA. Furthermore, the final rule does not waive EPA’s SIP requirements for using the latest emissions model when a SIP is developed, and does not change the conformity grace period for using MOVES in project-level conformity analyses.<sup>17</sup> The implications

<sup>16</sup> See EPA’s September 14, 2011 memo entitled, “Summary of Stakeholder Contact Prior to MOVES Grace Period Extension Rulemaking.” EPA has added other documentation to the docket regarding state and local progress during this MOVES transition.

<sup>17</sup> As noted in the October 2011 proposal, the transition to MOVES for project-level hot-spot analyses does not involve the complexity associated at the regional level, where “re-planning” under 40 CFR 93.111(b)(2) is necessary for some areas (i.e., SIP budgets and/or transportation plans/TIPs may

of changes in on-road mobile source emission inventories and/or control strategies will differ, and as result, need to be evaluated based on the unique circumstances of each nonattainment or maintenance area.

EPA is finalizing a one-year extension only for the MOBILE to MOVES transition for regional conformity analyses. The final rule's one-time extension is not indefinite. After March 2, 2013, MOVES must be used for new regional conformity analyses, whether or not start-up or re-planning issues have been addressed. EPA believes this additional year appropriately addresses the circumstances in the field and the need to meet statutory requirements for using latest emissions models in a timely manner.

The commenter also alleges that EPA staff stated that the primary purpose for this rulemaking was to allow nonattainment and maintenance areas to avoid a conformity lapse where MOVES produces higher emissions than MOBILE-based SIP budgets.<sup>18</sup> This statement is incorrect. Today's final rule does not amend the existing conformity rule's provisions for frequency (40 CFR 93.104) or conformity lapses (40 CFR 93.102(c)). EPA did not undertake this rulemaking to address any specific area's conformity issues or to avoid conformity lapses, but rather to provide a reasonable amount of time for all areas to prepare to use MOVES and revise existing SIP budgets and/or transportation plans/TIPs as needed. Any conformity issues for individual areas will need to be addressed according to all conformity requirements.

Finally, the commenter highlighted several court decisions to support his comments. However, the cases cited by the commenter are irrelevant to the final rule because the cases involved challenges to the technical underpinnings of various models.<sup>19</sup> In contrast, EPA is not approving or relying on any model in today's action. Instead, it is making a determination as to the time period that is needed before it is appropriate to require state and local agencies to use MOVES, given the planning and preparation involved

need to be revised before regional conformity analyses based on MOVES can be completed).

<sup>18</sup> The commenter included his notes taken during an informal conversation with EPA staff that occurred prior to the development of the October 2011 proposal.

<sup>19</sup> These cases include *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534 (challenge to cost analysis based on Department of Energy refinery modeling) and *American Iron and Steel v. EPA*, 115 F.3d 979, 1004 (challenge to Agency calculation of mercury bioaccumulation factor under Clean Water Act).

before the model can be properly applied.

In summary, EPA is finalizing the regional conformity grace period extension as proposed, and is not making any changes after consideration of comments. This final rule is consistent with CAA requirements, the conformity rule, and precedent to date.

#### IV. Conformity SIPs

The MOVES regional grace period extension applies on the effective date of today's final rule in all nonattainment and maintenance areas. Section 51.390(a) of the conformity rule states that the federal rule applies for the portion of the requirements that are not included in a state's approved conformity SIP.<sup>20</sup> Section 51.390(b) further allows state conformity provisions to contain criteria and procedures that are more stringent than the federal requirements. However, in the case of states with conformity SIPs that include the grace period provision in 40 CFR 93.111(b)(1), EPA concludes that such states did not intend to require a shorter grace period than EPA, in consultation with DOT, believes is needed. Therefore, since the MOVES grace period extension is a new provision being added to the conformity rule, it is not included in any current state conformity SIP and therefore applies immediately in all areas pursuant to section 51.390(a).

In addition, section 51.390(c) of the conformity rule requires states to submit a new or revised conformity SIP to EPA within 12 months of the **Federal Register** publication date of any final conformity amendments for certain situations. States with approved conformity SIPs that are prepared in accordance with current CAA requirements are not required to submit new conformity SIP revisions, since section 93.111 of the conformity rule is not contained in these SIPs. A conformity SIP prepared in accordance with current CAA requirements contains only the state's criteria and procedures for interagency consultation (40 CFR 93.105) and two additional provisions related to written commitments for certain control and mitigation measures (40 CFR 93.122(a)(4)(ii) and 93.125(c)). However, states with approved conformity SIPs that include section 93.111 from a previous rulemaking are required to submit a SIP revision by February 27, 2013, although EPA strongly encourages

<sup>20</sup> A conformity SIP is required by the CAA and contains a state's conformity requirements, including the state's specific interagency consultation procedures.

these states to submit a SIP revision with only the three required provisions.<sup>21</sup> A state without an approved conformity SIP is not required to submit a new conformity SIP within one year of today's action, but previous conformity SIP deadlines continue to apply.

For additional information on conformity SIPs, please refer to the January 2009 guidance entitled, "Guidance for Developing Transportation Conformity State Implementation Plans" available on EPA's Web site at: [www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf](http://www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf).

#### V. Statutory and Executive Order Reviews

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

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

##### B. Paperwork Reduction Act

This action does not impose any new information collection burden. The information collection requirements of EPA's existing transportation conformity regulations and the revisions in today's action are already covered by EPA's information collection request (ICR) entitled, "Transportation Conformity Determinations for Federally Funded and Approved Transportation Plans, Programs and Projects." OMB has previously approved the information collection requirements contained in the existing regulations at 40 CFR Part 93 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control numbers 2060-0561. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

##### C. Regulatory Flexibility Act

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

<sup>21</sup> The conformity SIP may contain provisions more stringent than the federal requirements, and in these cases, states must specify this intention in its conformity SIP submission.

include small businesses, small not-for-profit organizations and small government jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This regulation directly affects federal agencies and MPOs 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 RFA. Therefore, this rule will not impose any requirements on small entities.

#### *D. Unfunded Mandates Reform Act (UMRA)*

This rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of \$100 million or more in any year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule will not significantly or uniquely impact small governments because it directly affects federal agencies and MPOs that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000.

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

This rule does not have federalism implications. It will not have substantial direct effects on states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government, as specified in

Executive Order 13132. The CAA requires conformity to apply in certain nonattainment and maintenance areas as a matter of law, and today's action merely revises one provision for transportation planning entities in subject areas to follow in meeting their existing statutory obligations. Thus, EO 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The CAA requires transportation conformity to apply in any area that is designated nonattainment or maintenance by EPA. Because today's rule does not significantly or uniquely affect the communities of Indian tribal governments, EO 13175 does not apply to this action.

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

This rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

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

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

standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. The final rule involves a minor revision that provides administrative relief but does not change the conformity rule's underlying requirements for regional conformity analyses.

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a major rule as defined by 5 U.S.C. 804(2). This rule will be effective February 27, 2012.

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

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

Dated: February 15, 2012.

**Lisa P. Jackson,**  
Administrator.

For the reasons discussed in the preamble, 40 CFR Part 93 is 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 93.111 is amended by adding paragraph (b)(3) to read as follows:

#### § 93.111 Criteria and procedures: Latest emissions model.

\* \* \* \* \*

(b) \* \* \* \* \* (3) Notwithstanding paragraph (b)(1) of this section, the grace period for using the MOVES2010 emissions model (and minor revisions) for regional emissions analyses will end on March 2, 2013.

\* \* \* \* \*

[FR Doc. 2012-4484 Filed 2-24-12; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 140

[EPA-R09-OW-2010-0438; FRL-9633-9]

RIN 2009-AA04

#### Marine Sanitation Devices (MSDs): No Discharge Zone (NDZ) for California State Marine Waters

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is establishing a No Discharge Zone (NDZ) for marine waters of the State of California for sewage discharges from: all large passenger vessels of 300 gross tons or greater; and from large oceangoing vessels of 300 gross tons or greater with available holding tank capacity or containing sewage generated while the vessel was outside of the marine waters of the State of California, pursuant to Section 312(f)(4)(A) of the Clean Water Act (CWA), 33 U.S.C. 1322(f)(4)(A). This action is being taken in response to an April 5, 2006, application from the California State Water Resources Control Board requesting establishment of this NDZ. Based on the State's application, EPA has determined that the protection and enhancement of the quality of California's marine waters

requires the prohibition of sewage discharges from two classes of large vessels. For the purposes of today's rule, the marine waters of the State of California are defined as the territorial sea measured from the baseline, as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone, and extending seaward a distance of three miles and including all enclosed bays and estuaries subject to tidal influences from the Oregon border to the Mexican border. State marine waters extend three miles from State islands, including the Farallones and the Northern and Southern Channel Islands.

**DATES:** This final rule is effective March 28, 2012.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R09-OW-2010-0438. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Water Division, U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule an appointment. The Regional Office's business hours are Monday through Friday, 8:30 to 5, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Amato at (415) 972-3847 or [amato.paul@epa.gov](mailto:amato.paul@epa.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Background
- II. Summary of Final Action
- III. Response to Comments
  - A. Overview
  - B. Public Comments
  1. Protection of California's Coastal Resources
  2. Expansion of the Rule
  3. Scope and Applicability of CWA Section 312(f)(4)(A)
  4. Classes of Vessels
  5. Large Oceangoing Vessel Sewage Holding Capacity
  6. Applying a No Discharge Zone for All California Marine Waters
  7. Other General Comments
- IV. Administrative Requirements

## I. Background

The proposed rule was published in the September 2, 2010, issue of the **Federal Register** (75 FR 53914). A 60-day comment period followed that ended on November 1, 2010, during which time EPA Region IX received approximately 2,020 comment letters and emails, including 16 distinct letters and approximately 2,000 substantially identical letters. Section III addresses the comments.

Clean Water Act Section 312, 33 U.S.C. 1322, (hereafter referred to as "Section 312"), regulates the discharge of sewage from vessels into the navigable waters. Pollutants most frequently associated with sewage discharges include solids, nutrients, pathogens, petroleum products, heavy metals, pesticides, pharmaceuticals, and other potentially harmful compounds.<sup>1</sup> Sewage discharges can contaminate shellfish beds, pollute drinking water supplies, harm fish and other aquatic wildlife, and cause damage to coral reefs. Direct contact with these pollutants can have serious human health effects, with children, the elderly, and individuals with compromised immune systems being most susceptible. Currently, California marine waters include 120 miles of coast that are listed as impaired for pathogens commonly associated with sewage.

Clean Water Act Section 312(h) prohibits vessels equipped with installed toilet facilities from operating on the navigable waters (which include the three mile territorial seas), unless the vessel is equipped with an operable marine sanitation device (MSD), certified by the Coast Guard to meet applicable performance standards. 33 U.S.C. 1322(h). The provisions of Section 312 are implemented jointly by EPA and the Coast Guard. EPA sets performance standards for MSDs and is involved in varying degrees in the establishment of NDZs for vessel sewage. 33 U.S.C. 1322(b) and (f). The Coast Guard is responsible for developing regulations governing the design, construction, certification, installation and operation of MSDs, consistent with EPA's performance standards. 33 U.S.C. 1322(b) and (g); see also 33 CFR part 159. The Coast Guard's responsibility includes certifying MSDs for installation on U.S. flagged vessels. Under some circumstances, vessel sewage discharges treated by an MSD

<sup>1</sup> The State of California's "Application for Permission to Prohibit Sewage Discharges from Vessels in California's Waters Pursuant to Clean Water Act Section 312(f)(4)(A)" at page 33 (Apr. 5, 2006).