ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93
RIN 2060–AN82

Transportation Conformity Rule
Amendments To Implement Provisions
Contained in the 2005 Safe,
Accountable, Flexible, Efficient
Transportation Equity Act: A Legacy
for Users (SAFETEA–LU)

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, EPA is
amending the transportation conformity
rule to finalize provisions that were
proposed on May 2, 2007. The Clean Air
Act requires federally supported
transportation plans, transportation
improvement programs, and projects to be
consistent with ("conform to") the
purpose of the state air quality
implementation plan. Most of these
rules are necessary to make the
rule consistent with Clean Air Act
section 176(c) as amended by
SAFETEA–LU on August 10, 2005 (Pub.
L. 109–59), including changes to the
regulations to reflect that the Clean Air
Act now provides more time for state
and local governments to meet
conformity requirements, provides a
one-year grace period before the
consequences of not meeting certain
conformity requirements apply, allows
the option of shortening the timeframe
of conformity determinations, and
streamlines other provisions. This final
rule also includes minor amendments
that are not related to SAFETEA–LU,
such as allowing the Department of
Transportation (DOT) to make
categorical hot-spot findings for
appropriate projects in carbon
monoxide nonattainment and
maintenance areas.

EPA has consulted with DOT, and they concur with this final rule.

DATES: Effective Date: This final rule is
effective on February 25, 2008.

ADDRESSES: EPA has established a
docket for this action under Docket ID
No. EPA–HQ–OAR–2006–0612. All
documents in the docket are listed on
the 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 or in hard copy at
the Air Docket, EPA/DC, EPA West
Building, Room 3334, 1301 Constitution
Ave., NW., Washington, DC. The
Public Reading Room is open from 8:30 a.m.
to 4:30 p.m., Monday through Friday,
excluding legal holidays. The telephone
number for the Public Reading Room is
(202) 566–1744, and the telephone
number for the Air Docket is (202) 566–
1742.

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SUPPLEMENTARY INFORMATION: The
contents of this preamble are listed in
the following outline:
I. General Information
II. Background
III. Frequency of Conformity Determinations
IV. Deadline for Conformity Determinations
When a New Budget is Established
V. Lapse Grace Period
VI. Timeframes for Conformity
Determination
VII. Conformity SIPs
VIII. Transportation Control Measure
Substitutions and Additions
IX. Categorical Hot-Spot Findings for Projects
in Carbon Monoxide Nonattainment and
Maintenance Areas
X. Removal of Regulation 40 CFR
IX.109(e)(2)(i)
XI. Miscellaneous Revisions
XII. Statutory and Executive Order Reviews

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

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

<table>
<thead>
<tr>
<th>Category</th>
<th>Examples of regulated entities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local government</td>
<td>Local transportation and air quality agencies, including metropolitan planning organizations (MPOs).</td>
</tr>
<tr>
<td>State government</td>
<td>State transportation and air quality agencies.</td>
</tr>
</tbody>
</table>
| Federal government        | Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administra-
                           | tion (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 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
get a paper copy of this Federal Register
document, as well as the documents
specifically referenced in this action,
any public comments received, and
other information related to this action
at the official public docket. See
ADDRESSES section for its location.

2. Electronic Access

You may access this Federal Register
document electronically through EPA’s
Transportation Conformity Web site at
http://www.epa.gov/otaq/
stateresources/transconf/index.htm.
You may also access this document
electronically under the Federal
Register listings at http://www.epa.gov/
fedreg/. An electronic version of the official
public docket is available through
www.regulations.gov. You may use
www.regulations.gov to view public comments, access the index listing of the contents of the official public docket, and 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 are not 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 is not placed in the electronic public docket but is available only in printed, paper form in the official public docket.

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

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

II. Background

A. What Is Transportation Conformity?

Transportation conformity is required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with (“conform to”) the purpose of the state air quality implementation plan (SIP). Conformity currently applies to areas that are designated nonattainment and those redesignated to attainment after 1990 (“maintenance areas”) with plans developed under Clean Air Act section 175A (42 U.S.C. 7545A) for the following transportation-related criteria pollutants: Ozone, particulate matter (PM2.5 and PM10), carbon monoxide (CO), and nitrogen dioxide (NO2). Conformity to the purpose of the SIP means that transportation activities will not cause or contribute to new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS or “standards”).

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 several other amendments. See EPA’s Web site at http://www.epa.gov/otaq/stateresources/transconf/index.htm for further information.

B. Why Are We Issuing This Final Rule?

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

- Changing the required frequency of transportation conformity determinations from three years to four years;
- Providing two years to determine conformity after new SIP motor vehicle emissions budgets are either found adequate, approved or promulgated;
- Adding a one-year grace period before the consequences of a conformity lapse apply;
- Providing an option for reducing the time period addressed by conformity determinations;
- Streamlining requirements for conformity SIPs; and
- Providing procedures for areas to use in substituting or adding transportation control measures (TCMs) to approved SIPs.

SAFETEA–LU section 6011(g) requires that EPA revise the transportation conformity rule as necessary to address the new statutory provisions. This final rule addresses the relevant changes that SAFETEA–LU made to the Clean Air Act.

This final rule replaces the joint EPA–DOT interim guidance issued February 14, 2006, which provided guidance to areas subject to transportation conformity on implementing the changes to the Clean Air Act made by SAFETEA–LU. This final rule is consistent with the February 2006 guidance.

DOT is our federal partner in implementing the transportation conformity regulations. EPA has consulted with DOT on the development of this final rule, and DOT concurs with its content.

EPA received comments on the proposed rule from 16 different entities, though some commenters submitted comments jointly. Commenters included state DOTs, MPOs, state and local air quality agencies, government associations, and industry associations.

The majority of commenters supported EPA’s proposal in general, and specific provisions in particular, which are discussed below. EPA is addressing these and other comments in the relevant sections of the preamble and in the responses to comments document, which can be found in the public docket for this final rule.

III. Frequency of Conformity Determinations

A. Description of Final Rule

EPA is changing §93.104(b)(3) to require that the MPO and DOT determine conformity of a transportation plan at least every four years, and §93.104(c)(3) to require that the MPO and DOT determine conformity of a transportation improvement program (TIP) at least every four years. The pre-existing regulations required these determinations to be made at least every three years.

B. Rationale and Response to Comments

These changes to §93.104 are needed to make the conformity regulation consistent with the law. In SAFETEA–LU, Congress amended Clean Air Act section 176(c)(4)(D)(ii) to require that conformity be determined with a frequency of four years, unless the MPO decides to update its transportation plan or TIP more frequently, or the MPO is required to determine conformity in response to a trigger (see Section IV.). The Clean Air Act previously required transportation plan and TIP conformity to be determined every three years. These Clean Air Act provisions have been in effect as of August 10, 2005.

Several commenters voiced support for this change because it is consistent with the Clean Air Act, as amended by SAFETEA–LU. One commenter noted that this change will be helpful particularly to small communities. One commenter opposed the proposal because the commenter believes that having more frequent conformity determinations may be important in areas with significant on-road mobile source emissions.

As already stated, and as other commenters noted, this change is...
necessary to make the regulation consistent with the law. Furthermore, EPA believes that despite this change in the required frequency of conformity determinations, the transportation conformity program still achieves its purpose in ensuring transportation actions comform the SIP.

Transportation plans and TIPs must still conform before they are adopted. Several commenters suggested that EPA also change “three years” to “four years” in § 93.104(d) of the conformity rule. This provision describes the circumstances when a conformity determination for a project is needed, one of which is when more than three years have elapsed since the most recent major step to advance the project.

Commenters requested that three years be changed to four years to be consistent with SAFETEA-LU provisions of determining conformity on TIPs and transportation plans every four years. EPA is not changing § 93.104(d) in this rulemaking. First, this change was not proposed, as it was not required by the Clean Air Act as amended by SAFETEA-LU. SAFETEA-LU aligned transportation plan, TIP, and the frequency of transportation plan and TIP conformity determinations to create efficiencies in the overall planning process, rather than to allow more time when project phases are delayed.

Second, the conformity rule requires that a new conformity determination be done for a project if more than three years have elapsed since a major step has occurred to be consistent with the regulations under the National Environmental Policy Act (NEPA), rather than with the frequency of conformity determinations for transportation plans and TIPs. The NEPA regulations require reevaluation of NEPA documents for projects which have not had major action for three years. Please refer to “H. Time Limit on Project-Level Determinations” in the preamble of the November 24, 1993, conformity rule (58 FR 62200) for more explanation of this point.

C. Overlap With Transportation Planning Frequency Requirements

In addition to changing the required frequency of conformity determinations from a least every three years to every four years, SAFETEA-LU also changed the required frequency for updating transportation plans and TIPs for transportation planning purposes. Prior to SAFETEA-LU, transportation plans in nonattainment and maintenance areas had to be updated every three years and TIPs updated every two years; now both transportation plans and TIPs must be updated every four years in these areas. However, MPOs can voluntarily update their transportation plans and TIPs more frequently.

Consequently, conformity may still need to be determined more frequently than every four years, because an updated or amended transportation plan or TIP still must conform before it is adopted, regardless of the last time a conformity determination was done. Further discussion of the implementation of the SAFETEA-LU statewide and metropolitan transportation planning requirements can be found in DOT’s February 14, 2007, final rulemaking on metropolitan and statewide transportation planning (72 FR 7224).

Today’s change to the required frequency of transportation plan and TIP conformity determinations does not change other details for implementing conformity and planning frequency requirements. Both the transportation planning update clock and the conformity update clock continue to be reset on the date of the FHWA and FTA conformity determination for the respective transportation plan and/or TIP. For more information, see DOT’s May 25, 2001, guidance, available on EPA’s Web site at http://www.epa.gov/otaq/stateresources/transport/confpolicy.htm and on DOT’s Web site at http://www.fhwa.dot.gov/environment/conformity/plannup_m.htm.

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

1. Description of Final Rule

EPA is revising § 93.120(a)(2) to allow projects in the first four years of the conforming transportation plan and TIP, rather than the first three years of the conforming transportation plan and TIP, to proceed after final EPA disapproval of a control strategy SIP without a protective finding, i.e., when a conformity freeze occurs. In this section of the regulation, EPA is changing the two instances of “three years” to “four years,” similar to the changes made in §§ 93.104(b)(3) and (c)(3), the other sections of the rule affected by the change in the required frequency of conformity determinations. Though the final regulation at § 93.120(a)(2) differs from the language that was proposed, it is the same in substance as the proposed rule.

2. Rationale and Response to Comments

EPA is making this change to be consistent with the general implementation of SAFETEA-LU, which requires transportation plans and TIPs to be updated every four years and requires TIPs to cover a period of four years. EPA had proposed to generalize this language to allow a project to proceed during a freeze if it was included in the conforming TIP in order to account for the transition to new SAFETEA-LU transportation planning requirements. EPA believed the proposed language would be useful during the transition to SAFETEA-LU’s planning requirements. We believed that when the rule became final, some MPOs would still have three-year TIPs prior to developing four-year TIPs for SAFETEA-LU. See the preamble to the May 2, 2007, proposed rule (72 FR 24475) for EPA’s full rationale. Several commenters supported the language we had proposed, because it accounted for the transition to SAFETEA-LU’s planning requirements. EPA received no comments opposing it.

However, the transition period ended on July 1, 2007. While some areas may still have three-year TIPs today, these will all be replaced over time by four-year TIPs. EPA believes the better update to § 93.120(a)(2) is simply to change the instances of “three years” to “four years,” as it is more clear and more consistent with the prior regulatory language. If EPA disapproves a SIP without a protective finding in an area that still has a three-year TIP, only projects from the first three years of the conforming transportation plan and TIP could proceed, because the regulation states that projects must be in both the conforming transportation plan and TIP (except during the lapse grace period, discussed in Section V.E, below).

Today’s final rule at § 93.120(a)(2) is consistent with the proposed rule for this section. Though the proposed language had eliminated the reference to a conforming transportation plan, EPA did not intend to change other rule requirements. In fact, EPA stated so in the preamble to the May 2, 2007, proposed rule:

However, this proposed general language is not intended to change other rule requirements. Although EPA’s change to § 93.120(a)(2) would no longer include the phrase “conforming transportation plan,” the requirements of § 93.114 continue to apply. Specifically, there must still be a currently conforming transportation plan in place to approve projects during a conformity freeze (except as noted in Section V.E., below). (72 FR 24475)

While it is the same in substance as the proposed rule language, the change to § 93.120(a)(2) in today’s final rule is more clear, because it continues to state explicitly that a project must be in both the conforming transportation plan as well as conforming TIP. Note that Section V.B. discusses an exception to this requirement during the lapse grace
period, which is also included in today’s final rule for § 93.120(a)(2).

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

A. Description of the Final Rule

EPA is revising § 93.104(e), which requires a new transportation plan and TIP conformity determination to be made after actions that establish a new motor vehicle emissions budget for conformity, also known as “triggers.” The revision gives MPOs and DOT two years, increased from 18 months, to determine conformity of a transportation plan and TIP when a new budget is established. An MPO and DOT must make a conformity determination within two years of the effective date of:

- EPA’s finding that a motor vehicle emissions budget(s) (“budget(s)”) in a submitted SIP is adequate (40 CFR 93.104(e)(1));
- EPA’s approval of a SIP, if the budget(s) from that SIP have not yet been used in a conformity determination (40 CFR 93.104(e)(2)); and
- EPA’s promulgation of a Federal implementation plan (FIP) with a budget(s) (40 CFR 93.104(e)(3)).

B. Rationale and Response to Comments

This change makes the conformity regulation consistent with the current law. In SAFETEA-LU, Congress amended the Clean Air Act to give MPOs and DOT two years before conformity must be determined in response to one of the conformity triggers above. Several commenters generally supported this change, noting that it is necessary to be consistent with the current law. This Clean Air Act provision has been in effect as of August 10, 2005.

The regulation’s description of events that trigger a new conformity determination have not been changed because they were already consistent with the amendments made to the Clean Air Act in SAFETEA-LU, for the reasons described in the preamble to the May 2, 2007, proposed rule (72 FR 24475–24476). EPA also notes that no change is necessary for the point at which the two-year clocks begin. The two-year clocks begin on the effective date of EPA’s adequacy finding or the effective date of EPA’s SIP approval or FIP promulgation action. (For more details regarding the triggers, see Section III. of the August 6, 2002, final rule at 67 FR 50820 and Section XIX. of the July 1, 2004, final rule, at 69 FR 40050).

V. Lapse Grace Period

A. Description of the Final Rule

EPA is adding a one-year grace period before a conformity lapse occurs when an area misses an applicable deadline. The applicable deadlines are those that result from:

- The requirements to determine conformity of a transportation plan and TIP every four years under §§ 93.104(b)(3) and 93.104(c)(3) (see Section III.); and
- The requirement to determine conformity within two years of a trigger under § 93.104(e) (see Section IV.).

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

To provide the rules to allow projects to meet conformity requirements during the lapse grace period, EPA is adding a new provision to the regulation, § 93.104(f). New § 93.104(f)(1) allows non-exempt FHWA/FTA projects to be found to conform during the lapse grace period if they are included in the currently conforming transportation plan and TIP. New § 93.104(f)(2) allows non-exempt FHWA/FTA projects to be found to conform during the lapse grace period if they were included in the most recent conforming transportation plan and TIP, however, even though § 93.104(f)(2) allows a project to be found to conform when the transportation plan and TIP have expired, a project must also meet DOT’s planning and other requirements to receive federal funding or approval.

Today’s rulemaking does not change the law as it pertains to project-level conformity determinations. These changes are necessary to make the conformity regulation consistent with the amended law and the intentions of Congress. In SAFETEA-LU, Congress amended the Clean Air Act to provide a one-year grace period before the consequences of a conformity lapse apply in section 176(c)(9) and added a definition of “lapse” in section 176(c)(10). The changes to the law have been in effect as of August 10, 2005. See the preamble to the May 2, 2007, proposed rule (72 FR 24475–8) for EPA’s full rationale supporting this provision of the final rule.

Six of the seven commenters who commented on the lapse grace period supported EPA’s proposal. These commenters generally believe that EPA’s proposal to incorporate the lapse grace period into the conformity rule is consistent with the Clean Air Act as amended by SAFETEA-LU. One commenter stated that the lapse grace period allows time and flexibility for...
Therefore, the project's emissions would have been considered in the conformity determination for this TIP, eliminating the possibility of unanticipated emissions increases.

C. How Does the Grace Period Work In Practice?

The one-year conformity lapse grace period begins when the conformity determination required for a transportation plan or TIP is not made by the applicable deadline. As described above, during the grace period, a project may meet conformity requirements as long as it was included in either the currently conforming transportation plan and TIP or the most recent conforming transportation plan and TIP and other project-level conformity requirements are met.

An FHWA/FTA project must also project DOT's planning requirements to receive federal funding or approval. Specifically, 23 U.S.C. 134(j)(3) and 49 U.S.C. 5303(j)(3) require a TIP to be in the StIP/TIP, and 49 U.S.C. 1355(g)(4) and 49 U.S.C. 5304(g)(4) require a statewide TIP (STIP) to be in place for DOT to authorize transportation projects. The STIP contains all of the metropolitan area TIPs in the state.

Three specific scenarios are presented below to show how expiration of the transportation plan and/or STIP/TIP at the time of the missed deadline affects the ability to advance FHWA/FTA projects during the conformity lapse grace period.

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

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

Scenario 3: If both the transportation plan and the STIP/TIP have expired, FHWA/FTA will not authorize projects under the planning regulations. Regardless of the scenario, in addition to transportation planning requirements, project-level conformity requirements must also be met during the lapse grace period including any required hot-spot analysis. Refer to the Table 1 in 40 CFR 93.109 for the conformity criteria and procedures that apply to projects.

D. Newly Designated Nonattainment Areas

The lapse grace period provision in Clean Air Act section 176(c)(9) does not apply to the deadline for newly designated nonattainment areas to make the initial transportation plan/TIP conformity determination within 12 months of the effective date of the nonattainment designation. The lapse grace period in Clean Air Act section 176(c)(9) applies prior to when a lapse occurs, and Clean Air Act section 176(c)(10) and 40 CFR 93.301 define the term "lapse" to mean that the conformity determination for a transportation plan or TIP has expired. Therefore, the lapse grace period does not apply unless an area has already had a conforming transportation plan and TIP that has expired; it does not apply to a newly designated area that has not yet made its initial conformity determination for a transportation plan and TIP for a new pollutant or air quality standard.

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

These scenarios are consistent with those highlighted in EPA and DOT's joint February 14, 2006, interim guidance, which is superseded by today's final rule.

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

This one-year grace period for newly designated areas most recently applied to the areas designated...
Although the statutory and regulatory definitions of lapse do not apply to newly designated areas, once conformance applies, the identical restrictions of a conformity lapse will exist for any newly designated nonattainment area that does not have a conforming transportation plan and TIP in place one year after the effective date of SIP designation. EPA and DOT will continue to use the term “lapse” informally to describe these situations.

E. Conformity Freezes

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

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

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

VI. Timeframes for Conformity Determinations

A. Overview

Through SAFETEA–LU, Congress added new paragraph (7) to Clean Air Act section 176(c) (to allow areas to elect to shorten the period of time addressed by their transportation plan/TIP conformity determinations, or “timeframe.” Prior to this change, every conformity determination for a transportation plan and TIP has had to cover the entire timeframe of the transportation plan. Transportation plans cover a period of 20 years or longer. Because of the requirement to determine conformity of the entire transportation plan, the last year of the transportation plan has had to be analyzed in all transportation plan or TIP conformity determinations, as well as other earlier years in the timeframe of the transportation plan.

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

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

Today EPA is finalizing several changes in the regulatory language to provide the rules for shortening the conformity timeframe, and most of these changes are found in §93.106(d). This section discusses these changes and is organized as follows:

- Metropolitan areas that do not have an adequate or approved second maintenance plan (Section VI.B).
- Metropolitan areas with adequate or approved second maintenance plans (Section VI.C).
- How elections are made in metropolitan areas to either shorten the conformity timeframe, or revert to the original conformity timeframe once the timeframe has been shortened (Section VI.D).
- Isolated rural areas (Section VI.E).
- Conformity implementation in all areas under a shortened conformity timeframe, including which years must be analyzed (Section VI.F).

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

1. Description of Final Rule

Transportation plan and TIP conformity determinations must cover the timeframe of the transportation plan, unless an MPO elects to shorten the timeframe. This requirement is found in §93.106(d)(1). In areas without an adequate or approved second maintenance plan (i.e., a maintenance plan addressing Clean Air Act section 175A(b)), the Clean Air Act requires that a shortened conformity determination must extend through the latest of the following years:

- The first 10-year period of the transportation plan;
- The latest year for which the SIP (or FIP) applicable to the area establishes a motor vehicle emission budget; or
- The year after the completion date of a regionally significant project if the project is included in the TIP, or the project requires approval before the subsequent conformity determination.

These requirements are found in EPA’s regulation at §93.106(d)(2)(i). The final language in §93.106(d)(2)(i) is consistent with the proposed language, although minor clarifications have been made in response to comments. Specifically, the regulation at §93.106(d)(2)(i) states, “The shortened timeframe of the conformity determination must extend at least to the latest of the following years.” The proposed wording was, “The shortened timeframe of the conformity determination must be the longest of the following.”

4 The amendment to the Clean Air Act that allows areas to shorten the timeframe of conformity determinations (Clean Air Act section 176(c)(7), requires the MPO to consult with “the air pollution control agency.” For the reasons explained in the May 2, 2007, proposed rule (72 FR 24479 and 27790), EPA is using the equivalent term “state and local air quality agencies” in this preamble and final rule.
The final regulation at § 93.106(d)(2)(i)(B) is also slightly different than proposed, but the same in substance as the proposed rule. This provision now reads, “The latest year for which an adequate or approved motor vehicle emissions budget(s) is established in a submitted or applicable implementation plan.” Rather than the proposed wording, “The latest year in the submitted or applicable implementation plan that contains an adequate or approved motor vehicle emissions budget(s).”

Note that an MPO that has shortened its conformity timeframe does not choose which of these three timeframes it prefers to examine in the conformity determination; it must examine the longest of them. Such an MPO would have to determine which timeframe is the longest for each conformity determination, as the longest timeframe could determine the time period of conformity determination, because for example new budgets have been established or new regionally significant projects have been added to the TIP since the previous conformity determination.

2. Rationale and Response to Comments

These provisions to allow MPOs to shorten the timeframe covered by a conformity determination are necessary to make the conformity regulation consistent with the law. In SAFETEA-LU, Congress amended the Clean Air Act by adding section 176(c)(7), which allows MPOs to elect to shorten the timeframe of conformity determinations. EPA’s regulation at § 93.106(d)(1) requires that conformity determinations cover the timeframe of the transportation plan unless the MPO makes an election to shorten the timeframe. The Clean Air Act section 176(c)(7)(A) specifically states, “Each conformity determination shall require a demonstration of conformity for the period ending on either the final year of the transportation plan, or at the election of the metropolitan planning organization, a shorter timeframe.”

EPA’s regulation at § 93.106(d)(2)(i), which requires that a shortened timeframe must cover the longest of the three periods specified, also comes directly from the Clean Air Act. Specifically, section 176(c)(7)(A) states that a shortened conformity determination must cover:

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

EPA received several comments in support of the flexibility to shorten the timeframe of the conformity determination.

EPA is clarifying the language in § 93.106(d)(2)(i) and § 93.106(d)(2)(i)(B) from the proposal based on the suggestion of three commenters, although the meaning is the same as in the proposal. As a result, the final rule clarifies that the shortened timeframe must extend through the latest year of the three periods. EPA modified some of the commenters’ suggested language to be consistent with the statute.

The same commenters also suggested we change the language in § 93.106(d)(2)(i)(B) to refer to the latest year for which a budget is established, rather than the latest year that “contains” a budget. EPA has taken this suggestion because this language likewise improves clarity.

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

1. Description of Final Rule

In areas that have an adequate or approved maintenance plan under Clean Air Act section 175(a), transportation plan and TIP conformity determinations must cover the timeframe of the transportation plan unless an MPO elects to shorten the timeframe. This requirement is found in § 93.106(d)(1). Section 175(a) of the Clean Air Act is the provision that describes the submission of a maintenance plan. It covers the second ten years of the maintenance period. If an MPO with an adequate or approved second maintenance plan elects to shorten the timeframe, transportation plan and TIP conformity determinations would cover the period of time through the end of the maintenance period, that is, the period of time covered through the second maintenance plan. This period of time is in contrast to the longest of the three periods discussed in Section VI.B. for areas that do not have an adequate or approved second maintenance plan. The regulatory language for shortening the timeframe in areas with second maintenance plans is found in § 93.106(d)(3).

2. Rationale and Response to Comments

This rule provision for shortening the conformity timeframe in metropolitan areas with an adequate or approved second maintenance plan results directly from the Clean Air Act as amended by SAFETEA-LU. Clean Air Act section 176(c)(7)(C) specifically says that in areas with a second maintenance plan, a shortened conformity timeframe is “required to extend only through the last year of the implementation plan required under section 175(a) (sic) rather than the longest of the three periods established in Clean Air Act section 176(c)(7)(A).

Several commenters specifically noted their support for this provision. However, one commenter suggested that the proposed language for § 93.106(d)(2)(i) should be revised to be consistent with the fact that the Clean Air Act as amended by SAFETEA-LU allows areas with adequate or approved second 10-year maintenance plans to determine conformity through only the last year of the maintenance plan. EPA’s proposed regulation was consistent with the statutory provision for areas with adequate or approved second maintenance plans, and the final rule is as well. EPA believes this commenter may have misread the organization of this section, as we covered areas without second maintenance plans in § 93.106(d)(2), and areas with second maintenance plans in § 93.106(d)(3).

D. Process for Elections

1. Description of Final Rule

First, before an MPO elects to shorten the conformity timeframe, it has to consult with state and local air quality planning agencies, solicit public comment, and consider those comments. These requirements are found in § 93.106(d)(2). Consultation with the state and local air agencies would occur early in the decision-making process.

Second, once an MPO makes an election to shorten the period of time addressed in its transportation plan/TIP conformity determinations, the election remains in effect until the MPO elects otherwise. An MPO would make its election only once for a pollutant or pollutants and any relevant precursors, unless it chooses to elect otherwise in the future. An MPO that has elected to shorten the timeframe of conformity determinations that wants to revert to analyzing the full timeframe of the transportation plan must consult with the state and local air quality agencies, solicit public comments, and consider such comments before doing so. These provisions are found in § 93.106(d)(4).

EPA believes that consultation with the state and local air quality agencies on shortening the timeframe would typically occur in the context of the
normal interagency consultation process. EPA believes that for this consultation to be meaningful, it needs to occur at an early stage in the decision-making process. Therefore, consultation should occur when the MPO begins to consider shortening the timeframe. For example, it may be appropriate to discuss an election to shorten the conformity timeframe in the preliminary stages of developing the regional emissions analysis.

MPOs should follow their normal process for public participation regarding conformity actions when electing to shorten their conformity timeframe. MPOs are not required to revise their public participation/ involvement procedures required by 23 U.S.C. 134(f)(5) to address public consultation on shortening the area's conformity timeframe. MPOs are encouraged to make their elections prior to the start of the public comment period for their next conformity determination. Making the election prior to the start of the public comment period for the next conformity determination ensures that the public will understand that future conformity determinations will address a shorter period of time. Doing so will also allow the MPO to develop its next conformity determination in a more efficient manner and avoid running analyses for additional years, as described in the following paragraph.

However, there may be instances when an MPO will want to take public comments on the election to shorten the conformity timeframe at the same time that it is taking public comment on a conformity determination. In those cases, the conformity information presented to the public should include both a regional emissions analysis reflecting the election of a shorter timeframe and a regional emissions analysis that reflects the full length of the transportation plan. EPA recommends that both a shortened and a full-length analysis be included so that the MPO can complete its conformity determination according to its desired schedule, even if it receives negative public comment about shortening the timeframe and decides not to do so.

2. Rationale and Response to Comments

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

A definition of “air pollution control agency” has been added at Clean Air Act section 176(c)(7)(E), which EPA interprets to mean the relevant state and local air quality agencies that have regularly participated in the conformity consultation process, as discussed in the preamble to the May 2, 2007, proposed rule (72 FR 24480).

EPA’s regulation states that once an election to shorten the timeframe is made, it would remain in effect until the MPO elects otherwise, because that statement is specifically included in the statute. Clean Air Act section 176(c)(7)(D) states, “Any election by a metropolitan planning organization under this paragraph shall continue to be in effect until the metropolitan planning organization elects otherwise.” Changing previous elections. EPA requested comment on two options for the process that MPOs must follow if they have shortened the conformity timeframe and want to revert back to determining conformity for the full length of the transportation plan. Option A would have required MPOs to consult with state and local air agencies and solicit and consider public comment before reverting back to determining conformity for the full length of the transportation plan; Option B would have allowed MPOs to revert to the full timeframe without additional consultation or public comment. EPA is finalizing Option A. As explained in the proposal, Clean Air Act section 176(c)(7)(D) states that a shortened timeframe remains in effect unless an MPO elects otherwise.” An “election” to shorten the timeframe under section 176(c)(7) requires consultation with the state and local air quality agencies, solicitation of public comment and consideration of any comments received. EPA’s interpretation is that an election to revert to determining conformity for the entire length of the transportation plan is an election under this section and therefore also includes consultation with the state and local air pollution control agencies, solicitation of public comment, and consideration of those comments. Since the Clean Air Act uses the same term—“election”—in both subsections, it is reasonable to conclude that the same process should be followed for both actions. However, we expect the resource burden of this requirement to be minimal. MPOs can limit the additional burden of consultation with state and local air agencies and solicitation and consideration of public comment by using procedures developed to meet existing conformity requirements. Consultation with the state and local air quality planning agencies must already occur on the conformity determination within the interagency consultation process. Similarly, the MPO must already seek public comment on the conformity determination, according to the requirements in 40 CFR 93.106(e).

By relying on these existing consultation procedures, the MPO could avoid the additional resource costs associated with running another interagency consultation process or full public comment process for electing to revert to the full conformity timeframe.

Two trade associations supported Option A, and stated that their members appreciate the opportunity to comment on significant decisions made by MPOs that have the potential to impact transportation projects or an area’s ability to move forward with its transportation plans. These commenters thought that the public comment period should occur early in the conformity process so that conformity timing would not be negatively impacted. EPA appreciates these comments and supports the ability of the public to comment on decisions within the transportation conformity process that affect them.

A couple of commenters supported Option B, allowing an MPO to revert to a full-plan conformity timeframe without additional consultation or solicitation of public comment. Commenters opined that consultation and public comment are already required by 40 CFR 93.105, and those requirements already ensure that state and local air agencies will be consulted before any decisions are made. While MPOs can use these existing consultation and public comment provisions when reverting to the full transportation plan length timeframe, EPA is finalizing Option A so that MPOs will specifically solicit comment on the length of the conformity timeframe within these existing processes.

Other commenters offered an alternative option of using the established interagency consultation process to decide if a new public comment period should be required before an area elects to revert back to determining conformity for the entire timeframe of the transportation plan. The commenters suggested that this option would allow areas the flexibility to decide if a new public comment period is needed, while minimizing resource costs. EPA did not finalize these commenters’ suggestion because it would have required MPOs to consult
with a more extensive set of agencies to return to the full conformity timeframe than required by the statute when shortening the timeframe. When an MPO elects to shorten the timeframe, the Clean Air Act requires consultation with the state and local air agencies. Under the commenters' suggestion, before electing to revert to the full timeframe, MPOs would have to consult not only with state and local air agencies, but also EPA, DOT, and state and other local transportation agencies (e.g., transit agencies), because the interagency consultation process includes all of these agencies. This additional consultation is beyond what is required by this section of the statute.

As stated above, the existing interagency consultation process can be used to fulfill the requirement for consultation with state and local air quality agencies, because the MPO will be meeting with or speaking to representatives of these agencies in the context of the interagency consultation process. However, EPA believes that consulting with the relevant air agencies within the existing interagency consultation process is different, and less burdensome, than consulting with every agency involved in the interagency process. Second, the statute does not separate the interagency consultation and public comment processes as suggested by the commenters. The Clean Air Act section 176(c)(7) requires both consultation and public involvement whenever a timeframe is shortened, rather than consultation without public involvement. Rather than having agencies decide if the public would benefit by commenting, EPA believes the better interpretation of Congress' intent is to offer the public the opportunity to comment in all cases.

Placing in regulatory text. EPA is placing the requirements for state and local air quality agency consultation and public comment for shortening the conformity timeframe in §93.106 because this type of consultation would only occur when the MPO is considering electing to shorten the timeframe. Furthermore, placing these requirements in §93.106, rather than in 40 CFR 93.105, assures that no states with approved conformity SIPs have to amend them to add this provision. (See Section VII. for more information about the requirements for conformity SIPs.) EPA received no comments about this placement. See the preamble to the May 2, 2007, proposed rule (72 FR 24481) for EPA's full rationale.

E. Isolated Rural Nonattainment and Maintenance Areas

1. Description of Final Rule

Isolated rural nonattainment and maintenance areas do not have MPOs and are not required to prepare transportation plans or TIPs (40 CFR 93.101). Projects in these areas are generally included in the long-range statewide transportation plan and the statewide TIP. Isolated rural areas are not "donut areas." 9

The final rule gives isolated rural nonattainment and maintenance areas the flexibility to shorten the conformity timeframe in the same manner as metropolitan areas. The requirements for shortening the conformity timeframe in isolated rural areas are identical to the requirements in metropolitan areas, except the entity that would make the election to shorten the timeframe in an isolated rural area is the state DOT, rather than the MPO. The rule accomplishes this result by including a sentence in §93.109(1)(2)(i) that says, "When the requirements of §93.106(d) apply to isolated rural areas, references to "MPO" should be taken to mean the state department of transportation."

2. Rationale and Response to Comments

EPA believes it is appropriate to extend this flexibility to isolated rural areas to be consistent with how the conformity rule has been implemented in isolated rural areas. The Clean Air Act amendment made by SAFETEA-LU allows areas to shorten their conformity timeframes does not prohibit its use in isolated rural areas. In general, most aspects of the conformity regulation apply consistently to metropolitan and isolated rural areas. Where there are differences, the differences have given isolated rural areas additional flexibility. See the preamble to the May 2, 2007, proposed rule (72 FR 24482) for EPA's full discussion of why EPA concludes it is appropriate to give isolated rural areas the flexibility to shorten their conformity timeframe.

Seven commenters supported allowing isolated rural areas to shorten the timeframe of conformity determinations, and none opposed it. Commenters generally agreed with EPA's rationale that Congress did not prohibit extending the flexibility to isolated rural areas. They noted that these areas are treated much like MPOs throughout the rest of the conformity rule. One commenter noted that extending this flexibility to isolated rural areas will have no impact on project-level requirements.

EPA proposed two options for the entity that would make the election in isolated rural areas: Either the state DOT or the project sponsor, and solicited input on whether there are any other alternatives. Six commenters supported the state DOT option, and two supported the project sponsor option; no alternative entities were suggested. EPA believes that assigning the ability to elect to shorten the conformity timeframe to the state DOT makes the most sense. First, the state DOT prepares the statewide transportation plan and the statewide TIP and therefore in this regard, the state DOT serves a function in an isolated rural area that is similar to an MPO. Two commenters that supported the state DOT option cited this reason as well. Also, the state DOT may be better able to coordinate the consultation necessary to make an election with the state and local air quality planning agencies and with the public than any other entity in an isolated rural area. One commenter noted that given the consultation and public participation requirements associated with preparing transportation planning documents, the state DOT would be in the best position to satisfy similar requirements for electing to shorten the timeframe.

Though the state DOT is typically the project sponsor who prepares the conformity determination, several commenters were concerned about the possibility of there being more than one project sponsor in an area. Commenters noted that there may be multiple small entity project sponsors in an area, which could possibly lead to conflicts. A couple of commenters thought that the project sponsor option could result in confusion, inconsistent decisions in a state, and unpredictability.

The two commenters that supported the project sponsor option thought that project sponsors would be more closely attuned to local concerns. However, these commenters recognized that if there were multiple project sponsors, conflicts could arise, and recommended that in those cases, the state DOT should have the ability to shorten the timeframe. In considering these comments, EPA solicited input from FHWA and DOT field offices and concluded that in all recent cases, the state DOT is in fact the project sponsor for all FHWA/FTA projects in isolated rural areas. These areas are different than donut areas where county agencies sometimes are the project sponsor.

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9 Donut areas are defined as "geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or maintenance area that contains any part of a metropolitan area(s)." (40 CFR 93.101).
Finally, EPA believes it appropriate to name the state DOT as the entity with the ability to shorten the timeframe in an isolated rural area for specificity, because the state DOT is already relied upon in the conformity rule and guidance for isolated rural area conformity requirements.

F. Specific Analysis Requirements Under a Shortened Timeframe

1. Description of Final Rule

EPA is including most of the necessary regulatory language for shortening the conformity timeframe within §93.106, and is also updating §§93.118 and 93.119. Note that these provisions apply to both metropolitan and isolated rural areas.

- First, §93.106 is being renamed as “Content of transportation plans and timeframe of conformity determination.”

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

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

Areas that use the budget test. In areas that have budgets that choose to shorten the timeframe, the requirements for demonstrating consistency with budgets, and analyzing specific years, are similar to requirements that have existed, and still exist, for areas that determine conformity for the full length of the transportation plan. Under a shortened timeframe, consistency with, and an analysis for, the attainment year is necessary only if the attainment year is both within the timeframe of the transportation plan and conformity determination. In addition, under a shortened timeframe, instead of analyzing the last year of the transportation plan for the conformity determination, the analysis must be done for the last year of the shortened timeframe.

In areas that do not have an adequate or approved second maintenance plan budget, the conformity determination must also be accompanied by a regional emissions analysis for the last year of the transportation plan, as well as for any year where the budgets were exceeded in a previous regional emissions analysis if that year is later than the shortened conformity timeframe. These regional emissions analyses must be done in a manner consistent with how the budget test is performed and all relevant requirements of the transportation conformity regulation (e.g., 40 CFR 93.110, 93.111, and 93.122). However, these analyses would be for informational purposes only, and emissions would not have to meet the budgets in these years. Documentation of any informational analysis should clearly state that its purpose is informational only, and that conformity is not required to be demonstrated for the last year of the transportation plan or any year where the budgets were exceeded in a previous regional emissions analysis if that year is later than the shortened conformity timeframe. There is no similar requirement for information-only analyses in areas with an adequate or approved second maintenance plan budget, for the reasons described below.

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

The conformity determination must be accompanied by a regional emissions analysis for the last year of the transportation plan in areas that use the interim emissions tests. This regional emissions analysis would be for informational only, and must be done in a manner consistent with all relevant requirements of the transportation conformity regulation (e.g., 40 CFR 93.110, 93.111, and 93.122). Note that there is no requirement for an informational regional emissions analysis for years where the interim tests were not met in a previous regional analysis, as there is for areas that use the budget test that do not have adequate or approved second maintenance plans.

EPA proposed three options for the informational analysis for the last year of the transportation plan in areas that use the interim emissions tests: To compare estimated emissions to the interim emissions test(s) used in the conformity determination (Option X), to compare estimated emissions to either interim emissions test (Option Y), or just to estimate emissions without comparing them to either test (Option Z). EPA is finalizing Option Z.

While the final rule requires only an estimate of regional emissions for the transportation system that would exist in the last year of the transportation plan, EPA encourages MPOs and state DOTs to present this informational analysis in context so that it is truly informative for members of the public or state and local air agencies who are reviewing it. One possible way of doing so is to present a summary table of all of the years for which an analysis was run, including both the years analyzed in the conformity determination and the last year analyzed for informational purposes only. Another possible method would be to present a comparison with the emissions level from the baseline year (e.g., 2002), as is done for the baseline year test under 40 CFR 93.119. Furthermore, it would also be acceptable for an area to complete the build/no-build test as well, if desired. Documentation of any informational analysis should clearly state that its purpose is informational only, and that conformity is not required to be demonstrated for the last year of the transportation plan.

2. Rationale and Response to Comments

General. EPA has made these changes to the conformity regulation because SAFETEA-LU has amended the Clean Air Act to allow MPOs and state DOTs to shorten their conformity timeframes. EPA is implementing the specific requirements of the new Clean Air Act provision in today’s regulatory changes. These changes for required analysis years for conformity determinations with shortened timeframes are generally consistent with what has been current practice when conformity is determined for the full length of the transportation plan.

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

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

Areas that use the budget test. If the conformity timeframe is shortened in an area that does not have an adequate or approved second maintenance plan, EPA's regulation requires that the conformity determination be accompanied by an informational analysis. The rule language for the regional emissions analysis for the last year of the transportation plan, and for any year where the budgets were exceeded in a previous regional emissions analysis if that year is later than the shortened conformity timeframe, is also based in the new statutory language. Clean Air Act section 176(c)(7)(B) requires that the conformity determination "be accompanied by a regional emissions analysis" for these years. Absent a definition for "regional emissions analysis" in the statute, EPA assumes that the phrase has its usual meaning in the context of transportation conformity. Therefore, these analyses need to be done in a manner consistent with all the general requirements of the conformity regulations for such analyses.

This same statutory language is the reason that these analyses do not need to meet the required conformity tests. The statutory language makes it clear that these emissions analyses only "accompany" the conformity determination, and thus are not part of the conformity determination. Therefore, EPA concludes that conformity need not be demonstrated with respect to these analyses.

Areas that use the interim emissions tests. In areas that use the interim emissions tests, an informational analysis is required only for the last year of the transportation plan. In contrast, areas that use budgets also must do an informational analysis for any years that exceeded the budgets in a prior analysis. Such years would be years that extended beyond the shortened timeframe of prior conformity determinations, which were analyzed for informational purposes only. This result is because Clean Air Act section 176(c)(7)(B) states that these information-only regional emissions analyses are to be done "for the last year of the transportation plan and for any year shown to exceed emissions budgets by a prior analysis, if such year extends beyond" the end of the shortened timeframe. Areas subject to the interim emissions tests for a given pollutant or precursor do not have budgets for that pollutant or precursor. Therefore, there will not be any years for which a prior analysis shows the budget will be exceeded, and as such there is no statutory requirement for these areas to perform an informational regional emissions analysis for any year other than the last year of the transportation plan.

EPA requested comment on three options for what an information-only regional emissions analysis would consist of in an area that uses the interim emissions test. Option X would have required that emissions be compared to the same interim emissions test (i.e., build/no-build and/or the baseline year test(s)) as is used in the conformity determination. Option Y would have required that emissions be compared to either interim emissions test. Option Z, which we finalized, requires simply the estimate of emissions in the last year of the transportation plan with no comparison to either interim emissions test.

The statutory language is ambiguous regarding the information-only regional emissions analysis prior to the establishment of SIP budgets. Section 176(c)(7)(B) states that the regional emissions analysis that accompanies the conformity determination must be performed for the last year of the transportation plan, but does not specify that the interim emissions tests be conducted. The Congressional report language for this section states, "Generating this information will be helpful in ensuring that conformity is maintained," but does not include any direction on how this goal should be met in those areas that use the interim emissions tests.

Five commenters provided opinions on these options. One commenter preferred Option X (i.e., to use the same test(s) as in the conformity determination) because it involves use of similar information to that presented elsewhere in the determination. This commenter thought that presenting the estimate of emissions in context of the interim emissions tests is helpful in informing state and local agencies and the public about future emissions trends, and is consistent with the intent of Congress.

The remaining four commenters preferred Option Z. Some of these commenters thought that comparisons to the interim emissions tests could be confusing to stakeholders if a test is not met for the informational analysis. One of these commenters thought that EPA should allow for the presentation of these results at the discretion of the MPO and state DOT after interagency consultation. This commenter thought that states and MPOs understand the local context for transportation conformity and are best suited for determining what information should be presented for the last year of the transportation plan under a shortened timeframe.

As described above, EPA is finalizing Option Z to be consistent with the statute, which does not require that the interim emissions tests be performed for informational purposes. Under the final rule, MPOs and state DOTs have the discretion in presenting the results of the informational analysis for the last year of the transportation plan, and EPA encourages them to provide useful information to other involved agencies and the public. See Section F.1. above for additional suggestions on how to present such analyses to the public.

Areas with second maintenance plans that shorten their conformity timeframe. No information-only analyses is required in areas with an adequate or approved second maintenance plan, given Clean Air Act section 176(c)(7)(C). The statute labels this section, which applies to areas that have an adequate or approved second maintenance plan, as "Exception." EPA interprets section 176(c)(7)(C) to mean that areas with adequate or approved second maintenance plans that shorten their conformity timeframe do not have to comply with the requirements of Clean Air Act section 176(c)(7)(A) or (B), and section 176(c)(7)(C) itself does not require any information-only analyses. Therefore, areas with a second maintenance plan that shorten their conformity timeframe do not have to perform a regional emissions analysis for the last year of their transportation plans, or for a year shown to exceed budgets by a prior analysis, as required by Clean Air Act section 176(c)(7)(B) for other areas that have shortened their timeframe. EPA received no comments on this particular point.

VII. Conformity SIPs
A. Description of Final Rule

EPA is changing 40 CFR §390 to streamline the requirements for state conformity SIPs. A conformity SIP is different from a control strategy SIP or maintenance plan, as a conformity SIP only includes state conformity procedures and not motor vehicle
emissions budgets or air quality demonstrations.

EPA is finalizing requirements for states to submit conformity SIPs that address only the following sections of the pre-existing federal rule. These three sections that need to be tailored to a state’s individual circumstances:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in an MPO’s transportation plan and TIP, and that such commitments be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Prior to SAFETEA-LU, states were required to address these provisions as well as all other federal conformity rule provisions in their conformity SIPs. The rule had previously required states’ conformity SIPs to include most of the sections of the federal rule verbatim.

In addition, EPA is also deleting the requirement for states to submit conformity SIPs to DOT. States must continue to submit conformity SIPs to EPA. EPA is also reorganizing the conformity SIP regulatory language to improve clarity and readability. The regulatory language in §51.390 is reordered to more naturally fall into three topics: Purpose and applicability, conformity implementation plan content, and timing and approvals. The language retains existing requirements with appropriate modifications based on the new Clean Air Act amendment from SAFETEA-LU.

B. Rationale and Response to Comments

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

- Criteria and procedures for consultation, enforcement, and enforceability.
- Subparagraph (D)(i) in Clean Air Act section 176(c)(4) requires EPA to write regulations that address consultation procedures to be undertaken by MPOs and DOT with state and local air quality agencies and state DOTs before making conformity determinations. EPA’s regulations governing consultation are found at 40 CFR 93.105. Therefore, in effect the statute now requires states to address and tailor only the three sections of the conformity rule noted above in their conformity SIPs.
- EPA believes that the new conformity SIP requirements will reduce the administrative burden for state and local agencies significantly, because the new requirements will result in fewer required conformity SIP revisions in most areas. Four commenters supported these changes. Three commenters specifically agreed that these changes streamline the conformity SIP process and preclude the need for a state to update its conformity SIP each time the federal rule is revised. These commenters requested that the EPA urge states to include only the three required sections in their conformity SIPs to minimize the possibility of having to revise the SIP when the federal rule is updated. EPA agrees with this point.

However, the fourth commenter also requested that states still be able to incorporate the rest of the transportation conformity rule by reference. This option is further discussed in Section D.2 below.

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

The re-organizational changes to §51.390 are for clarity and readability and not related to changes in the law. EPA is making these changes to make this section more user-friendly, and the changes do not affect the substance of the pre-existing regulatory requirements.

C. How Does the Final Rule Impact States?

1. Areas That Have Never Submitted a Conformity SIP

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

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

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

3. Areas With Approved Conformity SIPs

States with EPA-approved conformity SIPs that decide to eliminate the provisions that are no longer mandatory would need to revise the SIP to eliminate those provisions. EPA would have to approve the changes to a state’s conformity SIP through the Federal Register rulemaking process. Such a SIP revision should not be controversial because the provisions are no longer required by the Clean Air Act as amended by SAFETEA-LU. In addition, their elimination from a state’s conformity SIP would not change conformity’s implementation in practice because the federal conformity rule applies for any provision not addressed in a state’s conformity SIP. States are encouraged to work with their EPA Regional Office as early in the process as possible to ensure the SIP submission meets all requirements and is fully approvable.

4. Areas That Submit a Partial Conformity SIP

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

D. When Are Conformity SIPs Due?

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

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

Once a state has an approved conformity SIP that addresses only the three sections that the Clean Air Act now requires, the state would need to revise its conformity SIP only if EPA revises one of these sections of the conformity rule, or the state chooses to revise one of these three provisions. Any future changes to the federal conformity rules beyond these three provisions would apply in any state that has only these three provisions in its approved conformity SIP, and these changes would not need to be adopted into the state’s SIP.

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

A state with a previously approved conformity SIP may decide to retain all or some of the federal rule in its SIP or a state without an approved conformity SIP could choose to submit for EPA approval all or some of the other sections of the federal rule. As noted above, one of the commenters expressly asked that EPA retain this option presumably so its state could avoid revising its conformity SIP. In such a case, the state should be aware that the conformity determinations in the state continue to be governed by the state’s approved conformity SIP. Such a state would need to revise its conformity SIP when EPA makes changes to the federal rule in order to have those changes apply in the state. As stated earlier, EPA strongly encourages states to only include the three required provisions in a conformity SIP to take advantage of the streamlining flexibilities provided for by the Clean Air Act, as amended by SAFETEA-LU. EPA is updating our previous guidance on conformity SIPs. The guidance will be available on EPA’s Web site at: http://www.epa.gov/otaq/stateresources/transconf/policy.htm.

State and local agencies that need to prepare a conformity SIP should review this guidance and consult with the appropriate EPA Regional Office.

VIII. Transportation Control Measure Substitutions and Additions

SAFETEA-LU section 6011(d) amended the Clean Air Act by adding a new section 176(c)(6) that establishes specific criteria and procedures for replacing TCMs in an approved SIP with new TCMs and adding TCMs to an approved SIP.

EPA is revising the definition of a TCM in § 93.101 to clarify that TCMs as defined for conformity purposes also include any TCMs that are incorporated into the SIP through this new TCM substitution and addition process. However, EPA has determined that no additional revision of the transportation conformity regulations is necessary to implement the TCM substitution and addition provision. EPA did not receive any comments on this portion of the proposed rulemaking.

EPA concluded no implementing regulations are necessary for the reasons explained in the preamble to the May 2, 2007 proposed rule (72 FR 24485–6).

EPA is updating our previous guidance on TCM substitutions and additions. The guidance will be available on EPA’s Web site at: http://www.epa.gov/otaq/stateresources/transconf/policy.htm. This guidance is consistent with the TCM substitution and additions portion (Section 5) of the EPA-DOT February 2006 Interim Guidance for implementing SAFETEA-LU. State and local agencies considering TCM substitutions or additions should review this guidance and consult with the appropriate EPA Regional Office.

Clean Air Act section 176(c)(6) requires that the EPA Administrator consult and concur on TCM substitutions and additions. However, as has been done with most other responsibilities related to the approval of SIP revisions, the Administrator has delegated this authority to the Regional Administrators. On September 29, 2006, the EPA Administrator signed a delegation of authority (Delegation of Authority 7–156: Transportation Control Measure Substitutions and Additions) providing EPA Regional Administrators with the authority to consult and concur on TCM substitutions and additions. The delegation of authority allows the Regional Administrators to further delegate these responsibilities to the regional air division directors, but no further.

IX. Categorical Hot-Spot Findings for Projects in Carbon Monoxide Nonattainment and Maintenance Areas

A. Background

Since the initial conformity rule was promulgated in 1993, a hot-spot analysis has been required for all project-level conformity determinations in CO nonattainment and maintenance areas (40 CFR 93.116 and 93.123(a)). A CO hot-spot analysis is an estimation of likely future localized pollutant concentrations and a comparison of those concentrations to the CO national ambient air quality standards ("standards") (40 CFR 93.101). A hot-spot analysis assesses air quality impacts on a scale smaller than the entire nonattainment or maintenance area, such as a congested roadway intersection.

A CO hot-spot analysis must show that a non-exempt FHWA/FTA project does not cause any new violations of the CO standards or increase the frequency or severity of existing violations (40 CFR 93.116(a)). Until a CO attainment demonstration or maintenance plan is approved, non-exempt FHWA/FTA projects must also eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (40 CFR 93.116(b)). These existing requirements remain unchanged by today’s final rule.

The type of CO hot-spot analysis varies depending on the type of project involved. Section 93.123(a)(1) requires quantitative hot-spot analyses for projects of most concern; section 93.123(a)(2) requires either a quantitative or qualitative hot-spot analysis for all other projects. These existing requirements also remain unchanged by today’s final rule.

Hot-spot analyses are also required for certain projects in PM2.5 and PM10 nonattainment and maintenance areas. The conformity rule allows DOT, in consultation with EPA, to make a "categorical hot-spot finding" in PM2.5 and PM10 nonattainment and maintenance areas if there is appropriate modeling that shows that a particular category of highway or transit projects will meet applicable Clean Air Act conformity requirements without further analysis (40 CFR 93.123(b)(3)). If DOT makes such a finding, then no further hot-spot analysis to meet 40 CFR 93.116(a) is needed for any project that fits the category addressed by the finding. A project sponsor would simply
EPA is extending the categorical hot-spot finding provision that applies in PM areas to CO nonattainment and maintenance areas in today’s final rule. This provision allows DOT, in consultation with EPA, to make categorical hot-spot findings for appropriate cases in CO nonattainment and maintenance areas if appropriate modeling shows that a type of highway or transit project does not cause or contribute to a new or worsened local air quality violation of the CO standards, as required under 40 CFR 93.119(a). The regulatory text for this provision is found in §93.123(a)(3). Any DOT categorical hot-spot finding would have to be supported by a credible quantitative modeling demonstration showing that all potential projects in a category satisfy statutory requirements without further hot-spot analysis. Such modeling would need to be derived in consultation with EPA, and consistent with EPA's existing CO quantitative hot-spot modeling requirements, as described in 40 CFR 93.123(a), and approved emissions model requirements in 40 CFR 93.111. Modeling used to support a categorical hot-spot finding could consider the emissions produced from a category of projects based on potential project sizes, configurations, and levels of service. Modeling could also consider the emissions produced by a category of projects and the resulting impact on air quality under different circumstances. The new provision does not affect the requirement for conformity determinations to be completed for all non-exempt projects in CO areas. The modeling on which a categorical finding is based would serve to fulfill the hot-spot analysis requirements for qualifying projects. The modeled scenarios used by DOT to make categorical hot-spot findings would be derived through consultation and participation by EPA.

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

C. Rationale and Response to Comments

EPA believes it is both appropriate and in compliance with the Clean Air Act for DOT to be able to make categorical hot-spot findings where modeling shows that such projects will not cause or contribute to new or worsened air quality violations. As long as modeling shows that all potential projects in a category meet the current conformity rule’s hot-spot requirements (40 CFR 93.116(a)—either through an analysis of a category of projects or a hot-spot analysis for a single project—then certain Clean Air Act conformity requirements are met. Clean Air Act section 176(c)(1)(B) is the statutory criterion that must be met by all projects in CO nonattainment and maintenance areas that are subject to transportation conformity. Section 176(c)(1)(B) states that federally-supported transportation projects must not “cause or contribute to any new violation of any standard in any area; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.”

EPA has not amended the existing CO hot-spot requirements in 40 CFR 93.116(a) that ensure areas meet Clean Air Act section 176(c)(1)(B) requirements. Today’s provision for DOT to make categorical hot-spot findings simply allows future information to be taken into account in an expedited manner, so that further CO hot-spot analyses are not performed on an individual basis for projects where it is determined to be unnecessary to meet certain statutory requirements. Making hot-spot findings for certain projects on a category basis may reduce the resource burden for state, regional and local agencies, and provide greater certainty and stability to the transportation planning process, while still ensuring that all projects meet Clean Air Act requirements.

As noted above, CO categorical hot-spot findings under today’s final rule could not be used to meet an additional hot-spot requirement for CO areas without approved attainment demonstrations or maintenance plans. Clean Air Act section 176(c)(5)(B)(ii) requires projects in these CO areas to also “eliminate or reduce the severity and number of violations of the carbon monoxide standards in the area substantially affected by the project.” This criterion is stipulated by 40 CFR 93.109(f)(1) and 93.116(b) for FHWA/FTA projects in these CO areas. EPA believes that this criterion is more appropriately met by evaluating the unique circumstances of an individual project, rather than based on a broader analysis of a category of projects. Since most CO areas already have approved attainment demonstrations or maintenance plans, there should be limited practical impact of this aspect of today’s proposal.

Six commenters supported this provision. These commenters agreed that allowing DOT to make categorical hot-spot findings, in consultation with EPA, provides an opportunity to streamline hot-spot analyses in all CO areas for certain projects. Additionally, commenters thought these categorical hot-spot findings would be consistent with the practice in many states already, and would reduce resource burdens while still ensuring that projects meet Clean Air Act requirements.

Some commenters thought that allowing DOT to make categorical hot-spot findings in CO areas would offer flexibility in satisfying the intent of the Clean Air Act. A commenter recognized that categorical hot-spot findings would have to be supported by credible quantitative modeling, and the scenarios modeled by DOT to make categorical findings would be derived through consultation and participation by EPA. EPA notes that the commenter’s understanding is correct; see Section IX.D. below for further description of how modeling would be developed.

While six commenters supported allowing DOT to make categorical hot-spot findings for projects in CO areas, one commenter was concerned that the provision to allow U.S. DOT to make categorical hot-spot findings would be a requirement, rather than an option. This provision is an optional flexibility and not a requirement. Once DOT has made a finding for a category of projects, a sponsor of a project in that category can choose whether to rely on DOT’s modeling, or do its own project-level analysis. In other words, a project sponsor can always decide to do its own project-level analysis, even for a project that belongs to a category that DOT has already analyzed.

This same commenter thought that this provision is unnecessary. The commenter thought that the similar
provision that applies in PM areas was created because of uncertainties regarding PM and because interagency consultation is needed to determine which projects are "projects of air quality concern and what constitutes a "significant number of diesel vehicles." This commenter also opined that the PM provision for categorical hot-spot analyses was developed because there are not acceptable modeling tools for PM_{2.5} or PM_{10}. In contrast, the commenter explained that the parameters used to identify the need for a CO hot-spot analysis are clearly stated under § 93.123(a), and the technology for CO hot-spot analyses is accepted by EPA and FHWA.

EPA disagrees with the commenter and believes it is useful to have a provision for categorical hot-spot analyses in CO areas. This provision will be useful because all non-exempt projects in CO areas that belong to a category for which DOT has made a hot-spot finding will have a hot-spot analysis available for use in future conformity determinations. As noted above, project sponsors have discretion on whether they want to model each project even if DOT has already made a categorical hot-spot finding for projects of that type.

This same commenter also stated that interagency consultation on CO analyses simply adds a layer of costly and inefficient bureaucracy that is unnecessary to complete the analysis. EPA disagrees with the commenter on this point as well. No additional layer of bureaucracy will be added to project-level conformity determinations in CO areas as a result of this provision. EPA and DOT's coordination on modeling for categorical hot-spot findings will occur separately from any particular project's conformity determination.

D. General Implementation for Categorical Hot-Spot Findings

EPA and DOT will implement the CO categorical hot-spot finding provision similar to the implementation of PM_{2.5} and PM_{10} categorical hot-spot findings, as described in the March 10, 2006, final rule. A project-level conformity determination continues to be required for all non-exempt FHWA/FTA projects in CO areas. Modeling used to support a categorical hot-spot finding would be based on appropriate motor vehicle emissions factor models, dispersion models, and EPA's existing requirements for quantitative CO hot-spot modeling as specified in 40 CFR § 93.123(a)(1) (40 CFR part 51, Appendix W [Guideline on Air Quality Models]). Categorical hot-spot findings and modeling to support such findings would primarily involve EPA and DOT headquarters offices rather than field offices. Such coordination at the headquarters level will ensure national consistency in applying §§ 93.123(a)(3) and (b)(3).

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

- FHWA and/or FTA, as applicable, would develop modeling, analyses, and documentation to support the categorical hot-spot finding. This would be done with early and comprehensive consultation and participation with EPA.
- FHWA and/or FTA would provide EPA an opportunity to review and comment on the complete categorical hot-spot finding documentation. Any comments would need to be resolved in a manner acceptable to EPA prior to issuance of the categorical hot-spot finding. Consultation with EPA on issue resolution would be documented.
- FHWA and/or FTA would make the final categorical hot-spot finding in a memorandum or letter, which would be posted on EPA's and DOT's respective conformity Web sites.

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

X. Removal of Regulation 40 CFR §93.109(e)(2)(v)

A. Description of Final Rule

EPA is removing a provision of the transportation conformity rule that was vacated by the U.S. Court of Appeals for the District of Columbia Circuit (Environmental Defense v. EPA, et al., D.C. Cir. No. 04-1291) on October 20, 2006. This provision, 40 CFR §93.109(e)(2)(v), allowed 8-hour ozone areas to use the interim emissions test(s) for conformity instead of 1-hour ozone SIP budgets where the interim emissions test(s) was determined to be more appropriate to meet Clean Air Act requirements. The court vacated this provision and remanded it to EPA.

B. Rationale and Response to Comments

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

The court's decision has minimal impact since most 8-hour ozone areas are already either using their 1-hour or 8-hour ozone SIP budgets. EPA, in cooperation with DOT, has already provided assistance to the limited number of areas affected by the recent court decision.

XI. Miscellaneous Revisions

A. Minor Revision to §93.102(b)(4)

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

Section 93.102(b)(4) had previously stated that conformity applied in "maintenance areas for 20 years from the date EPA approves the area's request under section 107(d) of the CAA for redesignation to attainment, unless the applicable implementation plan specifies that the provisions of this subpart shall apply for more than 20 years." We are clarifying this section to ensure that conformity would apply in maintenance areas through the last year of their approved Clean Air Act section 175A(b) maintenance plan (i.e., the area's second 10-year maintenance plan), unless the applicable implementation plan specifies that conformity would continue to apply beyond the end of that maintenance plan. We received two comments that supported this clarification.

EPA is only clarifying §93.102(b)(4) because the previous regulation may have been read to not account for the situation where a maintenance area submits a second maintenance plan that establishes a budget for a year more than 20 years beyond the date of EPA's
approval of the area’s redesignation request and first maintenance plan. For example, suppose an area’s redesignation request and first maintenance plan are approved in 2006 and the maintenance plan establishes budgets for 2016. This area submits a second maintenance plan that extends through 2030 and establishes budgets for that year. Under the previous regulatory conformity rule, this area would have made these corrections. This change will not impact current conformity practice.

C. Revisions to “Table 2—Exempt Projects” in §93.126

EPA is making several minor clarifications to “Table 2—Exempt Projects” in §93.126, under the category of “Safety.” Specifically, EPA is: updating the following terms:

• “Hazard elimination program” is now “Projects that correct, improve, or eliminate a hazardous location or feature;”
• “Safety improvement program” is now “Highway Safety Improvement Program implementation;”
• “Pavement marking demonstration” is now “Pavement marking.”

EPA is updating these terms to make them consistent with the terms in 23 U.S.C. 146, which has been amended by SAFETEA–LU section 1401. These revisions to Table 2 of the conformity regulation do not change the types of projects that are exempt from transportation conformity requirements. These revisions would only update the terminology to be consistent with the changes made by SAFETEA–LU to 23 U.S.C. 146. For more details see Section XI.C. “Revisions to ‘Table 2—Exempt Projects’ in §93.126” in the May 2, 2007, notice of proposed rulemaking (72 FR 24488).

We received five comments on this portion of the proposal. Several of the commenters indicated that they support the changes to the list of exempt projects.

One commenter asked if EPA had considered revising the list of exempt projects in 40 CFR 132.15 to further clarify the projects that are exempt or non-exempt under “Transportation Enhancement Activities.” FHWA’s guidance on activities that may be funded with Transportation Enhancement Activities is available on DOT’s Web site at: http://www.fhwa.dot.gov/environment/guidance.htm#eligible. After reviewing this guidance, we have concluded that 40 CFR 132.15 is correct and additional changes are not required.

Some commenters recommended additions to the list of exempt projects in §93.126. Given that we did not propose and request public comment on these additional changes to the list of exempt projects, these comments are outside the scope of today’s rulemaking.

D. Definitions

Today’s final rule revises the definitions of “metropolitan planning organization (MPO)” and “transportation improvement program (TIP)” to reflect the definitions in SAFETEA–LU sections 3005(a) and 6001(a). Pursuant to SAFETEA–LU, the term “MPO” now refers to the policy board for the organization that is designated under 23 U.S.C. 134(d) and 49 U.S.C. 5303(d). EPA is revising the definitions of these terms in §93.101 to be consistent with the new statutory definitions. These changes have no practical impact in conformity implementation.

EPA received three comments supporting the revisions to the definitions of MPO and TIP because these changes make the transportation conformity regulation consistent with SAFETEA–LU.

E. Minor Clarifications for Hot-Spot Analyses

EPA is incorporating two minor clarifications to the conformity rule’s hot-spot analysis provisions. These changes do not substantively change current requirements but should improve understanding and implementation of the conformity rule, in light of other rule changes. Three commenters supported these changes related to hot-spot analyses.

First, EPA is making minor changes to §§93.109(j)(2)(i) and 93.116(a) to ensure that CO, PM10, and PM2.5 hot-spot analyses will continue to consider a project’s air quality impact over the entire timeframe of the transportation plan or long-range statewide transportation plan, as appropriate. Specifically, EPA’s minor change to §93.116(a) ensures that hot-spot analyses cover the timeframe of the transportation plan in metropolitan and down nonattainment and maintenance areas. The addition to §93.109(j)(2)(i) ensures that hot-spot analyses in isolated rural areas examine a project’s air quality impact over the timeframe of the long-range statewide transportation plan.

As discussed in Section VI., today’s final rule allows MPOs to elect to shorten the timeframe addressed by transportation plan and TIP conformity determinations, and allows state DOTs to elect to shorten the timeframe addressed by regional emissions analyses in isolated rural areas. The minor changes to §§93.116(a) and 93.109(j)(2)(i) ensure that project-level hot-spot analyses examine the appropriate time period, even if the timeframe of the long-range transportation plan or TIP conformity determination or regional emissions analysis is shortened. The Clean Air Act provisions that allow an election to shorten the timeframe covered by
conformity determinations apply only to transportation plans and TIP conformity determinations, or regional emissions analyses in isolated rural areas, and do not apply to hot-spot analyses.

Second, today's final rule incorporates a technical clarification to §93.123(b)(1)(i) to address some confusion in the field since our March 10, 2006, final rule (71 FR 12468). Section 93.123(b)(1)(i) requires PM_{2.5} or PM_{10} hot-spot analyses to be conducted for “New highway projects that have a significant number of diesel vehicles, and expanded projects that have a significant increase in the number of diesel vehicles.” The prior wording was “New or expanded highway projects that have a significant number of or significant increase in diesel vehicles.”

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

F. Minor Revision for Terms Used To Describe Transportation Plan Revisions

EPA is finalizing a minor revision to how §§93.104(b)(2) and 93.105(c)(1)(v) describe transportation plan changes that require conformity determinations, but are not comprehensive transportation plan updates. EPA is changing references for transportation plan “revision(s)” to be transportation plan “amendment(s),” to be consistent with the revised planning definitions in DOT’s February 14, 2007, final transportation planning regulations (72 FR 7224). Today’s changes provide consistency between how mid-cycle transportation plan and TIP changes are currently described in the conformity rule. The revision does not change the substantive requirements for when a conformity determination is required for transportation plan changes. In addition, the minor wording change to §93.105(c)(1)(v) does not necessitate a conformity SIP revision. Three commenters supported the changes.

G. Minor Revision to Reference for Public Consultation Provision

EPA is updating a reference in §93.105(e) of the conformity rule to be consistent with DOT’s transportation planning regulations. Section 93.105(e) describes the procedures for consulting with the general public on conformity determinations. This provision now refers to 23 CFR 450.316(a) of DOT’s transportation planning regulations, which describes how public involvement occurs during the development of transportation plans and TIPs. In its February 14, 2007, final rule (72 FR 7224), DOT reorganized 23 CFR 450.316 to reflect the new SAFETEA-LU statute. DOT moved the public consultation procedures that EPA has historically relied upon in the conformity rule from 23 CFR 450.316(b) to 23 CFR 450.318(a). Today’s final rule reflects this change in DOT’s transportation planning regulations. Three commenters supported this change.

This revision does not change the substantive requirements for the public consultation requirements for conformity determinations. In addition, today’s change does not cause states to revise their conformity SIPs, since the revision involves an administrative change to one reference in DOT’s regulations. EPA has not required conformity SIP revisions for similar reference changes in the past; the public participation requirements in existing approved conformity SIPs can be implemented as intended even if they do not reflect the most current citation in DOT’s regulations.

XII. 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 (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

B. Paperwork Reduction Act

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

This action does not impose any new information collection burden or any new information collection requirements. The Office of Management and Budget has previously approved the information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The information collection requirements of EPA’s existing transportation conformity rule and the revisions in today’s action are addressed by two information collection requests (ICRs). Requirements for carbon monoxide, PM_{10}, nitrogen dioxide, and 1-hour ozone nonattainment and maintenance areas are covered under the DOT ICR entitled, “Metropolitan and Statewide Transportation Planning,” with the OMB control number of 2132–0529. Requirements related to PM_{2.5} and 8-hour ozone nonattainment and maintenance areas are covered by the EPA ICR entitled, “Transportation Conformity Determinations for Federally Funded Programs and Projects Under the New 8-hour Ozone and PM_{2.5} National Ambient Air Quality Standards,” with OMB control number 2060–0561, EPA ICR number 2130.02. EPA is currently revising its ICR to cover all transportation conformity burden (EPA ICR No. 2130.03, OMB Control No. 2060–0561), and this ICR will incorporate the efficiencies in today’s final rule.

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

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

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's final 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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This regulation directly affects federal agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000. Additionally, this rule contains no regulatory requirements that may result in expenditures 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.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This rule does not have federalism implications. It will not have substantial direct effects on states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in certain nonattainment and maintenance areas as a matter of law, and this rule merely establishes and revises procedures for transportation planning entities in subject areas to follow in meeting their existing statutory obligations. Thus, Executive Order 13132 does not apply to this rule.

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. This rule amends the conformity rule to be consistent with Clean Air Act section 176(c) as amended by SAFETEA-LU. The Clean Air Act amendments made by SAFETEA-LU affect nonattainment and maintenance areas subject to conformity requirements. This rule does not have tribal implications, as specified in Executive Order 13175. Accordingly, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045: “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

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

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

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 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., 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 action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. 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 report containing this rule and other reports to Congress and to the Comptroller General of the United States prior to applicability of the rule. A major rule defined by 5 U.S.C. 804(2) is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective February 25, 2008.

List of Subjects in 40 CFR Parts 51 and 93

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

Dated: January 9, 2008.

Stephen L. Johnson, Administrator.

For the reasons set out in the preamble, 40 CFR parts 51 and 93 are amended as follows:

PART 51—[AMENDED]

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


Subpart T—[Amended]

2. An authority citation for subpart T of part 51 is added to read as follows:

Authority: 42 U.S.C. 7401–7471q.

3. Section 51.390 is revised to read as follows:

§51.390 Implementation plan revision.

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

(b) Conformity implementation plan content. To satisfy the requirements of Clean Air Act section 176(c)(4)(E), the implementation plan revision required by this section must include the following three requirements of part 93, subpart A, of this chapter: §§ 93.105, 93.122(a)(4)(ii), and 93.125(c). A state may elect to include any other provisions of part 93, subpart A. If the provisions of the following sections of part 93, subpart A, of this chapter are included, such provisions must be included in verbatim form, except insofar as needed to clarify or to give effect to a stated intent in the revision to establish criteria and procedures
more stringent than the requirements stated in this chapter: §§ 93.101, 93.102, 93.103, 93.104, 93.106, 93.110, 93.111, 93.112, 93.113, 93.114, 93.115, 93.116, 93.117, 93.118, 93.119, 93.120, 93.121, 93.126, and 93.127. A state’s conformity provisions may contain criteria and procedures more stringent than the requirements described in this subpart and part 93, subpart A, of this chapter. Only if the state’s conformity provisions apply equally to non-federal as well as federal entities.

(c) Timing and approval. A state must submit this revision to EPA by November 25, 1994 or within 12 months of an area’s redesignation from attainment to nonattainment, if the state has not previously submitted such a revision. The state must also revise its conformity implementation plan within 12 months of the date of publication of any final amendments to §§ 93.105, 93.122(a)(4)(ii), and 93.125(c), as appropriate. Any other portions of part 93, subpart A, of this chapter that the state has included in its conformity implementation plan and EPA has approved must be revised in the state’s implementation plan and submitted to EPA within 12 months of the date of publication of any final amendments to such sections. EPA will provide DOT with a 30-day comment period before taking action to approve or disapprove the submission. In order for EPA to approve the implementation plan revision submitted to EPA under this subpart, the plan revision must address and give full legal effect to the following three requirements of part 93, subpart A: §§ 93.105, 93.122(a)(4)(ii), and 93.125(c). Any other provisions that are incorporated into the conformity implementation plan must also be done in a manner that gives them full legal effect. Following EPA approval of the state conformity provisions (or a portion thereof) in a revision to the state’s conformity implementation plan, conformity determinations will be governed by the approved (or approved portion of the) state criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the approved conformity SIP.

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

5. Section 93.101 is amended by:

a. Revising the definitions for “Metropolitan planning organization (MPO)” and “Transportation improvement program (TIP)”; and

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

The revisions read as follows:

§ 93.101 Definitions.

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

§ 93.102 [Amended]

6. Section 93.102 is amended as follows:

a. In paragraph (b)(2)(v), by removing “sulfur oxides (SOx)” and adding in its place “sulfur dioxide (SO2)”; and

b. In paragraph (b)(4), removing “for 20 years from the date EPA approves the area’s request under section 107(d) of the CAA for redesignation to attainment” and adding in its place “through the last year of a maintenance area’s approved CAA section 175A(b) maintenance plan”.

7. Section 93.104 is amended as follows:

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

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

c. By adding paragraph (f).

§ 93.104 Frequency of conformity determinations.

* * * * * * (b) All transportation plan amendments must be found to conform before the transportation plan amendments are approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in § 93.126 or § 93.127. The conformity determination must be based on the transportation plan and the amendment taken as a whole.

9. Section 93.106 is amended as follows:

a. By revising the section heading;

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

(e) Triggers for transportation plan and TIP conformity determinations. Conformity of existing transportation plans and TIPs must be redetermined within two years of the following, or after a 12-month grace period (as described in paragraph (f) of this section) the existing conformity determination will lapse, and no new project-level conformity determinations may be made until conformity of the transportation plan and TIP has been determined by the MPO and DOT:

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

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

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

§ 93.105 [Amended]

8. Section 93.105 is amended by removing “revisions or” in paragraph (c)(1)(v), and by removing the reference “23 CFR 450.316(b)” in paragraph (e) and adding in its place “23 CFR 450.316(a)”.
§ 93.106 Content of transportation plans and timeframe of conformity determinations.

(a) * * *
(b) * * *
(c) * * *
(d) Timeframe of conformity determination.

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

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

(i) The shortened timeframe of the conformity determination must extend at least to the latest of the following:

(A) The tenth year of the transportation plan;

(B) The latest year for which an adequate or approved motor vehicle emissions budget(s) is established in the submitted or applicable implementation plan; or

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

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

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

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

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

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

(1) * * *

(e) * * *

(2) Prior to paragraph (e)(1) of this section applying, the following test(s) must be satisfied:

(1) * * *

(2) * * *

(i) When the requirements of §§ 93.106(d), 93.116, 93.118, and 93.119 apply to isolated rural nonattainment and maintenance areas, references to "transportation plan" or "TIP" should be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the rural nonattainment or maintenance area. When the requirements of § 93.106(d) apply to isolated rural nonattainment and maintenance areas, references to "MPO" should be taken to mean the state department of transportation.

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

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

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

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

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

13. Section 93.116(a) is amended in the fourth sentence by removing "(or regional emissions analysis)".

14. Section 93.118 is amended as follows:

(a) By revising paragraph (b) introductory text;

(b) By revising the introductory text of paragraph (e)(2); and

(c) By adding new paragraph (d)(3).
extends beyond the timeframe of the conformity determination).

15. Section 93.119 is amended as follows:

a. In paragraph (f)(10), by removing “SO₂” and adding “SO₂” in its place;

b. By revising the last sentence in paragraph (g)(1); and

c. By adding new paragraph (g)(3).

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

* * * * *

(g) * * *

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

* * * * *

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

* * * * *

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

§93.120 Consequences of control strategy implementation plan failures.

(a) * * *

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

* * * * *

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

§93.121 Requirements for adoption or approval of projects by other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws.

(a) * * *

(1) The project comes from the currently conforming transportation plan and TIP (or meets the requirements of §93.104(f) during the 12-month lapse grace period), and the project’s design concept and scope have not changed significantly from those that were included in the regional emissions analysis for that transportation plan and TIP;

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

* * * * *

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

§93.123 Procedures for determining localized CO, PM10, and PM2.5 concentrations (hot-spot analysis).

(a) * * *

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

(b) * * *

(1) * * *

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

* * * * *

§93.126 [Amended]

19. Table 2 in §93.126 is amended under the heading “Safety” as follows:

a. By removing the entry “Safety elimination program” and adding in its place “Projects that correct, improve, or eliminate a hazardous location or feature”;

b. By removing the entry “Safety improvement program” and adding in its place “Highway Safety Improvement Program implementation”;

c. By removing the entry “Pavement marking demonstration” and adding in its place “Pavement marking”.

[FR Doc. E8–597 Filed 1–23–08; 8:45 am]
September 26, 2012

Mr. Ron Curry  
Regional Administrator  
U.S. EPA Region 6 (6-RA)  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202-2733

RE: Streamlining of New Mexico’s Transportation Conformity Regulation, 20.2.99 NMAC

Dear Mr. Curry:

On October 10, 2011, New Mexico submitted to EPA revisions to 20.2.99 NMAC - Conformity to the State Implementation Plan of Transportation Plans, Programs, and Project, for EPA’s approval and incorporation into New Mexico’s State Implementation Plan (SIP). EPA has not yet acted upon this submittal.

The purpose of this letter is to request that in reviewing New Mexico’s October 10, 2011 and any future transportation conformity SIP submittals, EPA only consider and act on the three elements (40 CFR § 93.105; § 93.122(a)(4)(ii); and § 93.125(c)) that are required under Clean Air Act section 176(c)(4)(E), as amended in August of 2005 by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), and that EPA take no action on the remainder of the State’s transportation conformity SIP.

As you know, EPA “strongly encourages states to only include the three required provisions in a conformity SIP to take advantage of the streamlining possibilities provided by the Clean Air Act, as amended by SAFETEA-LU” in order to “reduce the administrative burden ... by minimize[ing] the possibility of having to revise the conformity SIP each time the federal rule is revised.” 73 Fed. Reg. 4420, 4430 – 4432 (Jan. 24, 2008). The New Mexico Environment Department agrees that this approach will reduce our administrative burden without affecting the substantive requirements for transportation conformity, by eliminating the need to replicate verbatim the remainder of 40 C.F.R. Part 93 in the New Mexico Administrative Code. We therefore make this request, as recommended in EPA’s Guidance for Developing Transportation Conformity State Implementation Plans (SIPs), at p. 6.

Exhibit NMED 7b
Thank you for your assistance in this matter. If you have any questions, please contact Gail Cooke of my staff at 505-476-4319 or via email at gail.cooke@state.nm.us.

Sincerely,

Dave Martin
Secretary, New Mexico Environment Department

cc: Mr. Jeffrey Riley, EPA Region VI
    Mr. Guy Donaldson, EPA Region VI
    Mr. Tom Diggs, EPA Region VI
    Mr. Richard Goodyear, Air Quality Bureau
    Ms. Mary Lou Leonard, Director, Environmental Health Department, City of Albuquerque
EPA-APPROVED TENNESSEE NON-REGULATORY PROVISIONS

<table>
<thead>
<tr>
<th>Name of nonregulatory SIP provision</th>
<th>Applicable geographic or nonattainment area</th>
<th>State effective date</th>
<th>EPA approval date</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>110(a)(1) and (2) Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards—Elements 110(a)(1) and (2)(C) and (J).</td>
<td>Tennessee</td>
<td>12/14/2007</td>
<td>3/14/2012 [Insert citation of publication].</td>
<td></td>
</tr>
</tbody>
</table>

Additional requirements include:

- The Clean Air Act requires federally supported transportation plans, transportation improvement programs, and projects to be consistent with (conform to) the purpose of the state air quality implementation plan. EPA consulted with the U.S. Department of Transportation and they concur in the development of this final rule.
- EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2009–0128. All documents in the docket are listed in the 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 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.
- For further contact: Patty Klavon, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Travuerdo Drive, Ann Arbor, MI 48105, email address: klavon.patty@epa.gov, telephone number: (734) 214–4476, fax number: (734) 214–4052.

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

I. General Information
II. Background on the Transportation Conformity Rule
III. Restructure of Section 93.109—Tests of Conformity for Transportation Plans, TIPs, and Projects—and Changes to Related Sections
IV. Additional Option for Areas That Qualify for EPA's Clean Data Regulations or Policies
V. Restructure of the Baseline Year Test for Existing NAAQS and Baseline Year Test for Future NAAQS
VI. How do these amendments affect conformity SIPs?
VII. Statutory and Executive Order Reviews

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, programs, 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:

<table>
<thead>
<tr>
<th>Category</th>
<th>Examples of regulated entities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local government</td>
<td>Local transportation and air quality agencies, including metropolitan planning organizations (MPOs).</td>
</tr>
<tr>
<td>State government</td>
<td>State transportation and air quality agencies. Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)).</td>
</tr>
<tr>
<td>Federal government</td>
<td></td>
</tr>
</tbody>
</table>

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 action to a particular entity, consult the persons listed in the preceding FOR FURTHER INFORMATION CONTACT section.
B. How do I get copies of this document?

1. Docket

EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OAR-2009-0128. 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/oar/statesources/transconf/index.htm. An electronic version of the official public docket is also available through www.regulations.gov. You may use 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 enter 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.

II. Background on the Transportation Conformity Rule

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, transportation improvement programs (TIPs) and federally supported highway and transit projects are consistent with (conform to) the purpose of the state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause or contribute to new or existing violations, worsen existing violations, or delay timely attainment or achievement of the relevant National Ambient Air Quality Standards (NAAQS) and interim emission reductions or 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: Carbon monoxide (CO), ozone, nitrogen dioxide (NO2) and particulate matter (PM2.5 and PM10). EPA’s conformity rule (40 CFR Parts 51.390 and 93 Subpart A) 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 other amendments. DOT is EPA’s federal partner in implementing the conformity regulation. EPA consulted with the U.S. Department of Transportation (DOT), and they concur on this final rule.

B. Why are we issuing this final rule?

EPA is amending the conformity rule so that its requirements will clearly apply to areas designated for any future new or revised NAAQS. To achieve this, today’s final rule restructures two sections of the conformity rule, 40 CFR 93.109 and 93.119, and makes changes to certain definitions in 40 CFR 93.101. These amendments are intended to minimize the need to make administrative updates to the conformity rule merely to reference a specific new or revised NAAQS. EPA has already undertaken two conformity rulemakings primarily for the purpose of addressing a new or revised NAAQS. See the March 24, 2010 Transportation Conformity Rule PM2.5 and PM10 Amendments (“PM Amendments”) final rule and the July 1, 2004 final rule (75 FR 14260, and 69 FR 40004, respectively). Due to other CAA requirements, EPA will continue to establish new or revised NAAQS in the future. EPA believes that today’s conformity rule revisions provide more certainty to implementers without compromising air quality benefits from the current program. These changes are described in Sections III. and V. of today’s final rule.

EPA is also clarifying in today’s final rule the additional conformity test option available to current ozone “clean data” areas and is extending that option to any nonattainment areas for which EPA has developed a clean data regulation or policy. This provision should eliminate the need to update the conformity rule in the future to extend this conformity option to other NAAQS. See Section IV. of today’s final rule for further details.

EPA is also finalizing a change to the wording of conformity rule section 93.118(b) that does not change its requirements. Section 93.118(b) of the conformity rule continues to require consistency for any years where the SIP establishes a budget and for any years that are analyzed to meet the requirements in 40 CFR 93.116(d). This change simplifies this provision and eliminates repetitiveness within the regulation, but does not change the requirements for demonstrating consistency. EPA did not receive comments on this section, and we are finalizing it as proposed.

Section VI. covers how today’s final rule affects conformity SIPs. A conformity SIP includes a state’s specific criteria and procedures for certain aspects of the conformity process.

In the August 13, 2010 Federal Register notice, EPA had proposed that a near-term year would have to be analyzed when using the budget test when an area’s attainment date has passed or has not yet been established (75 FR 49435). EPA is not taking final action on this proposal at this time.

Finally, EPA received several comments requesting that we issue a rulemaking, rather than guidance, to address conformity requirements in areas designated for a distinct secondary NAAQS. Transportation conformity applies to any NAAQS for transportation-related criteria pollutants, including secondary...
NAAQS. CAA section 176(c) does not distinguish between primary and secondary NAAQS. EPA would issue future transportation conformity guidance as needed to implement new or revised NAAQS, including a distinct secondary NAAQS if one is promulgated in the future.

III. Restructure of Section 93.109—Tests of Conformity for Transportation Plans, TIPs, and Projects—and Changes to Related Sections

A. Overview

Conformity determinations for transportation plans, TIPs, and projects not from a conforming transportation plan and TIP must include a regional emissions analysis that fulfills CAA requirements. The conformity rule provides a different regional conformity tests that satisfy statutory requirements in different situations. Once a SIP with a budget is submitted for a NAAQS and EPA finds the budget adequate for conformity purposes or approves the SIP, conformity must be demonstrated using the budget test for such pollutant or precursor, as described in 40 CFR 93.119.

EPA has amended the conformity rule on two prior occasions to address a new or revised NAAQS. In the July 1, 2004 final rule (69 FR 40004), EPA amended 40 CFR 93.109 by adding new paragraphs to describe the regional conformity tests for the 1997 ozone areas that do not have 1-hour ozone budgets, 1997 ozone areas that have 1-hour ozone budgets, and 1997 PM2.5 areas. Also, in the March 24, 2010 PM. Amendments rulemaking (75 FR 14260), EPA amended 40 CFR 93.109 again by adding two new paragraphs to describe the regional conformity tests for 2006 PM2.5 areas without 1997 PM2.5 budgets, and 2006 PM2.5 areas that have 1997 PM2.5 budgets.

Given that CAA section 109(d)(1) requires EPA to revisit the NAAQS for criteria pollutants at least every five years, and that EPA is in the process of considering revisions to other NAAQS per this requirement, EPA anticipates other NAAQS revisions will be made in the future that will be subject to conformity requirements. Today’s action restructures 40 CFR 93.109 to eliminate repetition and reduce the need to update the rule each time a NAAQS is promulgated. The same hierarchy of conformity tests as described below in B. of this section generally applies to all areas where conformity is required, and for the reasons described below, EPA believes it would apply to future nonattainment and maintenance areas for transportation-related pollutants or NAAQS.

B. Description of the Final Rule

In today’s action, EPA is restructuring 40 CFR 93.109 so that it contains two paragraphs:

- Regional conformity tests, which are covered by section 93.109(c); and
- Project-level conformity tests, which are covered by section 93.109(d).

New paragraph (c). Today’s final rule revises 40 CFR 93.109(c) so that requirements for using the budget test and/or interim emissions tests apply for any NAAQS in the following way:

- First, a nonattainment or maintenance area for a specific NAAQS must use the budget test, if the area has adequate or approved SIP budgets for that specific NAAQS (section 93.109(c)(1)). For example, once a 2006 PM2.5 nonattainment area has adequate or approved SIP budgets for the 2006 PM2.5 NAAQS, it must use those budgets in the budget test as the regional test of conformity for the 2006 PM2.5 NAAQS;
- Second, if an area does not have such budgets but has adequate or approved budgets from a SIP that addresses a different NAAQS of the same criteria pollutant, these budgets must be used in the budget test. Where such budgets do not cover the entire area, the interim emissions test(s) may also have to be used (section 93.109(c)(2)). For example, before a 2006 PM2.5 area has adequate or approved budgets for the 2006 PM2.5 NAAQS, it must use the budget test, using budgets from an adequate or approved SIP for the 1997 PM2.5 NAAQS, if it has them. If these budgets do not cover the entire 2006 PM2.5 area, one of the interim emissions tests may also have to be used;
- Third, if an area has no adequate or approved SIP budgets for that criteria pollutant at all, it must use the interim emissions test(s) (section 93.109(c)(3)). For example, if a 2006 PM2.5 area has no adequate or approved budgets for any PM2.5 NAAQS, it must use one of the interim emissions tests, as described in 40 CFR 93.119.

These conformity test requirements are unchanged from the previous regulation; today’s rulemaking restates them in terms that apply to any NAAQS.

In addition, in conformity rule section 93.109(c)(5), EPA is expanding the clean data conformity option to all clean data areas for which EPA has a clean data regulation or policy. See Section IV. below for further information.

New paragraph (d). With regard to project-level requirements, today’s final rule places the existing rule’s requirements for hot-spot analyses of projects in CO, PM10, and PM2.5 nonattainment and maintenance areas together in one paragraph (section 93.109(d)(1), (2), and (3)). These requirements are unchanged from the previous regulation; today’s rulemaking simply groups them together under one paragraph.7

Related amendments. Today’s final rule removes the definitions for “1-hour ozone NAAQS”, “8-hour ozone NAAQS”, “1997 PM2.5 NAAQS”, “2006 PM2.5 NAAQS”, and “Annual PM10 NAAQS” from 40 CFR 93.101. These definitions are no longer necessary because the updated regulatory text for sections 93.109 and 93.119 applies to any and all NAAQS of those pollutants for which conformity applies. In addition, today’s final rule updates references to 40 CFR 93.109 found elsewhere in the regulation. Finally, today’s final rule corrects a reference to the consultation requirements found in 93.109(g)(2)(iii) which applies to isolated rural areas.

C. Rationale and Response to Comments

EPA is restructuring 40 CFR 93.109 because a recent court decision has already established the legal parameters for regional conformity tests. In Environmental Defense v. EPA, 467 F.3d 1329 (DC Cir. 2006), the Court of Appeals for the District of Columbia Circuit held that where a motor vehicle emissions budget developed for the revoked 1-hour ozone NAAQS existed in an approved SIP, that budget must be used to demonstrate conformity to the 8-hour ozone NAAQS until the SIP is revised to include budgets for the new (or revised) NAAQS. EPA incorporated the court’s decision for ozone conformity tests in its January 24, 2008 final rule (73 FR 4434). While the Environmental Defense case concerned ozone, EPA believes the court’s holding is relevant for other pollutants for which

6See Section V. of today’s rulemaking for revisions to 40 CFR 93.119.

7Project-level conformity determinations are typically developed during the National Environmental Policy Act (NEPA) process, although conformity requirements are separate from NEPA-related requirements. Today’s action to restructure 40 CFR 93.103 does not affect NEPA-related requirements as implemented in the field.

See the preamble to the August 13, 2010 proposal for further background (75 FR 49441).
conformity must be demonstrated. Consequently, EPA believes the hierarchy of regional conformity tests described above, which is already found in the existing rule for 1997 ozone and 2006 PM2.5 areas, would apply for any NAAQS of a pollutant for which the conformity rule applies.

EPA’s restructuring of 40 CFR 93.109 and elimination of certain definitions in 40 CFR 93.107 to align with the standardization of the baseline year in 40 CFR 93.119 (see Section V. of today’s final rule for details), should make the rule sufficiently flexible to address any future NAAQS changes, including the promulgation of a new or revised NAAQS or revocation of a NAAQS, without additional rulemakings.

The restructured section 93.109 does not change the criteria and procedures for determining conformity of transportation plans, TIPs, and projects and is consistent with the regional conformity test requirements described in the PM Amendments final rule (75 FR 14266–14274). The rationale for the required regional tests has been described in previous rulemakings. The rationale for the requirements for project-level conformity tests in CO, PM2.5, and PM10 areas has also been described in previous rulemakings.

Today’s restructuring of 40 CFR 93.109 reduces the likelihood that EPA would have to amend the conformity rule when new or revised NAAQS are promulgated, which has several benefits. First, implementers will know the requirements for regional conformity tests for any potential area designated nonattainment for a new or revised NAAQS, even before such area’s official designation, and will not need to wait for any additional conformity rulemaking from EPA to know what type of regional conformity test will apply. Second, reducing the need to amend the conformity regulation each time a NAAQS change is made will save government resources and taxpayer dollars, and will reduce stakeholder efforts needed to keep track of regulatory changes.

All commenters who addressed this proposal supported EPA’s approach for restructuring 40 CFR 93.109. Several commenters agreed with EPA that these changes will help streamline the conformity regulation and reduce the need to revise the conformity rule when new or revised NAAQS are promulgated. One commenter opined that the restructuring of 40 CFR 93.109 provides a clear and concise organization of the conformity requirements and agreed with EPA’s rationale that it will be beneficial for implementing organizations to know the conformity requirements in advance of any new or revised NAAQS.

A few commenters requested that EPA clarify whether areas that have an adequate or approved NOx SIP budget for a specific NAAQS (e.g., the 1997 ozone NAAQS) would have to use that NOx budget to demonstrate conformity for another pollutant, such as PM2.5. A NOx budget in an ozone SIP would apply for conformity for an ozone NAAQS only, and could not be used as a budget for any other pollutant. CAA section 176(c)(1)(A) establishes that conformity must demonstrate conformity to a SIP’s “‘purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards.’ The purpose of a SIP is tied to the pollutants it addresses. The 2006 court case cited above in this section supports this point. In that ruling, the court held that where a budget developed for the revoked 1-hour ozone NAAQS existed in an approved SIP, that budget must be used to demonstrate conformity to the 8-hour ozone NAAQS until a SIP is revised to include budgets for the new or revised NAAQS. The court did not refer to adequate or approved NOx or VOC budgets from a SIP that addressed a pollutant other than ozone, and did not indicate that such budgets would need to be used. In accordance with this court decision, if, for example, a 1997 ozone area has an approved 1997 ozone attainment demonstration with a NOx budget, this NOx budget must be used to demonstrate conformity for the 1997 ozone NAAQS and could also be used to demonstrate conformity for any future ozone NAAQS before the area has a SIP for that ozone NAAQS. However, the NOx budget could not be used to demonstrate conformity for a PM or NO2 NAAQS because doing so would not be consistent with CAA section 176(c) requirements that conformity be demonstrated to the relevant SIP. Finally, while pollutants may have precursors in common, control strategies may differ by pollutant and the seasons for which the budget is established may differ by pollutant as well. For example, precursor SIP budgets for the ozone NAAQS address a typical summer day, because ozone is a summertime air quality problem. However, PM2.5 violations in the same geographic area may have occurred during winter months. An ozone precursor SIP budget established for a typical summer day has no relevance in addressing a wintertime PM2.5 problem. EPA believes that section 93.109(c)(2) in today’s final rule provides sufficient clarity for these situations because it specifies that where an area does not have an adequate or approved SIP budget for a NAAQS, it would use an approved or adequate SIP budget(s) for another NAAQS of the same pollutant as the test of conformity. No additional changes are necessary.

IV. Additional Option for Areas That Qualify for EPA’s Clean Data Regulations or Policies

A. Overview

Prior to today’s final rule, the conformity rule provided an additional regional conformity test option for certain moderate and above ozone nonattainment areas that meet the criteria of EPA’s existing clean data regulation and policy. Today’s rule clarifies this option and extends it to any nonattainment areas that are covered by EPA’s clean data regulations or clean data policies. See Section IV of the August 13, 2010 proposal for further background on EPA’s clean data regulations and policies (75 FR 49439).

B. Description of the Final Rule

Today, EPA is clarifying that any nonattainment area that EPA determines has air quality monitoring data that meet the requirements of 40 CFR parts 50 and 58 and that show attainment of a NAAQS—a “clean data” area—can choose to satisfy the regional conformity test requirements by using on-road emissions from the most recent year of clean data as the budget(s) for that NAAQS rather than using the interim emissions test(s) per 40 CFR 93.119. The area may do this if the following are true:

- The state or local air quality agency requests that budgets be established by the EPA determination of attainment (Clean Data) rulemaking for that NAAQS, and EPA approves the request; and,
- The area has not submitted a maintenance plan for that NAAQS and EPA has determined (through the Clean Data rulemaking) that the area is not subject to the CAA reasonable further progress and attainment demonstration requirements for the relevant NAAQS.

See EPA’s March 24, 2010 final rule (75 FR 14266–14273). See also EPA’s July 1, 2004 final rule (69 FR 40019–40031).

For further details on project-level conformity test requirements, please refer to the March 10, 2006 final rule (71 FR 12460–12506). See also EPA’s January 24, 2008 final rule (73 FR 4432–4443). EPA’s July 1, 2004 final rule (69 FR 40019–40031; 40036–40038; 40045–40048), the August 15, 1997 final rule (62 FR 43796), and the November 24, 1993 final rule (58 FR 62190–62201; 62207–62208; 62212–62213).

See section 93.101 for a definition of “clean data.”
Otherwise, clean data areas for a NAAQS must satisfy the regional conformity test requirements using either the budget test if they have adequate or approved SIP budgets (per 40 CFR 93.109 and 93.118), or the interim emissions test(s) per 40 CFR 93.119 if they do not have adequate or approved SIP budgets.

In this rule, EPA is not making changes to its existing clean data regulations or policies or to the conformity option for clean data areas. EPA is merely clarifying this conformity option and extending it to any nonattainment areas that are covered by EPA's clean data regulations or clean data policies.

The regulatory text for this flexibility is found in section 93.109(c)(5) of the conformity rule. This text clarifies that before this flexibility may be used: (1) the state or local air quality agency must make the request that the emissions in the most recent year for which EPA determines the area is attaining (i.e., the most recent year that the area has clean data) be used as budgets, and (2) EPA would have to approve that request through notice-and-comment rulemaking.

Today's rule also updates the definition of "clean data" in 40 CFR 93.101 to describe this term more accurately. The updated definition references the appropriate requirements at 40 CFR part 50, as well as part 58.

C. Rationale and Response to Comments

EPA believes that it is reasonable to extend the same conformity option available to clean data ozone areas to all clean data areas for which EPA has a clean data regulation or policy. Furthermore, this provision should work with any clean data policy or regulation that EPA develops; thus, it would eliminate the need to update the conformity rule in the future in order to extend this conformity option to any NAAQS for which EPA develops a clean data policy or regulation. See EPA's previous discussion and rationale for the clean data conformity option in July 1, 2004 final rule (69 FR 40019–40021).

See also the preamble to the 1996 conformity proposal and 1997 final rule (July 9, 1996, 61 FR 36116, and August 15, 1997, 62 FR 43784–43785, respectively).

Several commenters requested that EPA clarify whether the use of the most recent year of clean data as the budget becomes binding once EPA approves it for use in completing regional conformity analyses. These commenters also wanted assurance that the state or local air quality agency would need to use the interagency and public consultation process before such budgets are submitted to EPA for approval. As EPA explained in its proposed rule (August 13, 2010, 75 FR 49439), once the state or local air quality agency makes the request that the emissions in the most recent year for which the area is attaining be used as the budget, and EPA approves that request through a rulemaking, this level of emissions becomes the approved budget for conformity purposes in the clean data area for the relevant NAAQS.12 The area may not revert back to using the interim emissions test(s) to demonstrate conformity once a budget has been established through a rulemaking, regardless of whether such budget is approved in a Clean Data rulemaking for a NAAQS or is approved as part of a control strategy SIP. Note that should EPA subsequently determine that the public must be provided an opportunity to comment. See the August 15, 1997 final rule (62 FR 43784–43785) that, regardless of whether a budget is created through the SIP process or through a Clean Data rulemaking, the interagency consultation process must be used and the public must be provided an opportunity to comment. See the August 15, 1997 final rule for further details.

For details on EPA's clean data regulations and policies, see the November 29, 2005 Phase 2 Ozone Implementation rulemaking for the 1997 ozone NAAQS (70 FR 71644–71646), 40 CFR 51.918, and the April 25, 2007 Clean Air Fine Particle Implementation Rule for the 1997 PM2.5 NAAQS (72 FR 20603–20605, 40 CFR 1004(c)). See also various determinations of attainment for PM2.5 nonattainment areas using EPA's Clean Data policy (October 30, 2006 final rule (71 FR 63642), February 8, 2006 final rule (71 FR 6352), March 14, 2006 final rule (71 FR 13021), March 23, 2010 proposed rule (75 FR 13710)).

V. Restructure of the Baseline Year Test for Existing NAAQS and Baseline Year Test for Future NAAQS

A. Overview

As stated above, conformity is demonstrated with one or both of the interim emissions tests if an adequate or approved SIP budget is not available. The interim emissions tests include different forms of the "build/no-build" test and "baseline year" test. In general, the baseline year test compares emissions from the planned transportation system to emissions that occurred in the relevant baseline year. The build/no-build test compares emissions from the planned (or "build") transportation system with the existing (or "no-build") transportation system in the analysis year.

B. Description of Final Rule

Today's action revises 40 CFR 93.119 to apply more generally to any NAAQS for a given pollutant. First, the section has been reorganized to place the baseline years for existing NAAQS in one paragraph (revised paragraph (e)). Today's action also revises 40 CFR 93.119 to define the baseline year for any NAAQS promulgated after 1997 by reference to another requirement. Rather than naming a specific year, the conformity rule defines the baseline year for conformity purposes as the most recent year for which EPA's Air Emissions Reporting Requirements (AERR) (40 CFR Part 51.30(b)) requires submission of on-road mobile source emission inventories, as of the effective date of EPA's nonattainment designations for any NAAQS promulgated after 1997. AERR requires on-road mobile source emission inventories to be submitted for every third year, for example, 2002, 2005, 2008, 2011, 2014, etc.

Today's rule is consistent with the baseline year definition finalized for the 2006 PM2.5 NAAQS in the PM Amendments final rule. In the PM Amendments final rule, this definition applied to only areas designated for any PM2.5 NAAQS other than the 1997 PM2.5 NAAQS. Today's action amends the
conformity rule to establish the same baseline year definition for new or revised NAAQS of any pollutant promulgated after 1997, not just the PM$_{2.5}$ NAAQS. See the March 24, 2010 p.m. Amendments final rule (75 FR 14265–14266) for further details.

This definition will automatically establish a relevant baseline year for conformity purposes for any areas designated nonattainment for all future NAAQS. For all future NAAQS, EPA will identify the baseline year that results from today’s rule in guidance and will maintain a list of baseline years on EPA’s Web site. Once the baseline year is established according to this provision, it will not change (i.e., the baseline year would not be a rolling baseline year for a given NAAQS). Today’s final rule does not change any baseline years already established for conformity purposes prior to today’s action.

The existing interagency consultation process (40 CFR 93.105(c)(1)(i)) must be used to determine the latest assumptions and models for generating baseline year motor vehicle emissions to complete any baseline year test. The baseline year emissions level that is used in conformity must be based on the latest planning assumptions available, the latest emissions model, and appropriate methods for estimating travel and speeds as required by 40 CFR 93.110, 93.111, 93.122 of the current conformity rule.

As described in earlier rulemakings, the baseline year interim emissions test can be completed with a submitted or draft baseline year motor vehicle emissions SIP inventory, if the SIP reflects the latest information and models. An MPO or state DOT, in consultation with state and local air agencies, could also develop baseline year emissions as part of the conformity analysis. EPA believes that a submitted or draft SIP baseline inventory may be the most appropriate source for completing the baseline year tests for an area’s first conformity determination under a new or revised NAAQS. This is due to the fact that SIP inventories are likely to be under development at the same time as these conformity determinations, and such inventories must be based on the latest available data at the time they are developed (CAA section 172(c)(3)).

C. Rationale and Response to Comments

EPA believes that today’s final rule results in an environmentally protective and legal baseline year for conformity for any NAAQS promulgated after 1997 and best accomplishes several important goals. First, as described in the August 13, 2010 proposed rule (75 FR 49440), EPA believes it is important to coordinate the conformity baseline year with the year used for SIP planning and an emissions inventory year. This was EPA’s rationale for using 2002 as the baseline year for interim emissions tests in nonattainment areas for the 1997 ozone and PM$_{2.5}$ NAAQS (69 FR 40014–40015). It was also EPA’s rationale for finalizing the same baseline year definition in today’s final rule for 2006 PM$_{2.5}$ nonattainment areas in the March 24, 2010 final rule: this definition resulted in a conformity baseline year of 2006 for the 2006 PM$_{2.5}$ NAAQS (75 FR 14265–14266). Therefore, today’s conformity baseline year is consistent with how EPA has implemented the conformity baseline year for new or revised NAAQS in the past.

Second, today’s baseline year definition also ensures that the baseline year for any future NAAQS is always fairly recent, which is appropriate for meeting CAA conformity requirements and is environmentally protective. Because the AERR requires submission of inventories every three years, the baseline year for any NAAQS promulgated after 1997 will always be either the same year as the year in which designations are effective, or one or two years prior to the effective date of the designation. For example, in the case of the 2006 PM$_{2.5}$ NAAQS, nonattainment designations became effective on December 14, 2009, and the baseline year for conformity purposes is 2008 for areas designated nonattainment for the 2006 PM$_{2.5}$ NAAQS, the year before the effective date of the designations (See the PM Amendments final rule for details (75 FR 14265–14266)).

EPA also believes that coordinating the baseline year for interim emissions tests with other data collection and inventory requirements would allow state and local governments to use their resources more efficiently. Given that the CAA requires EPA to review the NAAQS for possible revision once every five years, today’s baseline year provision standardizes the process for selecting an appropriate baseline year for any NAAQS promulgated in the future.

Finally, today’s rule for the baseline year definition provides implementers with knowledge of the baseline year for any future new or revised NAAQS upon the effective date of nonattainment designations for that NAAQS, without having to wait for EPA to amend the conformity rule. As a result, MPOs and other implementers should understand conformity requirements for future NAAQS revisions more quickly, which should enable them to fully utilize the 12-month conformity grace period to complete conformity determinations for new nonattainment areas.

Several commenters voiced support for coordinating the conformity baseline year with an emissions inventory year, in part because EPA could avoid additional rulemakings to implement future baseline year changes. Several commenters also agreed that this change would be beneficial since implementing organizations would know the conformity requirements in advance of any new or revised NAAQS.

Some commenters expressed concern that emissions inventories are not always submitted on time and recommended that the conformity rule require that the baseline year for the baseline year interim emissions test be the most recent emissions inventory year that has been completed and submitted to EPA. One commenter recommended that the baseline year be at least three years older than the date the first conformity determination is required and that if the most recent completed emissions inventory is less than three years old, the previous emissions inventory should be used. However, these suggestions could lead to different baseline years in areas designated for the same NAAQS, which may not meet statutory requirements, and would be confusing to track as well as inequitable. EPA’s final rule establishes the same baseline year for every area designated for a particular NAAQS regardless of whether an individual area submitted its inventory on time. If an area has not submitted a final AERR inventory for the relevant conformity baseline year, there are other options for generating on-road mobile source emissions in the baseline year, discussed above under B. of this section.

Another commenter opined that if a later year than currently required is used as a baseline year for the baseline year interim emissions test, and emissions are on a downward trend, the proposed change would make the baseline year interim emissions test more stringent than what was proposed. The commenter suggested that this concern may be mitigated by keeping the baseline year for all future NAAQS at or near the year 2002 that was
established for the 1997 ozone and PM\textsubscript{2.5} NAAQS.

Today's final rule is intended to ensure the same level of stringency for all NAAQS regardless of when the NAAQS was promulgated. The conformity baseline year of 2002 that EPA established for the 1997 ozone and PM\textsubscript{2.5} NAAQS is several years prior to the effective date of the 1997 ozone and PM\textsubscript{2.5} ozone nonattainment designations. Area designations for the 1997 ozone NAAQS became effective on June 15, 2004 and area designations for the 1997 PM\textsubscript{2.5} NAAQS became effective on April 5, 2005 (See the April 30, 2004 (69 FR 23858) and the January 5, 2005 (70 FR 944) final rules, respectively). Further, if there is a downward trend on on-road mobile source emissions, it makes sense to reflect that downward trend in the interim emissions test.

Today's final rule accomplishes that by ensuring that the baseline year is always fairly recent.

Finally, EPA would like to clarify a couple of points related to this comment. First, the commenter referred to the baseline year of 2002 in the "current conformity rule." That baseline year of 2002 was established in 2004 for the 1997 ozone and PM\textsubscript{2.5} NAAQS and it remains the baseline year only for these NAAQS. Second, the baseline year definition in today's rule is the same definition EPA established as the baseline year for areas designated nonattainment for the 2006 PM\textsubscript{2.5} NAAQS in the March 24, 2010 p.m. Amendments rule. Thus, today's definition had already been part of the current conformity rule prior to today's action.

VI. How do these amendments affect conformity SIPs?

Today's action does not affect existing conformity SIPs that were prepared in accordance with current CAA requirements since the final rule does not affect the provisions that are required to be in a conformity SIP. CAA section 176(c)(4)(E) requires a conformity SIP to include 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, the conformity rule also 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 if a state's conformity SIP includes the provisions of such final amendments (40 CFR 51.390(c)). Therefore, such a conformity SIP revision is required to be submitted by March 14, 2013 in states with approved conformity SIP's containing provisions addressed by today's action. EPA encourages these states to revise their conformity SIP to include only the three required sections so that future changes to the conformity rule do not require further revisions to conformity SIPs. EPA will continue to work with states to approve such revisions as expeditiously as possible through flexible administrative techniques, such as parallel processing and direct final rulemaking.

Finally, any state that has not previously been required to submit a conformity SIP to EPA must submit a conformity SIP within 12 months of an area's nonattainment designation (40 CFR 51.390(c)).

For additional information on conformity SIPs, please refer to the January 2009 guidance entitled, "Guidance for Developing Transportation Conformity Implementation Plans" available on EPA's Web site at www.epa.gov/otaqtp/statersources/transconf/policy/420b09001.pdf.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735; October 4, 1993), this action is a "significant regulatory action" because it raises novel legal and policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

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 proposed revisions in today's action are already covered by EPA information collection request (ICR) entitled, "Transportation Conformity Determinations for Federally Funded and Approved Transportation Plans, Programs, and Projects." The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing conformity regulations under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 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 include small businesses, small not-for-profit organizations and small government jurisdictions.

For purposes of assessing the impacts of today's final 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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This regulation directly affects federal agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities within the meaning of the Regulatory Flexibility Act. Therefore, this final rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

This action 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 final rule 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, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

This final 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 metropolitan planning organizations 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 action does not have federalism implications. It 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 CAA requires conformity to apply in certain nonattainment and maintenance areas as a matter of law, and this action merely establishes and revises procedures for transportation planning entities in subject areas to follow in meeting their existing statutory obligations. Thus, Executive Order 13132 does not apply to this action.

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 conformity to apply in any area that is designated nonattainment or maintenance by EPA. Because today's amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments, Executive Order 13175 does not apply to this action.

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

This action 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 have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 18555 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency regarding energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-134, 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. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider 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 (EO) 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 final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it maintains or increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

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 April 13, 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: March 8, 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 93.101 is amended by removing paragraphs (1) through (6) of the definition for "National ambient air quality standards (NAAQS)" and by revising the definition for "Clean data" to read as follows:

§93.101 Definitions.

* * * * *

Clean data means air quality monitoring data determined by EPA to meet the applicable requirements of 40 CFR Parts 50 and 56 and to indicate attainment of a NAAQS.

* * * * *

§93.105 [Amended]

3. Section 93.105(c)(1)(vi) is amended by removing the citation "§93.109(n)(2)[iii]" and adding in its place the citation "§93.109(g)[ii][iii]."

4. Section 93.109 is amended as follows:

a. By revising paragraphs (b) introductory text, (c), and (d);

b. By removing paragraphs (e) through (k), and redesignating paragraphs (l), (m), and (n) as paragraphs (e), (f), and (g);

c. In newly redesignated paragraph (g)(2) introductory text, by removing the
c. In newly redesignated paragraph (g)(2)(ii)(C), removing the citation "paragraph (n)(2)(i)(C)" and adding in its place "paragraph (g)(2)(ii)(C)";

§ 93.118 for the annual nonattainment area that has approved or adequate motor vehicle emissions budgets for that other NAAQS, where they can be reasonably identified through the interagency consultation process required by § 93.105; and

§ 93.119, when applicable, for either: the portion of the nonattainment area not covered by the approved or adequate budgets for that other NAAQS; the entire nonattainment area; or the entire portion of the nonattainment area within an individual state, in the case where separate adequate or approved motor vehicle emissions budgets for that other NAAQS are established for each state of a multi-state nonattainment or maintenance area.

3 In a nonattainment area, the interim emissions tests required by § 93.112 must be satisfied for a NAAQS if neither paragraph (c)(1) nor paragraph (c)(2) of this section applies for such NAAQS.

4 An ozone nonattainment area must satisfy the interim emissions test for NOX, 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 does not include a motor vehicle emissions budget for NOX. The implementation plan for an ozone NAAQS will be considered to establish a motor vehicle emissions budget for NOX if the implementation plan or plan submission contains an explicit NOX motor vehicle emissions budget that is intended to act as ceiling on future NOX emissions, and the NOX motor vehicle emissions budget is a net reduction from NOX emissions levels in the SIP's baseline year.

5 Notwithstanding paragraphs (c)(1), (c)(2), and (c)(3) of this section, nonattainment areas with clean data for a 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 that NAAQS must satisfy one of the following requirements:

(i) The budget test and/or interim emissions tests as required by §§ 93.118 and 93.119 as described in paragraphs (c)(2) and (c)(3) of this section;

(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 NAAQS for which the area is designated nonattainment (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 in the most recent year of attainment as motor vehicle emissions budgets, if the state or local air quality agency requests that the motor vehicle emissions in the most recent year of attainment be used as budgets, and EPA approves the request in the rulemaking that determines that the area has attained the NAAQS for which the area is designated nonattainment.

(ii) The emissions predicted in the "Action" scenario are lower than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section.

(b) Consistency with the motor vehicle emissions budget:

(1) * * *

(iii) The emissions predicted in the "Action" scenario are not greater than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section.

(d) PM2.5, PM10, and NOX areas.

(2) * * *

(e) Baseline year for various NAAQS.

The baseline year is defined as follows:

(1) 1990, in areas designated nonattainment for the 1990 CO NAAQS or the 1990 NOX NAAQS.

(2) 2002, in areas designated nonattainment for the 1999 PM10 NAAQS, unless the conformity implementation plan revision required by § 51.390 of this chapter defines the baseline emissions for a PM10 area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(3) 2002, in areas designated nonattainment for the 1997 ozone NAAQS or 1997 PM2.5 NAAQS.

(4) The most recent year for which EPA's Air Emission Reporting Rule (40 CFR Part 51, Subpart A) requires submission of on-road mobile source emissions inventories as of the effective date of designations, in areas designated nonattainment for a NAAQS that is promulgated after 1997.

§ 93.116 [Amended]

§ 93.116(b) is amended by removing the citation "§ 93.109(f)(1)" and adding in its place the citation "§ 93.109(d)(1)".

§ 93.119 Criteria and procedures.

§ 93.119(a) is amended:

(a) In paragraph (a), by removing the citation "§ 93.109(c) through (g)" and adding in its place the citation "§ 93.109(c) through (g)"; and

(b) By revising paragraph (b) introductory text.
Title 40: Protection of Environment
PART 93—DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS
Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

[Under 40 CFR 51.390, transportation conformity SIPs must include the requirements of 40 CFR §§ 93.105, 93.122(a)(4)(ii), and 93.125(c). Inclusion of other provisions within 40 CFR Part 93 is optional. See 73 Fed. Reg. 4420, 4431 (Jan. 24, 2008). These mandatory provisions are excerpted below.]

§ 93.105 Consultation. [Entire Section]

(a) General. The implementation plan revision required under § 51.390 of this chapter shall include procedures for interagency consultation (Federal, State, and local), resolution of conflicts, and public consultation as described in paragraphs (a) through (e) of this section. Public consultation procedures will be developed in accordance with the requirements for public involvement in 23 CFR part 450.

(1) The implementation plan revision shall include procedures to be undertaken by MPOs, State departments of transportation, and DOT with State and local air quality agencies and EPA before making conformity determinations, and by State and local air agencies and EPA with MPOs, State departments of transportation, and DOT in developing applicable implementation plans.

(2) Before EPA approves the conformity implementation plan revision required by § 51.390 of this chapter, MPOs and State departments of transportation must provide reasonable opportunity for consultation with State air agencies, local air quality and transportation agencies, DOT, and EPA, including consultation on the issues described in paragraph (c)(1) of this section, before making conformity determinations.

(b) Interagency consultation procedures: General factors. (1) States shall provide well-defined consultation procedures in the implementation plan whereby representatives of the MPOs, State and local air quality planning agencies, State and local transportation agencies, and other organizations with responsibilities for developing, submitting, or implementing provisions of an implementation plan required by the CAA must consult with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the transportation plan, the TIP, and associated conformity determinations.

(2) Interagency consultation procedures shall include at a minimum the following general factors and the specific processes in paragraph (c) of this section:

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

(ii) The organizational level of regular consultation;

(iii) A process for circulating (or providing ready access to) draft documents and supporting materials for comment before formal adoption or publication;
(iv) The frequency of, or process for convening, consultation meetings and responsibilities for establishing meeting agendas;

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

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

(c) Interagency consultation procedures: Specific processes. Interagency consultation procedures shall also include the following specific processes:

(1) A process involving the MPO, State and local air quality planning agencies, State and local transportation agencies, EPA, and DOT for the following:

(i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses;

(ii) Determining which minor arterials and other transportation projects should be considered “regionally significant” for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP;

(iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see §§ 93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

(iv) Making a determination, as required by § 93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

(v) Notification of transportation plan or TIP amendments which merely add or delete exempt projects listed in § 93.126 or § 93.127; and

(vi) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by § 93.109(g)(2)(iii).

(2) A process involving the MPO and State and local air quality planning agencies and transportation agencies for the following:

(i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in § 93.104; and

(ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins.
(3) Where the metropolitan planning area does not include the entire nonattainment or maintenance area, a process involving the MPO and the State department of transportation for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area.

(4) A process to ensure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered), including those by recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws, are disclosed to the MPO on a regular basis, and to ensure that any changes to those plans are immediately disclosed.

(5) A process involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws for assuming the location and design concept and scope of projects which are disclosed to the MPO as required by paragraph (c)(4) of this section but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of §93.122.

(6) A process for consulting on the design, schedule, and funding of research and data collection efforts and regional transportation model development by the MPO (e.g., household/travel transportation surveys).

(7) A process for providing final documents (including applicable implementation plans and implementation plan revisions) and supporting information to each agency after approval or adoption. This process is applicable to all agencies described in paragraph (a)(1) of this section, including Federal agencies.

(d) Resolving conflicts. Conflicts among State agencies or between State agencies and an MPO shall be escalated to the Governor if they cannot be resolved by the heads of the involved agencies. The State air agency has 14 calendar days to appeal to the Governor after the State DOT or MPO has notified the State air agency head of the resolution of his or her comments. The implementation plan revision required by §51.390 of this chapter shall define the procedures for starting the 14-day clock. If the State air agency appeals to the Governor, the final conformity determination must have the concurrence of the Governor. If the State air agency does not appeal to the Governor within 14 days, the MPO or State department of transportation may proceed with the final conformity determination. The Governor may delegate his or her role in this process, but not to the head or staff of the State or local air agency, State department of transportation, State transportation commission or board, or an MPO.

(e) Public consultation procedures. Affected agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a conformity determination for all transportation plans and TIPs, consistent with these requirements and those of 23 CFR 450.316(a). Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.43. In addition, these agencies must specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. These agencies shall also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.
§ 93.122 Procedures for determining regional transportation-related emissions. [Highlighted Subparagraph Only]

(a) General requirements. (1) The regional emissions analysis required by §§ 93.118 and 93.119 for the transportation plan, TIP, or project not from a conforming plan and TIP must include all regionally significant projects expected in the nonattainment or maintenance area. The analysis shall include FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO as required by § 93.105. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMs and similar projects that are not regionally significant may also be estimated in accordance with reasonable professional practice.

(2) The emissions analysis may not include for emissions reduction credit any TCMs or other measures in the applicable implementation plan which have been delayed beyond the scheduled date(s) until such time as their implementation has been assured. If the measure has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.

(3) Emissions reduction credit from projects, programs, or activities which require a regulatory action in order to be implemented may not be included in the emissions analysis unless:

(i) The regulatory action is already adopted by the enforcing jurisdiction;

(ii) The project, program, or activity is included in the applicable implementation plan;

(iii) The control strategy implementation plan submission or maintenance plan submission that establishes the motor vehicle emissions budget(s) for the purposes of § 93.118 contains a written commitment to the project, program, or activity by the agency with authority to implement it; or

(iv) EPA has approved an opt-in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe standards), or the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(4) Emissions reduction credit from control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.
(i) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

(ii) The conformity implementation plan revision required in § 51.390 of this chapter must provide that written commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(5) A regional emissions analysis for the purpose of satisfying the requirements of § 93.119 must make the same assumptions in both the "Baseline" and "Action" scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(6) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to establish the emissions budget in the applicable implementation plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the applicable implementation plan, unless modified after interagency consultation according to § 93.105(c)(1)(i) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

(7) Reasonable methods shall be used to estimate nonattainment or maintenance area VMT on off-network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

(b) Regional emissions analysis in serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas must meet the requirements of paragraphs (b) (1) through (3) of this section if their metropolitan planning area contains an urbanized area population over 200,000.

(1) By January 1, 1997, estimates of regional transportation-related emissions used to support conformity determinations must be made at a minimum using network-based travel models according to procedures and methods that are available and in practice and supported by current and available documentation. These procedures, methods, and practices are available from DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency consultation process, as required by § 93.105(c)(1)(i).

Network-based travel models must at a minimum satisfy the following requirements:

(i) Network-based travel models must be validated against observed counts (peak and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented;

(ii) Land use, population, employment, and other network-based travel model assumptions must be documented and based on the best available information;

(iii) Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable;

(iv) A capacity-sensitive assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak link volumes and speeds and uses speeds based on final assigned volumes;

(v) Zone-to-zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of
transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits; and

(vi) Network-based travel models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

(2) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network-based travel model.

(3) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network-based travel models, a factor (or factors) may be developed to reconcile and calibrate the network-based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future VMT. In this factoring process, consideration will be given to differences between HPMS and network-based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count-based programs and other departures from these procedures are permitted subject to the interagency consultation procedures of § 93.105(c)(1)(i).

(c) Two-year grace period for regional emissions analysis requirements in certain ozone and CO areas. The requirements of paragraph (b) of this section apply to such areas or portions of such areas that have not previously been required to meet these requirements for any existing NAAQS two years from the following:

(1) The effective date of EPA's reclassification of an ozone or CO nonattainment area that has an urbanized area population greater than 200,000 to serious or above;

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

(3) The effective date of EPA's action that classifies a newly designated ozone or CO nonattainment area that has an urbanized area population greater than 200,000 as serious or above.

(d) In all areas not otherwise subject to paragraph (b) of this section, regional emissions analyses must use those procedures described in paragraph (b) of this section if the use of those procedures has been the previous practice of the MPO. Otherwise, areas not subject to paragraph (b) of this section may estimate regional emissions using any appropriate methods that account for VMT growth by, for example, extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for VMT per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.

(e) PM$_{10}$ from construction-related fugitive dust. (1) For areas in which the implementation plan does not identify construction-related fugitive PM$_{10}$ as a contributor to the nonattainment problem, the fugitive PM$_{10}$ emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

(2) In PM$_{10}$ nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM$_{10}$ as a contributor to the nonattainment problem, the regional PM$_{10}$ emissions analysis shall consider construction-related fugitive PM$_{10}$ and shall account for the level of construction activity, the fugitive PM$_{10}$ control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

(f) PM$_{2.5}$ from construction-related fugitive dust. (1) For PM$_{2.5}$ areas in which the implementation plan does not identify construction-related fugitive PM$_{2.5}$ as a significant contributor to the nonattainment problem, the
fugitive PM$_2.5$ emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

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

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

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

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

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

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

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

(i) Not regionally significant; or

(ii) Included in the conforming transportation plan (even if it is not specifically included in the latest conforming TIP) with design concept and scope adequate to determine its contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination, and the design concept and scope of the project is not significantly different from that described in the transportation plan.

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

§ 93.125 Enforceability of design concept and scope and project-level mitigation and control measures. [Highlighted Subsection Only]

(a) Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws, FHWA, or FTA must obtain from the project sponsor and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local CO, PM10, or PM2.5 impacts. Before a conformity determination is made, written commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and are included in the project design concept and scope which is used in the regional emissions analysis required by §§ 93.118 ("Motor vehicle emissions budget") and 93.119 ("Interim emissions in areas without motor vehicle emissions budgets") or used in the project-level hot-spot analysis required by § 93.116.

(b) Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(c) The implementation plan revision required in § 51.390 of this chapter shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(d) If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of § 93.116, emission budget requirements of § 93.118, and interim emissions requirements of § 93.119 are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under § 93.105. The MPO and DOT must find that the transportation plan and TIP still satisfy the applicable requirements of §§ 93.118 and/or 93.119 and that the project still satisfies the requirements of § 93.116, and therefore that the conformity determinations for the transportation plan, TIP, and project are still valid. This finding is subject to the applicable public consultation requirements in § 93.105(e) for conformity determinations for projects.

Proposed substantive changes to 20.2.99 (in addition to Section deletions with subsequent renumbering, and Definitions deletions and subsequent renumbering)

The following table represents the substantive changes proposed in the repeal and replacement of 20.2.99 in the proposed rule text is in the middle column. Each change is represented by strikeouts for wording to be deleted (in the first column); where applicable, replacement language is represented by underlined text (in the middle column). Some strikeouts do not have replacement text, as these are deletions, rather than replacements or corrections. The reason each change is needed is noted in the third column. Beyond the changes shown in this table and the aforementioned tables, a few punctuation changes have also been made (i.e. addition or deletion of commas, colons, semicolons, periods, apostrophes or dashes; addition of italics for foreign words; corrections for capitalization; and addition of subscripts for pollutants and chemical formulas).

<table>
<thead>
<tr>
<th>Current Rule Text</th>
<th>Proposed Replacement Rule Text</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>20.2.99.2 SCOPE</td>
<td>C. The provisions of this part apply with respect to emissions of the following precursor pollutants in nonattainment or maintenance areas:</td>
<td>(1) Addition of acronym (1st time use)</td>
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<tr>
<td></td>
<td>(1) volatile organic compounds and nitrogen oxides in ozone areas;</td>
<td>(3) Correction of and/or usage</td>
</tr>
<tr>
<td></td>
<td>(2) nitrogen oxides in nitrogen dioxide areas;</td>
<td>(3) (a) Correction of acronym;</td>
</tr>
<tr>
<td></td>
<td>(3) volatile organic compounds and/or, nitrogen oxides; in PM10 areas if:</td>
<td>insertion of full term for 1st use</td>
</tr>
<tr>
<td></td>
<td>(a) the EPA region 6 administrator or the department has made a finding (including a finding as part of a SIP or a submitted implementation plan revision) that transportation-related emissions of one or both of these precursor emissions within the nonattainment area are a significant contributor to the PM10 nonattainment problem and has so notified the MPO (or the NMDOT in the absence of an MPO) and US DOT; or</td>
<td>insertion of full terms for 1st uses and parentheses for acronyms</td>
</tr>
<tr>
<td></td>
<td>(4) nitrogen oxides in PM2.5 areas, unless both the EPA regional administrator and the department have made a finding that transportation-related emissions of nitrogen oxides within the nonattainment area are not a significant contributor to the PM2.5 nonattainment problem and has so notified the MPO (or the NMDOT in the absence of an MPO) and US DOT, or the applicable implementation plan (or implementation plan submission) does not establish as approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy; and</td>
<td></td>
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<tr>
<td></td>
<td>(5) VOC, sulfur dioxide (SO2) and/or ammonia (NH3) in PM2.5 areas either if the EPA regional administrator or the department has made a finding that transportation-related emissions of any of these precursors within the nonattainment area are a significant contributor to the PM2.5 nonattainment problem and has so notified the MPO (or the NMDOT in the absence of an MPO)</td>
<td></td>
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<tr>
<td></td>
<td>and</td>
<td></td>
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<tr>
<td></td>
<td>(2) nitrogen oxides in ozone areas;</td>
<td>(4) Correction of typographical error</td>
</tr>
<tr>
<td></td>
<td>(3) volatile organic compounds or nitrogen oxides in PM10 areas if:</td>
<td>Correction of typographical error</td>
</tr>
<tr>
<td></td>
<td>(a) the US EPA region 6 administrator or the department has made a finding (including a finding as part of the New Mexico State Implementation Plan (SIP) or a submitted implementation plan revision) that transportation-related emissions of one or both of these precursor emissions within the nonattainment area are a significant contributor to the PM10 nonattainment problem and has so notified the metropolitan planning organization (MPO) (or the New Mexico Department of Transportation (NMDOT) in the absence of an MPO) and US DOT; or</td>
<td></td>
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<tr>
<td></td>
<td>(4) nitrogen oxides in PM2.5 areas, unless both the EPA regional administrator and the department have made a finding that transportation-related emissions of nitrogen oxides within the nonattainment area are not a significant contributor to the PM2.5 nonattainment problem and has notified the MPO (or the NMDOT in the absence of an MPO) and US DOT, or 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</td>
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<tr>
<td></td>
<td>(5) VOCs, sulfur dioxide (SO2) or ammonia (NH3) in PM2.5 areas either if the US EPA regional administrator or the department has made a finding that transportation-related emissions of any of these precursors within the nonattainment area are a significant contributor to the PM2.5 nonattainment problem and has so notified the MPO (or the NMDOT in the absence of an MPO)</td>
<td>Correction of typographical error</td>
</tr>
</tbody>
</table>
US 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.

D. The provisions of this part apply to PM$_{2.5}$ nonattainment and maintenance areas with respect to PM$_{2.5}$ from re-entrained road dust if the EPA regional administrator or the department has made finding that re-entrained road dust emissions within the area are a significant contributor to the nonattainment problem and has so notified the NMDOT.

E. The provisions of this part apply to maintenance areas through the last year of a maintenance area's approved CAA section 175A(b) maintenance plan.

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<table>
<thead>
<tr>
<th>STATUTORY AUTHORITY: Environmental Improvement Act, NMSSA 1978, section 74-1-8(A)(4) and (7), and Air Quality Control Act, NMSSA 1978, sections 74-2-1, et seq., including specifically, section 74-2-5(A), (B) and (C). Section 74-2-5(B) provides that the Environmental Improvement Board shall adopt regulations &quot;to attain and maintain national ambient air quality standards and prevent or abate air pollution.&quot;</th>
</tr>
</thead>
</table>

| OBJECTIVE: The purpose of this Part is to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.), the related requirements of 23 U.S.C. 109(j), and regulations under 40 CFR part 51 Subpart T and Part 93 subpart A, with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (US DOT), the NMSHTD, metropolitan planning organizations (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit Laws. |

| OBJECTIVE: The purpose of this Part is to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.), the related requirements of 23 U.S.C. 109(j), and regulations under 40 CFR Part 93 Subpart A, with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the US DOT, the NMDOT, MPOs or other recipients of funds under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53) to the New Mexico State Implementation Plan (SIP), as developed. |

| Definition moved to Section 7 (Definitions) |

| E. Reinsertion of required language corresponding to language in federal transportation conformity rule, inadvertently removed in past revision to 20.2.99 NMAC |

| Correction of references to state statutes. |

| Remove “or paragraph” (non-necessary); correct effective date |

| Reflect current effective date |

| Remove regulation reference which is no longer applicable |
### 20.2.99.7 DEFINITIONS

**G.** "Conformity determination" means the demonstration of consistency with motor vehicle emissions budgets for each pollutant and precursor identified in the applicable SIP. The conformity determination is the affirmative written documentation declaring conformity with the applicable SIP which is submitted to FHWA and FTA for approval with EPA consultation. An affirmative conformity determination means conformity to the plans purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards; and that such activities will not:

1. cause or contribute to any new violations of any standard in any area;
2. increase the frequency or severity of any existing violation of any standard in any area; or
3. delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

**H.** "Consultation" means that one party confers with another identified party, provides or makes available all relevant information to that party, and, prior to taking any action, considers the views of that party and (except with respect to those actions for which only notification is required) responds to written comments in a timely, substantive written manner prior to any final decision on such action. Such views and written response shall be made part of the record of any decision or action. Specific procedures and processes are described in 20.2.99.116 through 20.2.99.124 NMAC.

**O.** "FHWA/FTA project", for the purpose of this part, is any highway or transit project which is proposed to receive funding assistance and approval through the federal-aid highway program or the federal mass transit program, or requires federal highway administration (FHWA) or federal transit administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

**F.** "Consultation" means that one party confers with another identified party, provides or makes available all relevant information to that party, and, prior to taking any action, considers the views of that party and (except with respect to those actions for which only notification is required) responds to written comments in a timely, substantive written manner prior to any final decision on such action. Such views and written response shall be made part of the record of any decision or action. Specific procedures and processes are described in 20.2.99.102 through 20.2.99.110 NMAC.

**N.** "FHWA/FTA project" means, for the purpose of this part, any highway or transit project which is proposed to receive funding assistance and approval through the federal-aid highway program or the federal mass transit program, or requires federal highway administration (FHWA) or federal transit administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.
"Isolated rural nonattainment and maintenance areas" are areas that do not contain or are not part of any metropolitan planning area as designated under the transportation planning regulations. Isolated rural areas do not have federally required metropolitan transportation plans or TIPs and do not have projects that are part of the emissions in such areas. Isolated rural areas that do not have federally required metropolitan transportation plans or TIPs and do not have projects that are part of the emissions in such areas are instead included in statewide transportation improvement programs. These are not donut areas.

"Limited maintenance plan" means 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 significantly 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.

"National ambient air quality standards (NAAQS)" are those standards established pursuant to Section 109 of the CAA.

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

(2) "8-hour ozone NAAQS" means the 8-hour ozone national ambient air quality standard codified at 40 CFR 50.10.

(3) "24-hour PM$_{10}$ NAAQS" means the 24-hour PM$_{10}$ national ambient air quality standard codified at 40 CFR 50.6.

(4) "1997 PM$_{2.5}$ NAAQS" means the PM$_{2.5}$ national ambient air quality standards codified at 40 CFR 50.7.

(5) "2006 PM$_{2.5}$ NAAQS" means the 24-hour PM$_{2.5}$ national ambient air quality standard codified at 40 CFR 50.13.

(6) "Annual PM$_{10}$ NAAQS" means the annual PM$_{10}$ national ambient air quality standard that EPA revoked on December 18, 2006.

"NEPA process completion", for the purposes of this part, with respect to FHWA or FTA, means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a finding of no significant impact, or to issue a record of decision on a final environmental impact statement under NEPA.
AQ. "Transit" means mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.

AR. "Transit project" means an undertaking to implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It does not include actions that are solely within the jurisdiction of local transit agencies, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it shall be defined inclusively enough to:

1. connect logical termini and be of sufficient length to address environmental matters on a broad scope;
2. have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and
3. not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

AS. "Transportation control measure (TCM)" means any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA section 176(c)(8), that is either one of the types listed in Section 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this part.

AY. "Written commitment" for the purposes of this part means a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the applicable implementation plan.

AG. "Re-entrained road dust" means emissions which are produced by travel on paved and unpaved roads, including emissions from anti-skid and de-icing material(s).

AL. "Transit" means mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.

AN. "Transportation control measure (TCM)" means any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA Section 176(c)(8), that is either one of the types listed in Section 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this part.

AT. "Written commitment" means, for the purposes of this part, a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the applicable implementation plan.
20.2.99.8 DOCUMENTS: Documents incorporated and cited in this Part may be viewed at the New Mexico Environment Department, Air Quality Bureau, Harold Runnels Building, 1190 St. Francis Dr., or 2048 Galisteo St., Santa Fe, NM 87502.

[Current location is 1301 Siler Rd., Building B., Santa Fe, NM 87507.]

20.2.99.9 to 20.2.99.108 [RESERVED]

20.2.99.109 APPLICABILITY

A. Action applicability.

(1) Except as provided for in Subsection C of 20.2.99.109 NMAC or Subsection A of 20.2.99.149 NMAC conformity determinations are required for:

(a) the adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO (or NMDOT in the absence of an MPO) or US DOT;

(b) the adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO (or NMDOT in the absence of an MPO) or US DOT; and

(c) the approval, funding, or implementation of FHWA/FTA projects.

(2) Conformity determinations are not required under this part for individual projects which are not FHWA/FTA projects. However, 20.2.99.140 NMAC applies to such projects if they are regionally significant.

C. Limitations. In order to receive any FHWA/FTA approval or funding actions, including NEPA approvals, for a project phase subject to this subpart, a currently conforming transportation plan and TIP must be in place at the time of project approval as described in Subsection A of 20.2.99.133 NMAC, except as provided by Subsection B of 20.2.99.133 NMAC.

20.2.99.102 CONSULTATION.

A. 20.2.99.102 NMAC through 20.2.99.110 NMAC provide procedures for the interagency (federal, state, and local) consultation process, resolution of conflicts, and public consultation. Public consultation procedures will be developed in accordance with the requirements for public involvement in 23 CFR part 450. The affected agencies listed in Subsection C of 20.2.99.116 NMAC shall undertake a consultation process with each other prior to the development of: 1) conformity determinations; 2) major activities listed in 20.2.9.116 NMAC below; 3) specific major activities listed in 20.2.9.102 NMAC below; 4) major activities listed in 20.2.9.104 NMAC below; and 5) major activities listed in 20.2.9.106 NMAC below.

C. Removal of references to deleted section

C. Removal of references to deleted section

Renumbered section

A. Correction of 7 references to retained sections, due to renumbering

Address deletions to make location generic enough that revisions won't be necessary if the AQB moves again; corrections of capitalization
in 20.2.99.103 NMAC below; and 4) specific routine activities listed in 20.2.99.104 NMAC below. This consultation process shall follow the consultation procedures described in 20.2.99.105 NMAC below.

B. Prior to US EPA's approval of this part, any MPO (or NMDOT in the absence of an MPO) and NMDOT, before making any conformity determinations, shall provide reasonable opportunity for consultation with the department, the local transportation agency in the county where the nonattainment or maintenance area is located, the local air quality agency in the county in which the nonattainment or maintenance area is located, New Mexico FHWA division offices, FTA region 6 offices, and EPA region 6, including consultation on the issues described in 20.2.99.103 NMAC. This opportunity for consultation shall be provided prior to the determination of conformity.

C. Affected agencies.

(1) Agencies which are affected by this part and which are required to participate in the consultation process are:
   (a) the designated MPO for the nonattainment or maintenance area;
   (b) the department;
   (c) NMDOT;
   (d) the local transportation agency for the county or city in which the nonattainment or maintenance area is located;
   (e) the local transit agency for the city or county in which the nonattainment or maintenance area is located;
   (f) EPA Region 6;

D. Policy level points of contact and policy level meetings.

(1) The policy level points of contact for participating organizations are as follows:
   (a) MPO: executive director or designee;
   (b) department: secretary or designee;
   (c) NMDOT: secretary or designee;
   (d) NMDOT district office: district engineer;
   (e) local government: chief administrative officer or designee;
   (f) EPA region 6: regional administrator or designee;

   (a) MPO: executive director or designee;
   (b) department: secretary or designee;
   (c) NMDOT: secretary or designee;
   (d) NMDOT district office: district engineer;
   (e) local government: chief administrative officer or designee;
   (f) US EPA region 6: regional administrator or designee;
agencies participating in the interagency consultation process are listed in 20.2.99.104 NMAC. For the purposes of this part, the lead agency for all conformity processes and procedures is that agency which is responsible for initiating the consultation process, preparing the initial and final drafts of the document or decision, and for assuring the adequacy of the interagency consultation process.

B. In the case of areas in which an MPO has been established, the designated MPO for the nonattainment or maintenance area shall be the lead agency for:

(6) choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas; and

C. In the case of areas in which an MPO has not been established, NMDOT shall be the lead agency for:

(1) the development of the transportation plan for the nonattainment or maintenance area;
(2) development of the TIP (transportation improvement program) for the nonattainment or maintenance area;
(3) any amendments or revisions thereto;
(4) any determinations of conformity under this part for which an MPO would be otherwise responsible;
(5) choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas; and

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<table>
<thead>
<tr>
<th>20.2.99.104</th>
<th>AGENCY RESPONSIBILITIES IN CONSULTATION</th>
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<tbody>
<tr>
<td>D.</td>
<td>FHWA New Mexico offices and FTA region 6 shall be responsible for:</td>
</tr>
<tr>
<td></td>
<td>(1) assuring timely action on final findings of conformity, after consultation with other agencies as provided in 20.2.99.102 through 20.2.99.110 NMAC; and</td>
</tr>
<tr>
<td>E.</td>
<td>US EPA region 6 shall be responsible for providing guidance on conformity criteria and procedures to agencies participating in the interagency consultation process.</td>
</tr>
</tbody>
</table>

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20.2.99.104 AGENCY RESPONSIBILITIES IN CONSULTATION

D. FHWA New Mexico offices and FTA region 6 shall be responsible for:

(1) assuring timely action on final findings of conformity, after consultation with other agencies as provided in 20.2.99.102 through 20.2.99.110 NMAC; and

E. US EPA region 6 shall be responsible for providing guidance on conformity criteria and procedures to agencies participating in the interagency consultation process.
It shall be the responsibility of the lead agency to facilitate the interagency consultation process by:

1. Conferring with all other agencies identified under subsection C of 20.2.99.106 NMAC who are participating in the particular consultation process;

5. Conducting the consultation process as described in this section (20.2.99.109 NMAC);

It shall be the responsibility of each participating agency (those listed in paragraph (1) of subsection C of 20.2.99.106 NMAC) during the consultation process to:

1. Confer with the lead and other participating agencies (those listed in paragraph (1) of subsection C of 20.2.99.106 NMAC) in the consultation process;

2. Review and comment as appropriate (including comments in writing) on all proposed and final draft documents and decisions within thirty (30) days of receipt;
20.2.99.120 CONSULTATION PROCEDURES FOR SPECIFIC MAJOR ACTIVITIES. An interagency consultation process among the members of the lead and participating agencies shall be undertaken for the following specific major activities in accordance with all the procedures specified in 20.2.149 NMAC above. The lead agency for each activity shall be as specified, and the participating agencies shall be the agencies specified in Subsection C of 20.2.99.146 NMAC above.

C. Evaluation of whether projects otherwise exempted from meeting the requirements of this part (see 20.2.99.149 NMAC) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

D. Determination, as required by Paragraph (4) of Subsection C of 20.2.99.132 NMAC of whether past obstacles to implementation of TCMs which are behind the schedule established in the SIP have been identified and are being overcome, and whether state and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. Consultation shall also include consideration of whether delays in TCM implementation necessitate revisions to the SIP to remove TCMs or substitute TCMs or other emission reduction measures. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

E. Determination, as required by 20.2.99.140 NMAC, of whether:

G. Verification of what forecast of vehicle miles traveled (VMT) to use in developing SIPs. The lead agency shall be the air quality bureau of the department.

I. An interagency consultation process shall be undertaken for evaluating events which will trigger new conformity determinations in addition to those triggering events established in 20.2.99.111 NMAC through 20.2.99.115 NMAC. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

J. In the event that the metropolitan planning area does not include the entire nonattainment or maintenance area, an interagency consultation process involving the designated MPO for the nonattainment or maintenance area, NMDOT, local transportation agencies, and the department, shall be undertaken, in the context of an MOA, for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area.

20.2.99.106 CONSULTATION PROCEDURES FOR SPECIFIC MAJOR ACTIVITIES. An interagency consultation process among the members of the lead and participating agencies shall be undertaken for the following specific major activities in accordance with all the procedures specified in 20.2.99.105 NMAC above. The lead agency for each activity shall be as specified, and the participating agencies shall be the agencies specified in Subsection C of 20.2.99.102 NMAC above.

C. Evaluation of whether projects otherwise exempted from meeting the requirements of this part should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

D. Determination of whether past obstacles to implementation of TCMs which are behind the schedule established in the SIP have been identified and are being overcome, and whether state and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. Consultation shall also include consideration of whether delays in TCM implementation necessitate revisions to the SIP to remove TCMs or substitute TCMs or other emission reduction measures. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

E. Determination of whether:

G. Verification of what forecast of VMT to use in developing SIPs. The lead agency shall be the air quality bureau of the department.

I. An interagency consultation process shall be undertaken for evaluating events which will trigger new conformity determinations. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

J. In the event that the metropolitan planning area does not include the entire nonattainment or maintenance area, an interagency consultation process involving the designated MPO for the nonattainment or maintenance area, NMDOT, local transportation agencies, and the department, shall be undertaken, in the context of a memorandum of agreement (MOA), for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment area.
The lead agency shall be NMDOT.

K. In nonattainment or maintenance areas where more than one MPO is involved, such MPOs must develop a memorandum of agreement or memorandum of understanding reflecting their consultation.

L. In nonattainment or maintenance areas where the MPO's jurisdiction does not cover the entire nonattainment or maintenance area, the MPO and NMDOT must develop a memorandum of agreement or a memorandum of understanding reflecting their consultation.

M. Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by Subparagraph (c) of Paragraph (2) of Subsection L of 20.2.99.128 NMAC. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

20.2.99.124 CONSULTATION PROCEDURES FOR SPECIFIC ROUTINE ACTIVITIES. An interagency consultation process among the lead and participating agencies shall be undertaken for the following routine activities in accordance with all the procedures specified in 20.2.99.149 NMAC. The lead agency for each activity shall be as specified, and the participating agencies shall be the agencies specified in Subsection C of 20.2.99.146 NMAC above or as specified for the specific activity. Not later than thirty (30) days prior to the preparation of the final document or decision, the lead agency shall supply all relevant information and documents, as appropriate, to the participating agencies.

A. Identification, as required by Subsection B of 20.2.99.146 NMAC, of projects located at sites in PM10 nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM10 hot-spot analysis. The lead agency shall be either the MPO or NMDOT, in cooperation with the department.

B. Assumption of the location and design concept and scope of projects which are disclosed to the MPO, as required by Subsection D of 20.2.99.124 NMAC, but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis according to the requirements of 20.2.99.141 NMAC through 20.2.99.147 NMAC. The lead agency shall be either the MPO or NMDOT. Participating agencies shall include recipients of funds designated under title 23 U.S.C. or the federal transit laws.

D. Regionally Significant Non-FHWA/FTA Projects.

(3) In the case of any such regionally significant

20.2.99.107 CONSULTATION PROCEDURES FOR SPECIFIC ROUTINE ACTIVITIES. An interagency consultation process among the lead and participating agencies shall be undertaken for the following routine activities in accordance with all the procedures specified in 20.2.99.105 NMAC. The lead agency for each activity shall be as specified, and the participating agencies shall be the agencies specified in Subsection C of 20.2.99.102 NMAC above or as specified for the specific activity. Not later than thirty (30) days prior to the preparation of the final document or decision, the lead agency shall supply all relevant information and documents, as appropriate, to the participating agencies.

A. Identification of projects located at sites in PM10 nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM10 hot-spot analysis. The lead agency shall be either the MPO or NMDOT, in cooperation with the department.

B. Assumption of the location and design concept and scope of projects which are disclosed to the MPO, as required by Subsection D of 20.2.99.107 NMAC, but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis. The lead agency shall be either the MPO or NMDOT. Participating agencies shall include recipients of funds designated under title 23 U.S.C. or the federal transit laws.

D. Regionally significant non-FHWA/FTA projects.

(3) In the case of any such regionally significant
20.2.99.108 NOTIFICATION PROCEDURES FOR ROUTINE ACTIVITIES. Notification of affected agencies (including those listed in Paragraph (1) of Subsection C of 20.2.99.102 NMAC) of transportation plan or TIP amendments which merely add or delete exempt projects listed in 20.2.99.149 NMAC, shall be the affirmative responsibility of NMDOT and/or the MPO. Such notification shall be provided not later than thirty (30) days prior to the preparation of the final draft of the document or decision. This process shall include:

A. notification of the affected agencies (including those listed in Paragraph (1) of Subsection C of 20.2.99.146 NMAC) early in the process of decision on the final document; and

B. supplying all relevant documents and information to the affected agencies (including those listed in Paragraph (1) of Subsection C of 20.2.99.146 NMAC).

20.2.99.109 CONFLICT RESOLUTION AND APPEALS TO THE GOVERNOR

Removal of reference to deleted section

Renumbered Section

Removal of reference to deleted section

Correction of reference to retained section, due to renumbering; removal of reference to deleted section

Style correction for number

Removal of reference to deleted Section

A. & B. Correction of references to retained Section, due to renumbering

Renumbered Section
The department has fourteen (14) calendar days to appeal a determination of conformity (or other policy decision under this part) to the governor after NMDOT or MPO has notified the department of the resolution of all comments on such determination of conformity or policy decision. Such fourteen-day period shall commence when the MPO or NMDOT has confirmed receipt by the secretary of the department of the resolution of the comments of the department. If the department appeals to the governor, the final conformity determination must have the concurrence of the governor. The department must provide notice of any appeal under this subsection to the MPO and NMDOT. If the department does not appeal to the governor within fourteen (14) days, the MPO or NMDOT may proceed with the final conformity determination.

### PUBLIC CONSULTATION PROCEDURES

**A.** Affected agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period, and prior to taking formal action on a conformity determination for all transportation plans and TIPs, and projects, consistent with the requirements of 23 CFR part 450, including sections 450.316(a), 450.322(c), and 450.324(c) as in effect on the date of adoption of this Part. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.43. In addition, any such agency must specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been.

**B.** The department has 14 calendar days to appeal a determination of conformity (or other policy decision under this part) to the governor after NMDOT or the MPO has notified the department of the resolution of all comments on such determination of conformity or policy decision. Such 14-day period shall commence when the MPO or NMDOT has confirmed receipt by the secretary of the department of the resolution of the comments of the department. If the department appeals to the governor, the final conformity determination must have the concurrence of the governor. The department must provide notice of any appeal under this subsection to the MPO and NMDOT. If the department does not appeal to the governor within 14 days, the MPO or NMDOT may proceed with the final conformity determination.

**C.** In the case of any comments with regard to findings of fiscal constraint or air quality effects of any determination of conformity, NMDOT has fourteen (14) calendar days to appeal a determination of conformity (or other policy decision under this part) to the governor after the MPO has notified the department or NMDOT of the resolution of all comments on such determination of conformity or policy decision. Such fourteen-day period shall commence when the MPO has confirmed receipt by the secretary of the department or NMDOT of the resolution of the comments of NMDOT. If NMDOT appeals to the governor, the final conformity determination must have the concurrence of the governor. NMDOT must provide notice of any appeal under this subsection to the MPO and the department. If NMDOT does not appeal to the governor within 14 days, the MPO may proceed with the final conformity determination.

### PUBLIC CONSULTATION PROCEDURES

**A.** Affected agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period, and prior to taking formal action on a conformity determination for all transportation plans and TIPs, and projects, consistent with the requirements of 23 CFR part 450, including Sections 450.316(a), 450.322(c), and 450.324(c) as in effect on the date of adoption of this Part. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.43. In addition, any such agency must specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been.

**B.** The department has 14 calendar days to appeal a determination of conformity (or other policy decision under this part) to the governor after NMDOT or the MPO has notified the department of the resolution of all comments on such determination of conformity or policy decision. Such 14-day period shall commence when the MPO or NMDOT has confirmed receipt by the secretary of the department of the resolution of the comments of the department. If the department appeals to the governor, the final conformity determination must have the concurrence of the governor. The department must provide notice of any appeal under this subsection to the MPO and NMDOT. If the department does not appeal to the governor within 14 days, the MPO or NMDOT may proceed with the final conformity determination.

**C.** In the case of any comments with regard to findings of fiscal constraint or air quality effects of any determination of conformity, NMDOT has fourteen (14) calendar days to appeal a determination of conformity (or other policy decision under this part) to the governor after the MPO has notified the department or NMDOT of the resolution of all comments on such determination of conformity or policy decision. Such fourteen-day period shall commence when the MPO has confirmed receipt by the secretary of the department or NMDOT of the resolution of the comments of NMDOT. If NMDOT appeals to the governor, the final conformity determination must have the concurrence of the governor. NMDOT must provide notice of any appeal under this subsection to the MPO and the department. If NMDOT does not appeal to the governor within 14 days, the MPO may proceed with the final conformity determination.

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**20.2.99.124 PUBLIC CONSULTATION PROCEDURES**

A. Affected agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period, and prior to taking formal action on a conformity determination for all transportation plans and TIPs, and projects, consistent with the requirements of 23 CFR part 450, including sections 450.316(a), 450.322(c), and 450.324(c) as in effect on the date of adoption of this Part. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.43. In addition, any such agency must specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been.

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**20.2.99.110 PUBLIC CONSULTATION PROCEDURES**

A. Affected agencies making conformity determinations on transportation plans, programs and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period, and prior to taking formal action on a conformity determination for all transportation plans, TIPs, and projects, consistent with the requirements of 23 CFR part 450, including Sections 450.316(a), 450.322(c), and 450.324(c) as in effect on the date of adoption of this Part. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.43. In addition, any such agency must specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been.

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**Renumbered Section**

**Correction of grammar**

**Style corrections for number**

**Removal of reference to deleted Section**
properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. Any such agency shall also provide opportunity for public involvement in conformity determinations for projects to the extent otherwise required by law (e.g. NEPA).

B. The opportunity for public involvement provided under this section (20.2.99.142 NMAC) shall include access to information, emissions data, analyses, models and modeling assumptions used to perform a conformity determination, and the obligation of any such agency to consider and respond in writing to significant comments.

20.2.99.150 ENFORCEABILITY OF DESIGN CONCEPT AND SCOPE AND PROJECT-LEVEL MITIGATION AND CONTROL MEASURES

A. Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the federal transit laws, FHWA, or FTA must obtain from the project sponsor and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local CO, PM10, or PM2.5 impacts. Before a conformity determination is made, written contractual commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and included in the project design concept and scope which are used in the regional emissions analysis required by 20.2.99.137 NMAC and 20.2.99.138 NMAC or used in the project-level hot-spot analysis required by 20.2.99.135 NMAC.

D. If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of 20.2.99.135 NMAC, emission budget requirements of 20.2.99.137 NMAC, and interim emissions requirements of 20.2.99.138 NMAC are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under 20.2.99.116 NMAC through 20.2.99.124 NMAC. The MPO (or NMDOT in the absence of an MPO) and US DOT must find that the transportation plan and TIP still satisfy the applicable requirements of 20.2.99.137 NMAC and 20.2.99.138 NMAC and that the project still satisfies the requirements of 20.2.99.135 NMAC and therefore properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. Any such agency shall also provide opportunity for public involvement in conformity determinations for projects to the extent otherwise required by law (e.g. NEPA).

B. The opportunity for public involvement provided under this section (20.2.99.110 NMAC) shall include access to information, emissions data, analyses, models and modeling assumptions used to perform a conformity determination, and the obligation of any such agency to consider and respond in writing to significant comments.

20.2.99.111 ENFORCEABILITY OF DESIGN CONCEPT AND SCOPE AND PROJECT-LEVEL MITIGATION AND CONTROL MEASURES

A. Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the federal transit laws, FHWA, or FTA must obtain from the project sponsor or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local CO, PM10, or PM2.5 impacts. Before a conformity determination is made, written contractual commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and included in the project design concept and scope which is used in the regional emissions analysis or used in the project-level hot-spot analysis.

D. If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements, emission budget requirements and interim emissions requirements are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under 20.2.99.102 NMAC through 20.2.99.110 NMAC. The MPO (or NMDOT in the absence of an MPO) and US DOT must find that the transportation plan and TIP still satisfy the applicable requirements for vehicle emissions budgets and interim vehicle emissions budgets, and that the project still satisfies the requirements for hot spots, and therefore that the conformity determinations for
that the conformity determinations for the transportation plan, TIP, and project are still valid. This finding is subject to the applicable public consultation requirements in 20.2.99.424 NMAC for conformity determinations for projects.

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<th>20.2.99.154 SAVINGS PROVISION: The federal conformity rules under 40 CFR part 93 subpart A, in addition to any existing applicable state requirements, establish the conformity criteria and procedures necessary to meet the requirements of CAA Section 176(c) until such time as this conformity implementation plan revision is approved by EPA. Following EPA approval of this revision to the SIP (or a portion thereof) the approved (or approved portion of the) department's criteria and procedures would govern conformity determinations and the federal conformity regulations contained in 40 CFR part 93 would apply only for the portion, if any, of the department's conformity provisions that is not approved by EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the department revises its SIP to specifically remove them and that revision is approved by EPA.</th>
<th>Correction of reference to retained Section, due to renumbering</th>
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<th>20.2.99.112 SAVINGS PROVISION: The federal conformity rules under 40 CFR Part 93 Subpart A, in addition to any existing applicable state requirements, establish the conformity criteria and procedures necessary to meet the requirements of CAA Section 176(c) until such time as this conformity implementation plan revision is approved by US EPA. Following US EPA approval of this revision to the SIP (or a portion thereof), the approved (or approved portion of the) department's criteria and procedures would govern conformity determinations and the federal conformity regulations contained in 40 CFR Part 93 would apply only for the portion, if any, of the department's conformity provisions that is not approved by US EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the department revises its SIP to specifically remove them and that revision is approved by US EPA.</th>
<th>Renumbering of section</th>
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4 corrections to acronym
This is an amendment to 20.2.99 NMAC, Sections 2, 7, 109, 112-118, 120-123, 125, 128-129, 135-140, and 143-154, effective 10/15/05.

20.2.99.2 SCOPE. Agencies affected by this part are: federal transportation agencies (the federal highway administration (FHWA) and the federal transit administration (FTA) of the United States department of transportation (US DOT)), and state and local agencies responsible for transportation planning and air quality management that are within the geographic jurisdiction of the environmental improvement board (see also 20.2.99.6 NMAC).

A. The provisions of this part shall apply in all non-attainment and maintenance areas for transportation-related criteria pollutants for which the area is designated non-attainment or has a maintenance plan.

B. The provisions of this part apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, and 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).

C. The provisions of this part apply with respect to emissions of the following precursor pollutants in nonattainment or maintenance areas:
   (1) volatile organic compounds and nitrogen oxides in ozone areas;
   (2) nitrogen oxides in nitrogen dioxide areas; and
   (3) volatile organic compounds and/or nitrogen oxides, [and PM10] in PM10 areas if:
      (a) the EPA region 6 administrator or the department has made a finding (including a finding as part of a SIP or a submitted implementation plan revision) that transportation-related emissions of one or both of these precursor emissions within the nonattainment area are a significant contributor to the PM10 nonattainment problem and has so notified the MPO (or the [NMED HT] NMDOT in the absence of an MPO) and US DOT; or
      (b) the applicable SIP (or implementation plan submission) establishes [(a)] an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

D. The provisions of this part apply to PM2.5 nonattainment and maintenance areas with respect to PM2.5 from re-entrained road dust if the EPA regional administrator or the department has made finding that re-entrained road dust emissions within the area are a significant contributor to the PM2.5 nonattainment problem and has so notified the MPO (or the NMDOT in the absence of an MPO) and US DOT, or if the applicable SIP (or implementation plan submission) establishes [(a)] an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy. Re-entrained road dust emissions are produced by travel and paved and unpaved roads (including emissions from anti-skid and deicing material(s)).

DEFINITIONS. Terms used but not defined in this part shall have the meaning given them by the CAA titles 23 and 49 U.S.C., US EPA regulations, US DOT regulations, and 20.2.2 NMAC (Definitions), in that order of priority.

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

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

[C]. "Applicable implementation plan" is defined in Section 302(g) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under Section 110 (of the CAA), promulgated under Section 110(c), or promulgated or approved pursuant to regulations promulgated under Section 301(d) and which implements the relevant requirements of the CAA.

[D]. "CAA" means the Clean Air Act, as amended, 42 U.S.C. 7401, et seq.

[E]. "Cause or contribute to a new violation" for a project means:
   (1) to cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard during the future period in question, if the project were not implemented, or
   (2) to contribute to a new violation in a manner that would increase the frequency or severity of a new violation of a standard in such area.

[F]. "CFR" means the code of federal regulations.
# Invoice

**Invoice Number:** NMIR-2014- 200  
**Date:** 5/5/2014

**Bill To:** Cindy Hollenberg (505) 476-7907  
Environment Department - Air Quality Bureau  
525 Camino de los Marquez  
Santa Fe, NM 87505  
E-Mail: cindy.hollenberg@state.nm.us

**Ship To (if different address):**  
Environment Department - Air Quality Bureau  
525 Camino de los Marquez  
Santa Fe, NM 87505

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**Subtotal:** $44.00  
**Payment Amount:** $44.00  
**Amount Due:** $44.00

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*Please pay promptly to Vendor Number 0000000729  
Commission of Public Records  
State Records Center and Archives  
Exhibit NMED 12a*
New Mexico Commission of Public Records
Administrative Law Division
1205 Camino Carlos Rey
Santa Fe, NM 87507
505-476-7907

Affidavit of Publication in the New Mexico Register

I, Matthew Ortiz, certify that the agency noted below has published legal notices or rules in the New Mexico Register, and that payment has been assessed by invoice for said legal notice or publication, which appeared on the date and in the volume and issue number noted below.

Date of Publication: 4/30/2014
Volume: XXV Issue #: 8
Invoice #: NMR-2014-200
Amount: $44.00

Agency:
Environment Department - Air Qual Bureau
Contact: Cindy Hollenberg
525 Camino de los Marquez
Santa Fe, NM 87505-

Description:
Notice Notice of Rulemaking Hearing

State of New Mexico, County of Santa Fe
Signed and affirmed before me on Monday, May 05, 2014
by Matthew Ortiz

Notary Public:
Louise Wood [My commission expires: 5/15/17]

Affiant:
Publisher, New Mexico Register Date: 5/5/2014

Copies of the published material documented in this affidavit are enclosed.

Form SRC-2002-04 Revised July 2007
NEW MEXICO ECONOMIC DEVELOPMENT DEPARTMENT

Notice of Proposed Rulemaking

The Economic Development Department ("EDD or Department") hereby gives notice that the Department will conduct a public hearing as indicated to obtain input on amending the following rule:

5.3.50 NMAC (Industrial Development Training Program).

The proposed rulemaking actions specific to the Job Training Incentive Program may be accessed on April 30, 2014 on the Department's website (http://www.pom.be/JITIP) or obtained from Sara Haring at the contact below.

A public hearing regarding the rules will be held on Friday, May 30, 2014 at the CNM Workforce Training Center, 5600 Eagle Rock Ave., NE, Albuquerque, NM. The time for the hearing on the proposed rules is 9:00 AM MDT.

Interested individuals may testify at the public hearing or submit written comments regarding the proposed rulemaking relating to the Job Training Incentive Program to Sara Haring, JITIP Program Manager, New Mexico Economic Development Department, P.O. Box 20003 Santa Fe, New Mexico 87504-5003, or via http://www.pom.be/JITIP. Written comments must be received no later than 5:00 p.m. on Friday, May 23, 2014.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this hearing are asked to contact Theresia Varela as soon as possible. The Department requests at least ten days advanced notice to provide requested special accommodations.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD
NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on July 11, 2014 at 9:00 a.m. at the New Mexico State Capitol Building, Room 307, in Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of EIB 14-03 (R), proposed repeal and replacement of the New Mexico State Implementation Plan ("SIP") regarding Air Quality Control Regulation Part 99 (Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects) New Mexico Administrative Code ("20.2.99 NMAC").

The purpose of the public hearing is to consider and take possible action on a petition from the NMED to repeal and replace 20.2.99 NMAC. The proposed repeal and replacement of 20.2.99 NMAC is in response to amendments issued by the Environmental Protection Agency January 24, 2008 and March 14, 2012 to 40 CFR Part 93. Subpart A - Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved under Title 23 U.S.C. or the Federal Transit Laws. 40 CFR 93 Subpart A was amended to allow states to streamline their regulations and eliminate the provisions unrelated to implementation by the State. Upon adoption by the Board, the repeal and replacement of 20.2.99 NMAC would be submitted to EPA for incorporation into New Mexico's SIP.

The NMED will host an informational open house on the proposed repeal and replacement of 20.2.99 NMAC at the NMED Air Quality Bureau Office, 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico from 12:00 p.m. - 2:30 p.m. on May 16, 2014. For questions regarding the open house, please contact Cindy Hollenberg at 505-476-1356 or cindy.hollenberg@state.nm.us.

Full text of NMED's proposed revised regulations are available on NMED's website at www.enviro.state.nm.us or by contacting Cindy Hollenberg at (505) 476-4356 or cindy.hollenberg@state.nm.us.

The proposed revised regulation may also be examined during office hours at the Air Quality Bureau office, 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures - Environmental Improvement Board), the Environmental Improvement Act, NSISA 1978, Section 71-1-9, the Air Quality Control Act, NSISA 1978, Section 74-2-6, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file the Board a written notice of intent to do so. The notice of intent shall:

1. Identify the person for whom the witness(es) will testify;
2. Identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
3. Include a copy of the direct testimony of each technical witness in narrative;
4. List and attach each exhibit anticipated to be offered by that person at the hearing; and
5. Attach the text of any recommended modifications to the proposed new and revised regulations.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on June 20, 2014, and should reference the docket number, EIB 14-03 (R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pan Castaneda, Board Administrator
Environmental Improvement Board
P.O. Box 5489
Santa Fe, NM 87502
Phone: (505) 827-2423, Fax (505) 827-0310

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact Juan Carlos Borrego of the NMED Human Resources Bureau by July 1, 2014 at P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-0424 or email jucarlos.borrego@state.nm.us. TDY users please access his number via the New Mexico Relay Network at 1-800-659-8311.

The Board may make a decision on the proposed revised regulations at the
conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD
NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board (“Board”) will hold a public hearing on July 11, 2014 at 9:00 a.m. at the State Capitol Building, Room 307, 490 Old Santa Fe Trail, Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of No. EIB 14-02(R), proposed revision to the New Mexico State Implementation Plan (“SIP”) regarding Air Quality Control Regulation Part 12 of 20.2 New Mexico Administrative Code (Cement Kilns) (“20.2.12 NMAC”).

The proponent of this regulatory adoption and revision is the New Mexico Environment Department (“NMED”).

The purpose of the public hearing is to consider and take possible action on a petition from NMED to repeal 20.2.12 NMAC. The proposed repeal is in response to the U.S. Environmental Protection Agency’s (“EPA”) February 12, 2013 amendments to the federal New Source Performance Standard, 40 CFR Part 60, Subpart F – Standards of Performance for Portland Cement Plants. If adopted by the Board, the repeal of 20.2.12 NMAC would be submitted to EPA for incorporation into New Mexico’s SIP.

The NMED will host an informational open house on the proposed repeal of 20.2.12 NMAC at the NMED Air Quality Bureau Office, 525 Camino del los Marquez, Suite 1, Santa Fe, New Mexico from 12:00 p.m.-3:00 p.m. on June 4, 2014. To attend the informational open house, please contact Michael Baca at 575-647-7983 or michael.baca@state.nm.us.

The proposed revised regulation may be reviewed during regular business hours at the NMED Air Quality Bureau office, 525 Camino del los Marquez, Suite 1, Santa Fe, New Mexico. Full text of NMED’s proposed revised regulations are available on NMED’s web site at www.nmed.state.nm.us, or by contacting Michael Baca at 575-647-7983 or michael.baca@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures Environmental Improvement Board), the Environmental Improvement Act, NMSA 1978, Section 74-1-9, the Air Quality Control Act Section, NMSA 1978, 74-2-6, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

(1) identify the person or persons whom the witness(es) will testify;
(2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
(3) include a copy of the direct testimony of each technical witness in narrative form;
(4) list and attach each exhibit anticipated to be offered by that person at the hearing; and
(5) attach the text of any recommended modifications to the proposed new and revised regulations.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 p.m. on June 20, 2014 and should reference the docket number, EIB 14-02(R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pam Castaneda, Board Administrator Environmental Improvement Board P.O. Box 5169 Santa Fe, NM 87502 Phone: (505) 827-2425, Fax (505) 827-0310

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact Juan Carlos Borrego of the NMED Human Resources Bureau by June 26, 2014 at P.O. Box 5169, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-0314 or email juancarlos.borrego@state.nm.us. TTY users please access his number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting at a later date to consider action on the proposal.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD
NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board (“Board”) will hold a public hearing on July 11, 2014 at 9:00 a.m. in Room 307 at the State Capitol in Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of No. EIB 14-01(R), proposed revisions to the New Mexico State Implementation Plan (“SIP”) regarding Air Quality Control Regulation Part 74 of 20.2 New Mexico Administrative Code (Permits – Prevention of Significant Deterioration) (“20.2.74 NMAC”).

The proponent of this regulatory adoption and revision is the New Mexico Environment Department (“NMED”).

The purpose of the public hearing is to consider and take possible action on a petition from NMED to revise 20.2.74 NMAC. The proposed revisions are in response to the U.S. Environmental Protection Agency’s (“EPA”) December 9, 2013, amendments to federal rules 40 CFR 51.166 and 22.21. The amendments by the EPA to the federal rules address the January 22, 2013, United States Court of Appeals for the District of Columbia Circuit vacatur and remand of two prevention of significant deterioration provisions that were promulgated by EPA in 2010. The two provisions include the Significant Impact Levels (SILs) and Significant Monitoring Concentrations (SMC) for particulate matter 2.5 microns in size and less (PM2.5). The Court’s vacatur of the PM2.5 SILs and the SMC means that these provisions can no longer be relied upon by either permit applicants or permitting authorities. The NMED is proposing to remove the PM2.5 SILs provision and revise the PM2.5 SMC provision that were incorporated into 20.2.74 NMAC in May 2011. If adopted by the Board, the revisions to 20.2.74 NMAC would be submitted to EPA for incorporation into New Mexico’s SIP.

The NMED will host an informational open house on the proposed revisions to 20.2.74
AFFIDAVIT OF PUBLICATION

STATE OF NEW MEXICO
County of Bernalillo

Linda MacCachren, being duly sworn, declares and says that she is Classified Advertising Manager of The Albuquerque Journal, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefore has been made of assessed as court cost; that the notice, copy of which is hereeto attached, was published in said paper in the regular daily edition, for ___ times, the first publication being on the ___ day of ___ 20___, and the subsequent consecutive publications on ___day of ___ 20___.

Sworn and subscribed before me, a Notary Public, in and for the County of Bernalillo and State of New Mexico this ___ day of ___ 20___.

PRICE: $28.64

Statement to come at end of month.

ACCOUNT NUMBER: 407594

Linda MacCachren, being duly sworn, declares and says that she is Classified Advertising Manager of The Albuquerque Journal, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefore has been made of assessed as court cost; that the notice, copy of which is hereeto attached, was published in said paper in the regular daily edition, for ___ times, the first publication being on the ___ day of ___ 20___, and the subsequent consecutive publications on ___day of ___ 20___.

Sworn and subscribed before me, a Notary Public, in and for the County of Bernalillo and State of New Mexico this ___ day of ___ 20___.

PRICE: $28.64

Statement to come at end of month.

ACCOUNT NUMBER: 407594
AFFIDAVIT OF PUBLICATION

STATE OF NEW MEXICO
County of Bernalillo SS

Linda MacAuliffe, being duly sworn, declares and says that she is Classified Advertising Manager of The Albuquerque Journal, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefore has been made of assessed as court cost; that the notice, copy of which is hereto attached, was published in said paper in the regular daily edition, for times, the first publication being on the day of _________, 20__ and the subsequent consecutive publications on

Sworn and subscribed before me, a Notary Public, in and for the County of Bernalillo and State of New Mexico this day of _________, 20__.

[Signature]
Notary Public

PRICE: $3.69

Statement to come at end of month.

ACCOUNT NUMBER 1602594

Exhibit NMED 12c
This matter comes before the New Mexico Environmental Improvement Board ("Board") upon a petition filed by the New Mexico Environment Department ("NMED" or "Department"), proposing repeal and replacement of 20.2.99 NMAC, *Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects*. The Board heard testimony from the Department and admitted exhibits into the record. On July 11, 2014, the Board deliberated and voted to adopt the proposed repeal and replacement for the reasons that follow:

**STATEMENT OF REASONS**

1. The federal Clean Air Act ("CAA") at Section 176 requires that federally supported transportation plans, programs, and projects be consistent with ("conform to") air quality implementation plans adopted or promulgated under section 110 of the Act. 42 U.S.C. § 7506(c)(1)(B).

2. CAA Section 176 further requires that the U.S. Environmental Protection Agency ("EPA") promulgate regulations requiring states to include in their state implementation plans ("SIPs") criteria and procedures for consultation, enforcement, and enforceability to
ensure the conformity of such transportation plans, programs and projects to the SIP. 42 U.S.C. 7506 (c)(1)(E).

3. Acting pursuant to the requirements of the CAA, the EPA promulgated the federal transportation conformity rule, codified at 40 CFR Part 93, in 1993. 58 Fed. Reg. 62188 (November 24, 1993).

4. Pursuant to CAA Section 176 and 40 C.F.R. Part 93, in 1994 New Mexico adopted regulations to assure conformity to the SIP of transportation plans, programs and projects, and has revised those regulations several times since to comply with revisions in the federal regulations. See 20.2.99 NMAC.

5. Although each state is required to adopt transportation conformity regulations in its SIP, conformity determinations are only required in areas that are in nonattainment with one of the national ambient air quality standards ("NAAQS"). 40 CFR §93.102(b)

6. No areas in New Mexico are currently designated as nonattainment for a NAAQS affecting the transportation conformity provisions. The only area in nonattainment of a NAAQS is Anthony, New Mexico, in Southern Doña Ana County, which is designated nonattainment for PM$_{10}$ due to high wind events, not for PM$_{2.5}$ from transportation sources. Therefore Anthony is not subject to transportation conformity requirements.

7. The EPA has revised the transportation conformity rule several times since 1993. Recent revisions relevant to this proceeding were made in January 2008 (73 Fed. Reg. 4420, (Jan. 24, 2008)) (Exhibit NMED 7a) and March 2012 (77 Fed. Reg. 14979 (Mar. 14, 2012)) (Exhibit NMED 8).

8. In the 2008 revisions to 40 C.F.R. Part 93, EPA provided that states may submit SIPs addressing only three provisions within Part 93: 40 C.F.R. § 93.105, 40 C.F.R. §
93.122(a)(4)(ii), and 40 C.F.R. § 93.125(c). These changes were in response to amendments to the federal Clean Air Act that Congress made in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The SAFETEA-LU amendments eliminated the requirement that states include verbatim most sections of Part 93 in their SIPs. See 77 Fed. Reg. at 4430 – 4431. See also Exhibit NMED 4, Test. of Cindy Hollenberg, at p.4.

9. On September 26, 2012, NMED requested that EPA, in reviewing transportation conformity SIP revisions previously submitted by the Department, consider only the three portions of 40 C.F.R. Part 93 required for inclusion in SIPs by SAFETEA-LU. See Exhibit NMED 7b, Letter from David Martin to Ron Curry.

10. In the 2012 revisions to 40 C.F.R. Part 93, EPA revised the definition of national ambient air quality standard ("NAAQS") at 40 C.F.R. § 93.101 by removing paragraphs 1-6 of that definition, which had listed pollutant-specific NAAQS. See 77 Fed. Reg. at 14986. This will reduce the need for updates to the rule each time a NAAQS is promulgated. 77 Fed. Reg. at 14981.

11. The revisions proposed by the Department in this rule-making are responsive to, and comply with, the January 24, 2008, and March 14, 2012 revisions to the federal transportation conformity rule.

12. The proposed revisions eliminate the replication of those parts of 40 C.F.R Part 93 no longer required to be included in SIPs, in light of SAFETEA-LU and the 2008 revisions to Part 93. Accordingly, 34 of the current 54 sections of 20.2.99 NMAC are eliminated. Due to the extent of the revisions, in accordance with the recommendation of the State
Records Center the revisions are in the form of repeal and replacement of Part 99 in its entirety. See Exhibit NMED 4 at p. 5.

13. In accordance with the revisions to 40 C.F.R. § 93.101, the proposed revisions eliminate the listing of specific NAAQS under the definition of NAAQS, at proposed 20.2.99.7.Z NMAC.

14. In considering the proposed SIP revisions, the Board is required by the Air Quality Control Act, NMSA 1978, § 74-2-5.E to give the weight it deems appropriate to all facts and circumstances, including but not limited to (1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

15. The NAAQS are developed by EPA to protect the public health with an adequate margin of safety. 42 U.S.C. § 7409(b)(1). SIPs are developed by the states to assure attainment and maintenance of the NAAQS. 42 U.S.C. § 7410(a)(1). SIPs must “include enforceable emission limitations and other control measures, means, or techniques … as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements” of the Clean Air Act. 42 U.S.C. § 7410(a)(2)(A).

16. Transportation conformity assures that transportation plans and projects are consistent with the SIP. Therefore, transportation conformity is designed to ensure that the NAAQS are achieved through the mix of emissions limitations and other control measures previously approved by the Board in New Mexico’s SIP. The transportation conformity
provisions are built upon, and help preserve, New Mexico’s SIP, which considers the (1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants, in accordance with NMSA 1978, § 74-2.5.E (1) and (2).

17. The transportation conformity regulations do not contemplate or require the application of technological controls on sources of air pollutants. To the extent that conformity determinations involve consideration of economic costs, that consideration will occur in the context of individual determinations, in accordance with NMSA 1978, § 74-2.5.E (3).

18. The proposed regulatory revisions satisfy the statutory requirements of the Air Quality Control Act, NMSA 1978, Section 74-2-5.E.

19. Proposed replacement 20.2.99 NMAC is neither more nor less stringent than federal regulations require.

20. Pursuant to 20.1.300.A NMAC, any person may petition the Board for amendment of regulations within the jurisdiction of the Board.

21. On February 26, 2014, NMED filed a petition with the Board for a public hearing in this matter.

22. On March 21, 2014, at a meeting conducted in compliance with the Open Meetings Act and other applicable requirements, the Board granted the Department’s request for a hearing.


25. NMED filed a Notice of Intent to Present Technical Testimony (NOI) on June 19, 2014, in accordance with 20.1.1.302 NMAC.

26. A hearing was held in this matter on July 11, 2014 in Santa Fe, New Mexico.

27. The Board has the authority to approve this proposed regulatory provision pursuant to NMSA 1978 § 74-2-5 (B) (1).

28. The Board approves of NMED’s proposed replacement 20.2.99 NMAC, as contained in Exhibit NMED 6 admitted at the hearing, as satisfying the applicable requirements of CAA Section 176 and the federal transportation conformity rule as amended by 73 Fed. Reg. 4420 and 77 Fed. Reg. 14979.

29. The notice and hearing requirements of NMSA 1978 Section 74-2-6 and 20.1.1 NMAC were satisfied in this rulemaking process.

30. The proposed amendments are adopted for any or all of the reasons stated above.

ORDER

By a ___ vote of a quorum of the Board members, the proposed regulatory revisions were approved by the Board on July 11, 2014. The Department shall submit replacement 20.2.99 NMAC to the Administrative Law Division of the New Mexico Commission of Public Records for compilation into the New Mexico Administrative Code, with any further revisions necessary to correct typographical errors and to reflect formatting required by the Commission. The Department shall submit the replacement regulations to the U.S. EPA for approval and incorporation into New Mexico’s State Implementation Plan.

On Behalf of the Board

Dated: __________________________

EIB No. 14-03 Proposed Statement of Reasons and Order

Exhibit NMED 13

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