ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

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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 amendments 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
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IV. Deadline for Conformity Determinations When a New Budget Is Established
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I. General Information

A. Does This Action Apply to Me?

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

Category	Examples of regulated entities
Local government	Local transportation and air quality agencies, including metropolitan planning organizations (MPOs).
State government	State transportation and air quality agencies.
Federal government	Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)).

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

B. How Can I Get Copies of This Document?

1. Docket

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

2. Electronic Access

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

An electronic version of the official public docket is available through *www.regulations.gov*. 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) for the following transportation-related criteria pollutants: Ozone, particulate matter ($PM_{2.5}$ and PM_{10}),[1] carbon monoxide (CO), and nitrogen dioxide (NO_2). 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 Clear 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.[2] 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

[1] 40 CFR 93.102(b)(1) defines $PM_{2.5}$ and PM_{10} as particles with an aerodynamic diameter less than or equal to a nominal 2.5 and 10 micrometers, respectively.

[2] Note that the TCM portion of the February 14, 2006, guidance is not covered in today's final rule, but in an updated guidance document that will be available on EPA's Web site at *http://www.epa.gov/otaq/stateresources/transconf/policy.htm*.

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 conform to 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 at least every three years to every four years, SAFETEA–LU also changed the required frequency for updating transportation plans and TIPs for transportation planning purposes. Prior to SAFETEA–LU, transportation plans in nonattainment and maintenance areas had to be updated every three years and TIPs updated every two years; now both transportation plans and TIPs must be updated every four years in these areas. However, MPOs can voluntarily update their transportation plans and TIPs more frequently. Consequently, conformity may still need to be determined more frequently than every four years, because an updated or amended transportation plan or TIP still must conform before it is adopted, regardless of the last time a conformity determination was done. 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/transconf/policy.htm* and on DOT's Web site at *http://www.fhwa.dot.gov/environment/conformity/planup_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.E. discusses the 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 50810 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 [3] 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 how exempt projects and traffic signal synchronization projects are addressed under the transportation conformity rule. These projects are able to proceed during the lapse grace period, and for that matter during a conformity lapse, because exempt projects and traffic signal synchronization projects do not require project-level conformity determinations per 40 CFR 93.126 and 93.128, respectively.

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

- Section 93.114 requires that there be a currently conforming transportation plan and TIP at the time of project approval, except during the lapse grace period, when a non-exempt project must come from the most recent conforming transportation plan and TIP. (A project must also meet DOT's planning and other requirements to receive Federal funding or approval. See Section V.C. below for further discussion.)
- Section 93.115 requires that non-exempt FHWA/FTA projects come from a conforming transportation plan and TIP, except during the lapse grace period, when a project could come from the most recent conforming plan and TIP. (A project must also meet DOT's planning and other requirements to receive federal funding or approval. See Section V.C. below for further discussion.)
- Similarly, § 93.121 requires that regionally significant non-Federal projects either come from the currently conforming transportation plan and TIP, or the regional emissions analysis that supports such a transportation plan and TIP, except during the lapse grace period, when such projects could be approved if they are from the most recent conforming transportation plan and TIP, or the regional emissions analysis that supported the most recent conforming transportation plan and TIP.

Note that the lapse grace period only applies to transportation conformity, and not to DOT's transportation planning requirements. DOT and EPA agree that planning requirements still must be met during the lapse grace period in order for DOT to fund or approve a project as discussed further in C. of this section.

B. Rationale and Response to Comments

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 24476–8) 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

[3] By the phrase ''meet conformity requirements,'' EPA means that FHWA/FTA projects can be found to conform, and non-Federal projects can be approved.

areas to comply with Clean Air Act requirements. Another commenter who supported the lapse grace period specifically agreed with EPA's interpretation that Congress meant to allow conformity requirements to be satisfied for projects during the lapse grace period, even if there is no conforming transportation plan and TIP at the time. This commenter opined that any other interpretation renders Clean Air Act section 176(c)(9) meaningless.

Two commenters requested that EPA clarify the commenters' interpretation that the lapse grace period applies to projects not from a conforming transportation plan and TIP as long as the requirements of 40 CFR 93.115(b)(2) are addressed. EPA disagrees with the commenters' interpretation; merely meeting § 93.115(b)(2) and nothing more would not be sufficient for a project to proceed during the lapse grace period. To be found to conform during the lapse grace period, a project must be from a conforming transportation plan and TIP (§ 93.104(f)(1)), or from the most recent conforming transportation plan and TIP (§ 93.104(f)(2)).

Section 93.115(b) describes the circumstances under which a project is considered to be from a conforming transportation plan. Paragraph (b)(2) provides that if a project is not specifically identified in the transportation plan, it can be considered to be ''from'' the plan as long as it ''is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.''

A project that meets only the requirements of § 93.115(b)(2) can be considered to be from a conforming transportation plan. But to proceed during the lapse grace period, it must also be from a conforming or most recent conforming TIP as well, as required by Clean Air Act sections 176(c)(2)(D) and (c)(2)(C)(i).

The one commenter who opposed EPA's proposal for the lapse grace period thought that it was counter to EPA's mission to protect public health. The commenter stated that on-road mobile source emissions are important and thought that the lapse grace period would increase these emissions. In response, first EPA notes that Congress added the lapse grace period in its amendments to the Clean Air Act, and EPA is simply revising the regulations to make them consistent with the current law. Second, a project cannot actually proceed to completion unless there is a valid, i.e., currently conforming, TIP that also meets transportation planning requirements. 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 meet DOT's planning requirements to receive federal funding or approval. Specifically, 23 U.S.C. 134(j)(3) and 49 U.S.C. 5303(j)(3) require a TIP to be in place and 23 U.S.C. 135(g)(4) and 49 U.S.C. 5304(g)(4) require a statewide TIP (STIP) to be in place for DOT to authorize transportation projects. The STIP contains all of the metropolitan area TIPs in the state.

Three specific scenarios are presented below to show how expiration of the transportation plan and/or STIP/TIP at the time of the missed deadline affects the ability to advance FHWA/FTA projects during the conformity lapse grace period.[4]

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

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 93.101 define the term ''lapse'' to mean that the conformity determination for a transportation plan or TIP has expired. Therefore, the lapse grace period does not apply unless an area has already had a conforming transportation plan and TIP that has expired; it does not apply to a newly designated area that has not yet made its initial conformity determination for a transportation plan and TIP for a new pollutant or air quality standard.

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

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

[5] 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.

[6] 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 conformity applies, the identical restrictions of a conformity lapse will exist for any newly designated nonattainment area that does not have a conforming transportation plan and TIP in place one year after the effective date of EPA's designation. EPA and DOT will continue to use the term ''lapse'' informally to describe these situations.

E. Conformity Freezes

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

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.

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

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[8] 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.''

for the 8-hour ozone and $PM_{2.5}$ standards. All of these metropolitan areas have at this point determined transportation plan/TIP conformity.

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

[8] 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 27780), 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 change from determination to determination, because for example new budgets have been established or new regionally significant projects have been added to the TIP since the previous conformity determination.

2. Rationale 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 175A(b), 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 175A(b) of the Clean Air Act is the provision that describes the submission of a maintenance plan that covers the second ten years of the maintenance period. If 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)(b)'' [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(i)(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 of the statute that allow elections to shorten the conformity timeframe. Both of these sections allow such elections to be made only ''after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments.'' The Clean Air Act 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 93.105(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 in the first place. 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.

Placement 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(l)(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 allowing areas to shorten their conformity timeframes does not prohibit its use in isolated rural areas. In general, most aspects of the conformity regulation apply consistently to metropolitan and isolated rural areas. Where there are differences, the differences have given isolated rural areas additional flexibility. 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, and 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 in these areas.

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 EPA 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.

[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 purposes 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 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,'' [10] 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 informational 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 51.390 to streamline the requirements for state conformity SIPs. A conformity SIP is different from a control strategy SIP or maintenance plan, as a conformity SIP only includes state conformity procedures and not motor vehicle

[10] Joint Explanatory Statement of the Committee of Conference, ''Section 6011, Transportation Conformity,'' p. 1059.

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

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

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 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)(8) 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)(8) requires that the EPA Administrator consult and concur on TCM substitutions and additions. However, as has been done with most other responsibilities related to the approval of SIP revisions, 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 7–158: 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 $PM_{2.5}$ and PM_{10} nonattainment and maintenance areas. The conformity rule allows DOT, in consultation with EPA, to make a ''categorical hot-spot finding'' in $PM_{2.5}$ and PM_{10} nonattainment and maintenance areas if there is appropriate modeling that shows that a particular category of highway or transit projects will meet applicable Clean Air Act conformity requirements without further analysis (40 CFR 93.123(b)(3)). If DOT makes such a finding, then no further hot-spot analysis to meet 40 CFR 93.116(a) is needed for any project that fits the category addressed by the finding. A project sponsor would simply

reference a categorical hot-spot finding in the project-level conformity determination to meet hot-spot analysis requirements. See EPA's March 10, 2006, final rule for further information (71 FR 12502–12506) on categorical hot-spot findings in $PM_{2.5}$ or PM_{10} areas.

B. Description of Final Rule

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 93.116(a).[11] 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)(3)(B)(ii) requires projects in these CO areas to also ''eliminate or reduce the severity and number of violations of the carbon monoxide standards in the area substantially affected by the project.'' This criterion is stipulated by 40 CFR 93.109(f)(1) and 93.116(b) for FHWA/FTA projects in these CO areas. EPA believes that this criterion is more appropriately met by evaluating the unique circumstances of an individual project, rather than based on a broader analysis of a category of projects. Since most CO areas already have approved attainment demonstrations or maintenance plans, there should be limited practical impact of this aspect of today's proposal.

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

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

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 budget(s). 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 language, conformity applied in this area ''for 20 years from the date EPA approves'' the area's redesignation to maintenance, i.e., until 2026, despite the fact that the area would have budgets for 2030. This result would have been inconsistent with the Clean Air Act, which requires that transportation activities conform to the SIP. EPA's clarification that conformity applies through the last year of the approved second maintenance plan ensures that conformity applies throughout the time period covered by the SIP budgets. In this example, conformity would apply until 2030.

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

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

EPA is making corrections to §§ 93.102(b)(2)(v) and 93.119(f)(10) to change ''sulfur oxides'' to ''sulfur dioxide'' and ''SO_X'' to ''SO_2.'' In the May 6, 2005, transportation conformity final rule (70 FR 24279), EPA finalized requirements for $PM_{2.5}$ precursors. In that final rulemaking, we included ''sulfur oxides'' as one of the precursors and referred to sulfur oxides as SO_X. Since that rulemaking was finalized, EPA has finalized the $PM_{2.5}$ implementation rule (72 FR 20586) and indicated that sulfur dioxide (SO_2) would be regulated as a $PM_{2.5}$ precursor rather than all sulfur oxides. We are making these corrections to the transportation conformity rule in order to make it consistent with EPA's broader $PM_{2.5}$ implementation strategy. We received two comments that supported 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;'' and
- ''Pavement marking demonstration'' is now ''Pavement marking.''

EPA is updating these terms to make them consistent with the terms in 23 U.S.C. 148, which has been amended by SAFETEA–LU section 1401. These revisions to Table 2 of the conformity regulation do not change the types of safety projects that are exempt from transportation conformity requirements. These revisions would only update the terminology to be consistent with the changes made by SAFETEA–LU to 23 U.S.C. 148. 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 93.126 to further clarify the types of 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/te/guidance.htm#eligible.* After reviewing this guidance, we have concluded that 40 CFR 93.126 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(l)(2)(i) and 93.116(a) to ensure that CO, PM_{10}, and $PM_{2.5}$ 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 donut nonattainment and maintenance areas. The addition to § 93.109(l)(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(l)(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 plan 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 completed 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,[12] 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 450.316(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 and those redesignated to attainment after 1990 (''maintenance areas'' with SIPs developed under Clean Air Act section 175A) for transportation-source criteria pollutants. The Clean Air Act gives EPA the statutory authority to establish the criteria and procedures for determining whether transportation activities conform to the SIP.

This action does not impose any new information collection burden or any new information collection requirements. 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 and Approved Transportation Plans, 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

[12] For additional information about $PM_{2.5}$ and PM_{10} hot-spot analysis requirements, including regulations, guidance, and Q and As, see EPA's and DOT's Web sites at: *http://www.epa.gov/otaq/stateresources/transconf/index.htm* and *http://www.fhwa.dot.gov/environment/conform.htm.*

comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's 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.

D. Unfunded Mandates Reform Act

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

EPA has determined that this rule itself does not contain a federal mandate that may result in expenditures of $100 million or more by state, local, and tribal governments, in the aggregate, or the private sector in any one year. The primary purpose of this rule is to amend the conformity rule to be consistent with Clean Air Act section 176(c) as amended by SAFETEA–LU. The Clean Air Act amendments made by SAFETEA–LU were intended to reduce the burden of demonstrating conformity in designated nonattainment and maintenance areas subject to conformity requirements. Thus, although this rule explains how to implement these Clean Air Act amendments, it merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of $100 million or more in any year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA and EPA has not prepared a statement with respect to budgetary impacts.

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

E. Executive Order 13132: Federalism

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

This 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 implcations, 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

This rule is not subject to Executive Order 13211, ''Action Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355; May 22, 2001) because it will not have a significant adverse effect on the supply, distribution, or use of energy. Further, we have determined that this 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 rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 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:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart T—[Amended]

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

Authority: 42 U.S.C. 7401–7671q.

■ 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 would continue to apply for the portion of the requirements that the state did not include in its conformity implementation plan and the portion, if any, of the state's conformity provisions that is not approved by EPA. In addition, any previously applicable implementation plan conformity requirements remain enforceable until the state submits a revision to its applicable implementation plan to specifically remove them and that revision is approved by EPA.

(b) *Conformity implementation plan content.* To satisfy the requirements of Clean Air Act section 176(c)(4)(E), the implementation plan revision required by this section must include the following three requirements of part 93, subpart A, of this chapter: §§ 93.105, 93.122(a)(4)(ii), and 93.125(c). A state may elect to include any other provisions of part 93, subpart A. If the provisions of the following sections of part 93, subpart A, of this chapter are included, such provisions must be included in verbatim form, except insofar as needed to clarify or to give effect to a stated intent in the revision to establish criteria and procedures

more stringent than the requirements stated in this chapter: §§ 93.101, 93.102, 93.103, 93.104, 93.106, 93.109, 93.110, 93.111, 93.112, 93.113, 93.114, 93.115, 93.116, 93.117, 93.118, 93.119, 93.120, 93.121, 93.126, and 93.127. A state's conformity provisions may contain criteria and procedures more stringent than the requirements described in this subpart and part 93, subpart A, of this chapter only if the state's conformity provisions apply equally to non-federal as well as federal entities.

(c) *Timing and approval.* A state must submit this revision to EPA by November 25, 1994 or within 12 months of an area's redesignation from attainment to nonattainment, if the state has not previously submitted such a revision. The state must also revise its conformity implementation plan within 12 months of the date of publication of any final amendments to §§ 93.105, 93.122(a)(4)(ii), and 93.125(c), 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).

* * * * *

Transportation control measure (TCM) is any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA section 176(c)(8), that is either one of the types listed in CAA section 108, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. * * *

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

* * * * *

§ 93.102 [Amended]

■ 6. Section 93.102 is amended as follows:
■ a. In paragraph (b)(2)(v), by removing ''sulfur oxides (SO_X)'' and adding in its place ''sulfur dioxide (SO_2)''; 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) * * *

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

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

(c) * * *

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

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

* * * * *

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

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

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

§ 93.105 [Amended]

■ 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)''.

■ 9. Section 93.106 is amended as follows:
■ a. By revising the section heading;

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

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

(a) * * *

(1) * * *

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

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

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

* * * * *

(d) *Timeframe of conformity determination.*

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

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

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

(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.

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

* * * * *

§ 93.109 [Amended]

■ 10. Section 93.109 is amended as follows:
■ a. By revising the introductory text of paragraph (e)(2);
■ b. By removing paragraph (e)(2)(v); and
■ c. By revising paragraph (l)(2)(i):

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

* * * * *

(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.

* * * * *

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

■ 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 first sentence in paragraph (d)(2); and
■ c. By adding new paragraph (d)(3).

§ 93.118 Criteria and procedures: Motor vehicle emissions budget.

* * * * *

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes motor vehicle emissions budget(s), for the attainment year (if it is within the timeframe of the transportation plan and conformity determination), for the last year of the timeframe of the conformity determination (as described under § 93.106(d)), and for any intermediate years within the timeframe of the conformity determination as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

* * * * *

(d) * * *

(2) The regional emissions analysis may be performed for any years in the timeframe of the conformity determination (as described under § 93.106(d)) provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the transportation plan and conformity determination) and the last year of the timeframe of the conformity determination. * * *

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

extends beyond the timeframe of the conformity determination).

* * * * *

■ 15. Section 93.119 is amended as follows:

■ a. In paragraph (f)(10), by removing ''SO_X'' and adding ''SO_2'' 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 timeframe of the conformity determination (as described under § 93.106(d)) must also be an analysis year.

* * * * *

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

* * * * *

■ 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 ''Hazard 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''; and

■ c. By removing the entry ''Pavement marking demonstration'' and adding in its place ''Pavement marking''.

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